

**COMMONWEALTH  
OF  
PENNSYLVANIA**

ENVIRONMENTAL HEARING BOARD

**ADJUDICATIONS**

**1973**

COMMONWEALTH  
OF  
PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD  
ADJUDICATIONS

CONTAINING  
CASES DECIDED  
BY THE

PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

DURING THE  
CALENDAR YEAR

1973

PRINTED IN 1976

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**DEPARTMENT OF GENERAL SERVICES  
for the**

**COMMONWEALTH OF PENNSYLVANIA**

**MEMBERS**  
**OF THE**  
**ENVIRONMENTAL HEARING BOARD**  
**DURING THE PERIOD OF THE**  
**ADJUDICATIONS**



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**Member . . . . . PAUL E. WATERS**  
**Member . . . . . GERALD H. GOLDBERG**

**Secretary to the Board**  
**Antoinette S. Caswell**



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## FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1973.

The Environmental Hearing Board was created by the Act of December 3, 1970, P. L. 854, which amended the Administrative Code of 1929, Act of April 7, 1929, P. L. 177, as amended. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1921-A of the Administrative Code, provides as follows:

"§1921-A Environmental Hearing Board

(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P. L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.

(b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.

(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.

(d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental

Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for the taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such other order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1, *et seq.* and the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, as amended, 35 P. S. §4001 *et seq.*

Although the Board is made, by §62 of the Administrative Code, an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its members are appointed directly by the Governor, with the consent of the Senate. Its secretary<sup>1</sup> is appointed by the Board with the approval of the Governor. The Department is a party before the Board in most cases<sup>2</sup> and has even

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1. The current Secretary of the Board is M. Diane Smith, who was appointed on April 1, 1976.

2. The one exception has been appeals from decisions of municipalities and county health departments under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1, *et seq.* That exception was eliminated for the future by amendments to the Pennsylvania Sewage Facilities Act enacted July 22, 1974, (Act 208).

appealed decisions of the Board to Commonwealth Court.

The first members of the Board were Michael H. Malin, Esquire of Philadelphia, Chairman; Paul E. Waters, Esquire of Harrisburg; and Gerald H. Goldberg, Esquire of Harrisburg. In December of 1971, Michael H. Malin resigned to return to private practice, and Robert Broughton, Esquire, a professor of law at Duquesne University of Law School was appointed Chairman on January 2, 1973, and served until December 31 of 1974, when he was succeeded by Joanne R. Denworth, Esquire of Philadelphia. Gerald H. Goldberg left, also to return to private practice, in June of 1973, and Joseph L. Cohen, Esquire, an associate professor of health law at the Graduate School of Public Health, University of Pittsburgh, was appointed on December 31, 1973, to replace him.

The range of subject matter of the cases before the Board is probably best gleaned from a perusal of the index and the cases themselves in this and subsequent volumes.

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**CASES BEFORE THE**  
**ENVIRONMENTAL HEARING BOARD**  
**COMMONWEALTH OF PENNSYLVANIA**

**CITY OF CHESTER**  
Delaware County  
Respondent

: Docket No. 72-256

**CHESTER SEWER AUTHORITY**  
Intervenor

**A D J U D I C A T I O N**

By **ROBERT BROUGHTON**, Chairman, January 31, 1973

This is an appeal by the City of Chester from an Order dated May 5, 1972 issued by Daniel B. Drawbaugh, Chief, Division of Water Supply and Sewerage, Pennsylvania Department of Environmental Resources. The Order requires that the City of Chester negotiate with and enter into an agreement with the Delaware County Regional Water Quality Control Authority (DELCORA) on a basis consistent with the Delaware County Regional Sewerage Plan. Respondent challenges the propriety of establishing DELCORA as the county-wide agency for implementation of the Regional Sewerage Plan.

Chester Sewer Authority was given leave to intervene in the matter.

Hearings were held on September 12 and September 22, 1972, before M. Melvin Shralow, Esquire, Hearing Examiner.

**FINDINGS OF FACT**

1. The City of Chester is the owner and the Chester Sewer Authority is the operator of a sewage treatment plant located in the City of Chester, Delaware County, Pennsylvania. This plant is operated pursuant to Sanitary Water Board Permit No. 5679.

2. The Chester plant services residents of the City of Chester. It also provides sewage treatment for nine municipalities in the vicinity of the City of Chester, pursuant to written service agreements between each such municipality and the City of Chester.

3. In 1968 the Pennsylvania Department of Environmental Resources (the Department), in conjunction with the Delaware River Basin

2. *City of Chester*

Commission (DRBC),<sup>1</sup> began to encourage the development of plans for regional programs dealing with sewage and waste water treatment facilities. This was consistent with widely accepted and recognized economies, both in efficiency of operation and quality of water management, to be realized by broadly based regional systems as compared to a proliferation of small municipal treatment facilities.

4. A series of meetings was held during 1968 and 1969 at which thoughts on regionalization were developed and pursued. As a result of these meetings, the Commissioners of Delaware County and the Delaware County Planning Commission decided to have a study prepared for a county-wide sewage treatment system.

5. In 1970, Albright & Friel, a division of Betz Environmental Engineers, Inc., was engaged to perform this study. A technical advisory committee (TAC) was formed, consisting of representatives of industry, regional commissions, state government and municipal governments, to advise the engineers. Charles J. Catania, City Engineer of the City of Chester and owner of Catania Engineering Associates, Inc., consulting engineers to the Chester Sewer Authority, was a voting member of TAC.

6. The work of Albright & Friel and TAC resulted in a report entitled "Delaware County Regional Sewerage Project" dated October 28, 1971. The report evaluates 25 alternative plans and recommends a plan which provides for division of the county into two sections, eastern Delaware County and western Delaware County. According to the plan, sewage from eastern Delaware County would be conveyed to and treated at Philadelphia's Southwest Treatment Plant. In the western part of the county, sewage would be conveyed to and treated at an expanded and upgraded plant at the site of the existing City of Chester plant.

7. The plan calls for facilities development in stages. In each stage, additional interceptors and pumping stations would be built to reach more outlying communities and capacity at the plant would be increased, reaching a peak of 115 million gallons per day in the year 2020.

8. The plan calls for the establishment of a single, countywide Authority to implement the plan and administer the entire system.

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1. The Delaware River Basin Commission was created by the adoption of the Delaware River Basin Compact by the United States and the four participating states, Delaware, New Jersey, New York and Pennsylvania. Act of July 7, 1961, P.L. 518, 32 P.S. § 815.101.

9. The Commissioners of Delaware County accepted the proposed plan and on October 20, 1971, they adopted a resolution pursuant to the Municipality Authorities Act of 1945, P.L. 382, 53 P.S. § 301 *et seq.*, establishing DELCORA as a county authority for the purpose of implementing the regional plan. Articles of Incorporation were filed with the Department of State on November 17, 1971.

10. Even before the development of the regional plan, it was apparent that capacity of the Chester plant would have to be increased to meet growing needs in the area. Therefore, concurrently with the regional studies, plans were developed to increase the plant capacity to 40 mgd or 60 mgd, depending on whether certain industries were to be included as dischargers into the plant.

11. A United States Department of Housing and Urban Development (HUD) grant was obtained for this study, based upon an application filed by the Chester Sewer Authority. In addition, the Authority obtained a bank loan of \$1,300,000 for preparation of plans. It has been agreed that DELCORA will assume all expenses and obligations for the study and for expansion of the plant in the event that its designation as the regional authority is upheld.

12. In developing the regional plan and recommending a single regional authority, consideration was given to the various advantages and disadvantages of regional versus local implementing authorities.

13. The opinions of experts in the fields of construction, management and finance of sewage treatment systems all support the use of a single regional authority based upon the following factors:

A. More efficient planning and implementation of a system is available when the implementing agency has control over the entire system.

B. Economies of manpower use and administration are available when a single agency is utilized, as opposed to the duplication necessary when more than one implementing agency is involved.

C. More advantageous financing terms are available to a county-wide agency whose obligations are backed by the county than would be available to agencies whose obligations were backed by smaller, local governmental units.

D. A county-wide unit is better able to negotiate contracts with municipalities than is an authority created by another municipality.

4. *City of Chester*

E. Political control of the implementing authority is more properly lodged in the county commissioners, representing all of the county, than in a single municipality.

14. A meeting was held on February 4, 1972, sponsored jointly by the Department and DRBC for consideration of the recommended plan. Thereafter, on February 23, 1972, DRBC adopted the Delaware County Regional Sewage Project Report as an amendment to DRBC's Comprehensive Plan.

15. At the February 4 meeting, the City of Chester expressed its desire to be named as the implementing authority for the part of the plan covering western Delaware County. Neither at that meeting nor at any other time has the City of Chester or the Chester Sewer Authority expressed any disagreement with the regional plan itself.

16. The only objections of Respondent and Intervenor are to the designation of DELCORA as a county-wide authority to implement the plan, rather than limiting DELCORA, or any other body to implementation of the plan for eastern Delaware County and the designation of Respondent as the implementing body for western Delaware County.

17. Respondent and Intervenor have produced no evidence to show that any of the factors considered by the Department, DRBC, the Commissioners of Delaware County, Albright & Friel or TAC were improper, nor has any evidence been produced to show an abuse of discretion by any governmental agency involved.

18. Although given an opportunity to do so, neither Respondent nor Intervenor has filed a brief with the Board in support of its position.

#### DISCUSSION

The position of Respondent and Intervenor in this appeal is an anomalous one. They have stated their agreement with the regional plan, but dissent from one of the key features of the plan, namely, the designation of a county-wide authority to implement construction and administer the system. Thus on the one hand they appear to support regionalization, while on the other hand they would cut out one of the essential features which makes this a truly regional plan. Furthermore, they have presented

no evidence whatever which would show either that DELCORA is unqualified to assume this role, or that the Chester Sewer Authority is more qualified. There has been no rebuttal of testimony offered by the Department to show the numerous advantages accruing to a county-wide authority which were considered in the recommendation and adoption of the regional plan.

The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P.S. § 691.1 *et seq.*, provides that the Department<sup>2</sup> shall consider, where applicable, (1) water quality management and pollution control in the watershed as a whole;... (3) the feasibility of combined or joint treatment facilities;... (5) the immediate and long-range economic impact upon the Commonwealth and its citizens. The Department is given the power and duty to establish policies for effective water quality control and water quality management in the Commonwealth and to coordinate and be responsible for the development and implementation of comprehensive public water supply, waste management and other water quality plans. The Clean Streams Law, § 5.

The authority is thus granted to the Department to encourage appropriate regional planning and, where such plans have been adopted, to require that the actions of individual municipalities and municipal authorities are consistent with such regional plans. This is what the Department has done in this case, and there is no evidence in the record which would show that the Department abused its discretion or exceeded its authority in any way.

#### CONCLUSIONS OF LAW

1. The Department of Environmental Resources has the authority under The Clean Streams Law to encourage comprehensive regional planning for sewage and waste water facilities, and to order municipalities and municipal authorities to act in a manner consistent with regional planning in dealing with such systems.

2. The order of the Department of May 5, 1972 was issued

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<sup>2</sup> The powers and duties originally lodged in the Sanitary Water Board and the Department of Health were transferred to the Department of Environmental Resources by the Act of December 3, 1970, No. 275, P.L.---, § 20 (22), 71 P.S. § 510-1 (22).

6. *City of Chester*

pursuant to the authority granted to the Department by The Clean Streams Law.

3. The Department did not exceed its authority or abuse its discretion in issuing the order of May 5, 1972.

#### ORDER

The appeal of the City of Chester and the Chester Sewer Authority from the order of the Department of Environmental Resources dated May 5, 1972 is hereby dismissed.

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*George F. Cramer*

**GEORGE F. CRAMER** : Docket No. 72-349

#### A D J U D I C A T I O N

By **ROBERT BROUGHTON**, Chairman, February 5, 1973

This is an appeal by George F. Cramer (hereinafter designated Appellant) from a decision of the Pennsylvania Department of Environmental Resources (hereinafter designated Department) denying Application Permit No. 074542 for an on-site sewage disposal system in Maple Ridge Heights, Somerset Borough, Pennsylvania. An evidentiary hearing was held on October 18, 1972 before Hearing Examiner Michael P. Malakoff, Esquire. Appellant was informed of his right to be represented by an attorney, but elected to proceed without legal representation. On the basis of this hearing, the Environmental Hearing Board makes the following findings of facts and conclusions of law:

#### FINDINGS OF FACT

1. George Gardner, sewage enforcement officer for Somerset Borough, is charged with the responsibility for conducting site suitability tests when application is made to the Borough by a property owner for a permit for a standard subsurface sewage disposal system.

2. Appellant applied for a permit for a standard subsurface

sewage disposal system on August 11, 1972, at which time he proposed installation of a septic tank and two foot deep ditch, 100 feet in length.

3. George Gardner conducted two sets of percolation tests on Appellant's property to determine if Somerset Borough should grant Appellant a permit for a standard subsurface sewage disposal system.

4. The first set of percolation tests, based on 6 holes 24 inches to 36 inches deep, indicated that the soil drainage on Appellant's site was inadequate for his proposed subsurface sewage disposal system.

5. The second set of percolation tests, conducted by George Gardner in a similar manner, again demonstrated that the soil on Appellant's site was unsatisfactory for the proposed subsurface sewage disposal system.

6. George Gardner denied Appellant's request for a permit for a subsurface sewage disposal system because of the unsatisfactory results of the two percolation tests.

7. Numerous other percolation tests conducted by George Gardner in Somerset Borough have demonstrated that the soil in this locale drains inadequately and therefore is unsuitable for a subsurface sewage disposal system.

8. Examination of a map prepared by the United States Department of Agriculture indicated that the site in question is composed of gilpin and wharton soils which are generally unsuitable for subsurface sewage disposal systems.

9. Satisfactory percolation rates must be at least 1 inch per hour. Any lower percolation rate will result in an insufficient renovation of the liquid waste prior to its contact with surface water.

10. George Gardner did not have the authority to approve a pit-type sewage disposal system subsequently proposed by Appellant, and referred Appellant to Robert Black.

11. Robert Black is employed by the Pennsylvania Department of Environmental Resources, and is authorized to conduct tests to determine site suitability for on-site pit-type sewage disposal systems.

12. Appellant's proposed pit-type sewage disposal system consisted of a six to eight foot deep pit, coupled with 200 feet of ditch, three feet deep.

13. In an existing "observation pit" on Appellant's site, Robert Black observed soil mottling three to four feet below the ground surface and concluded that Appellant's site would not be acceptable for

8. *George F. Cramer*

a pit-type sewage disposal system.

14. Robert Black concluded that a three foot trench as a part of the proposed pit-type sewage system would either be in, or within one foot of, the seasonal high water table, and there would be insufficient renovation of the effluent prior to its contact with the ground water.

15. A pit-type sewage disposal system, utilized in soil where the seasonal high water table is above or slightly below the absorption trench, would cause pollution of the ground water, and would eventually cause sewage effluent to flow out onto the surface of the ground.

16. On the day preceeding this hearing, William Shanczar, a soil scientist employed by the Pennsylvania Department of Environmental Resources, inspected Appellant's site.

17. William Shanczar conducted tests on Appellant's site, and found covode soil. Covode soil does not drain as well as wharton soil.

18. William Schanczar's inspection of Appellant's site disclosed mottling of the soil within seven to eighteen inches of the surface of the ground.

19. Soil mottling is one indication that the soil has poor drainage characteristics.

20. William Schanczar testified a pit-type sewage disposal system on Appellant's site would result in ground water pollution because of the seasonal high water table in Somerset Borough area.

21. The Appellant did not challenge the facts testified to by George Gardner, Robert Black and William Schanczar pertaining to "on lot" subsurface disposal systems on his site.

#### CONCLUSIONS OF LAW

1. Pursuant to authority granted under the Act of January 24, 1966, P.L. 1535, §3 (35 P.S. §750.3), the Act of December 3, 1970, Act No. 275, §1920-A (71 P.S. §510-20) and the Act of June 22, 1937, P.L. 1987, as amended, §§5 and 402 (35 P.S. §§691.501 and 691.402), the Department of Environmental Resources enacted Chapter 73 of the Rules and Regulations of the Department of Environmental Resources setting forth the Standards for Sewage Disposal Facilities, that govern the case *sub judice*.

2. Section 73.11(c) provides *inter alia*: "the maximum

elevation of the ground water table shall be at least four feet below the bottom of the excavation for the subsurface absorption area."

3. Section 73.11(d) provides *inter alia*: "the percolation times shall be within the range indicated in §§73.63 and 73.64 of this title..."

4. Section 73.61(a) provides *inter alia*: "When the percolation rate is over 60 minutes per inch, a subsurface disposal system as described (in Chapter 73) shall not be used."

5. Section 73.62 establishes the proper method for determining percolation rates, which is basically to test at least 6 holes dug to the depth of the proposed trench, to fill the holes to a minimum depth of 12 inches, and to determine percolation rates 24 hours after water is added to the hole.

6. Section 73.63 establishes acceptable percolation rates, and the manner in which they are to be measured, stating percolation rates shall not apply where soils are mottled as a result of seasonal high water tables, and a subsurface disposal system shall not be used when the percolation rate exceeds 60 minutes per inch.

7. The percolation rate of .9 inch per hour or approximately 66.7 minutes per inch, on Appellant's site exceeds the maximum permissible rate in Section 73.63.

8. The maximum height of the seasonal high water table, as evidenced by soil mottling, is 18 inches to 4 feet below ground level, which is higher than that permitted for subsurface or pit-type sewage systems, irrespective of the percolation rates.

9. Appellant's application for a subsurface sewage disposal system was properly and reasonably denied by the Department of Environmental Resources.

10. Appellant's oral request to construct a pit-type sewage disposal system was properly and reasonably denied by the Department of Environmental Resources.

#### DISCUSSION

Appellant did not challenge any of the facts presented by the Department. The result of the percolation tests conducted by George Gardner are therefore conclusive.

A percolation rate of .9 inch per hour is the equivalent of

10. *George F. Cramer*

66.7 minutes per inch. This exceeds the legal maximum of 60 minutes per inch by more than 10 percent. The Environmental Hearing Board, therefore, concludes that there is insufficient drainage to renovate the effluent from either the subsurface sewage or pit-type disposal systems proposed by Appellant.

There are yet other reasons that compel this Board to affirm the Department's denial of a permit to Appellant. Percolation rates do "not apply where soils are mottled as a result of seasonal high water tables or where perched water tables preclude adequate effluent renovation." Section 73.63 (2). Soil on Appellant's site mottled as a result of high water tables, indicating this soil was unsuitable for a subsurface disposal system or a pit-type sewage disposal system. Robert Black found, in his inspection, soil mottling, which is conclusive, since unrefuted by Appellant, of the seasonal high water table level, at 3 to 4 feet below ground level. The maximum level of the ground water table must be at least 4 feet below the bottom of the proposed sewage excavation. To permit construction of a subsurface or pit-type sewage disposal system on Appellant's lot would impinge on the necessary margin between sewage level and the maximum water table level, and would, therefore, be illegal.

There are at least two reasons in support of the requirements established by the Department for construction of a subsurface or pit-type disposal system. First, the homeowner must be protected against a sewage system which is likely to create a health hazard to himself and his family. When a subsurface system is installed despite inadequate percolation rates, the inevitable result will be a discharge of liquid wastes onto the surface of his land, creating the very health hazard the Pennsylvania Sewage Facilities Act was designed to prevent. Second, the water table must be protected against the introduction of raw sewage. Providing a minimum of four feet between the bottom of the sewage excavation and the seasonal high water table level insures a four foot buffer or filter system to cleanse the effluent before it becomes a part of the ground waters of the Commonwealth. Ignoring the requirement for this buffer would be paramount to dumping raw sewage into our lakes, streams and rivers.

Appellant's defense is that if the letter of the law is followed, further economic development in Somerset Borough will be thwarted. This is not necessarily so. Existing sewage lines extend to within 1200 feet of Appellant's property. The possibility of their extension by the Borough

was mentioned at the hearing. Also mentioned was the possible use of holding tanks on Appellant's site.

If environmental considerations are to be continually subordinated to economic interests, there would be little or no use for the Pennsylvania Sewage Facilities Act. The least expensive method to accomplish an end is seldom the best, particularly where, as here, the long-range costs and effects are monumentally damaging.

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Supreme Court reviewed a decision made by the Secretary of the Department of Transportation authorizing the use of Federal funds for construction of an expressway which would go through a then existing city park. The Department of Transportation Act of 1966 permitted such construction only if there was no "reasonable and prudent" alternative to use of park land. In reversing the District Court's grant of summary judgment in favor of the defendant, Justice Marshall succinctly noted that if costs were the only factor to be used in determining whether there was a reasonable and prudent alternative, Environmental Acts would not be needed. Justice Marshall stated:

"It is obvious that in most cases considerations of cost...will indicate that parkland should be used for highway construction... There will always be a smaller outlay required from the public purse when parkland is used...no one will have to leave his home or give up his business...If Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes...The few green havens that are public parks were not to be lost unless there were truly unusual...costs." *Id.* at 412-413.

The Supreme Court in *Citizens to Preserve Overton Park v. Volpe* concluded that passage of a statute protecting parks whenever possible from highway condemnation evinced an intent by Congress to preserve parks despite high financial construction costs.

By analogy, there would have been no need for enactment of restrictive Acts with respect to the use of subsurface or pit-type sewage systems if immediate economic considerations were to be placed on an equal footing with preservation of environmental resources. The fact that such subsurface sewage disposal requirements were enacted is indicative of the legislature's intent to establish the preservation of our environmental

12. *George F. Cramer*

resources as a matter of paramount importance.

There is no justification for permitting construction of a subsurface sewage or pit-type disposal system when such an installation will eventually cause harm to the occupants of the land and to the citizens of the Commonwealth. Based upon the foregoing findings of fact and conclusions of law, the appeal is denied, and the Order denying Application No. 074542 is affirmed.

#### ORDER

AND NOW, this 5th day of FEBRUARY, 1973, it is hereby ordered that the Order of the Department of Environmental Resources denying Application No. 074542 is affirmed.

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*Charles Harmuth*

CHARLES HARMUTH

: Docket No. 72-333

#### A D J U D I C A T I O N

By PAUL E. WATERS, Member, February 5, 1973

This matter comes before the Board as an appeal from an Order issued by the Department of Environmental Resources, hereinafter called Department on July 28, 1972, requiring Charles Harmuth, hereinafter called Appellant, the owner of a landfill in Washington County, to correct an unlawful discharge from said landfill, and take other renovative action in the area.

The Appellant contends that the amount of the discharge is so insignificant as to be de minimis, and raises a question of statutory construction as to whether the owner of land is liable in any event where the land is leased and he is not in active possession.

The difficulty of the case appears to be that large expenditures of funds will be required to comply with the Department's Order and the landfill is no longer producing revenue. The volume and location of the discharge does not, in Appellant's view, warrant this expense.

### FINDINGS OF FACT

1. Charles Harmuth, Appellant, is the owner of approximately 72 acres of land in Cecil Township, Washington County, Pennsylvania.
2. For more than 15 years, Appellant's land, or portions thereof, has been used for a sanitary landfill, with State authorization.
3. Appellant himself operated the landfill at one time, but subsequently leased it to one Nancy Carlisle, who later sublet to Richard D. Stitt, who continued landfill operations until sometime in June of 1970.
4. There is no treatment facility or other activity conducted by Appellant for the collection and treatment of "leachate", an industrial waste which results from the operation of a landfill.
5. The industrial waste "leachate" is produced by and emanates from the Appellant's landfill in at least two locations, which lead to a tributary of water covered by The Clean Streams Law.
6. The Appellant does not have a permit to discharge an industrial waste into the waters of the Commonwealth.
7. The industrial waste leachate is detectable by water sample at the site and can be detected by odor, as far as 3,000 feet downstream from Appellant's property.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the person and subject matter of this appeal.
2. The Appellant is the owner of the landfill in question, and is included as a responsible party for pollution under The Clean Streams Law, §316, which requires "the landowner or occupier" to correct the condition in a manner satisfactory to the Board.
3. The Appellant has violated The Clean Streams Law by an unlawful discharge from a sanitary landfill into the waters of the Commonwealth.

### DISCUSSION

The only aspect of this case which warrants further discussion concerns its procedural history.

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From the record it appears that the two parties who were previously involved with the landfill operation, Nancy Carlisle and Richard D. Stitt, have both come to terms with the law.

A Consent Decree was signed before The Honorable Richard DiSalle of the Washington County Courts on May 30, 1972.

This Decree provides that the named parties, former lessees of separate areas of Appellant's dump, agree to take the necessary steps to make their respective sites comply with the law and Regulations of the Department.

It is clear to me that all parties share joint and several liability for the present condition of the landfill. The Appellant, Charles Harmuth, however, is the only one before us and, of course, his interests alone are the concern of this Adjudication. The matter could have been settled in a much more satisfactory manner if the rights of all parties could have been declared in one proceeding.

At first blush, the Appellant's argument to the effect that the discharge from his landfill adds so little pollution to the waters of the Commonwealth that the law should not require this great expenditure of funds to correct it, does require some reflection. Upon reflection, however, it becomes clear that if the Courts would accept this explanation (excuse?) from each small contributor to our present environmental woes, we might never be rid of them. The law cannot be bothered with trifles, 'tis true, but the condition that has developed and is developing on the Appellant's landfill cannot, in my opinion, be properly categorized in that manner.

In any event, we find that the Appellant must share responsibility for the condition existing on his property, and the Order of the Department is a proper exercise of its power to this end.

**ORDER**

AND NOW, this 5th day of FEBRUARY 1973, the Order of the Department of Environmental Resources, issued to Charles Harmuth on July 28, 1972, is hereby sustained and the appeal is dismissed.

**CONCURRING OPINION**

By **GERALD H. GOLDBERG**, Member, February 5, 1973

I concur.

It should be noted that, for reasons unknown to this Board, the Parties to the action in the Court of Common Pleas of Washington County failed to avail themselves of the right to require the Joinder of Charles Harmuth, the Appellant herein. The decision filed in that action does not, as we understand it, affect Mr. Harmuth.

At the same time, Mr. Harmuth has failed to take advantage of our Rules, which would permit him to forcibly join the other two parties in the proceedings before our Board.

Under the circumstances, it is clearly the responsibility of the parties to take advantage of the Rules of Procedure which would enable the Court of Common Pleas of Washington County, or the Board, or both to deal with the joint liabilities of the parties. They have failed to do so, and we have no recourse but to dispose of the matter in the manner in which they have chosen to present it before us.

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*Borough of Zelienople*

**Borough of Zelienople**

: Docket No. 72-199

**Butler County**

**A D J U D I C A T I O N**

By **ROBERT BROUGHTON**, Chairman, February 5, 1973

This matter is before the Board on an Appeal filed by the Borough of Zelienople (Zelienople) from an Order of the Department of Environmental Resources (Department).

This Order, dated April 1, 1972, prohibited the Municipal Authority of the Borough of Zelienople and Zelienople from constructing, building, allowing or permitting any sewage connection by any residence, commercial business or industry into the existing sewerage system which carries sewage for treatment to the existing Zelienople Municipal Authority

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Sewage Treatment Plant. The Order also directed both the Authority and Zelianople to immediately take measures to discover and abate any and all infiltration occurrences on the sewer collection system and to submit a detailed report to the Department, setting forth any and all actions taken to comply therewith, within sixty days from the date thereof.

In its Appeal from this Order, Zelianople contended that it could not reasonably take any action to stop the infiltration into the sewers which flow into the existing treatment plant until a joint project for sewage treatment, involving Zelianople and three adjacent communities and favored by numerous agencies, including the Department, is formalized. Furthermore, Zelianople, challenged certain technical details set forth in the Order and in the preamble thereto.

On July 26, 1972, this Board granted a supersedeas to Zelianople to that portion of the Order which required Zelianople to submit a detailed compliance report to the Department within sixty days from the date thereof.

A hearing on this Appeal was held before Louis R. Salamon, Esquire, Hearing Examiner, on October 6, 1972. At the inception of the hearing the parties agreed (N.T. 5) that the following facts were uncontroverted:

1. Zelianople received the Order imposing the sewer connection ban.
2. The imposition of the sewer connection ban was based upon the discharge of raw sewage from the existing sewage treatment plant to Connoquenessing Creek.

The parties also stipulated (N.T. 5,6) that the sole issue for adjudication before the Board was whether there were reasonable alternatives to that portion of the Order which requires Zelianople to abate the infiltration into the said sewer collection system.

The parties waived filing of briefs.

The Board makes the following:

FINDINGS OF FACT

1. Ground water run-off and surface water run-off have infiltrated the existing interceptor sewer in Zelianople.
2. The quantity of sanitary sewage and ground water and

surface water run-off which flows through the existing interceptor sewer exceeds the treatment capacity of the existing Zelienople Municipal Authority Sewage Treatment Plant and causes the plant to be hydraulically overloaded.

3. As the result of this infiltration and hydraulic overloading, untreated sewage is permitted to bypass directly into the waters of The Commonwealth, to-wit, Connoquenessing Creek.

4. This problem of discharges of raw sewage to Connoquenessing Creek has existed in Zelienople for many years.

5. In 1968, the Municipal Authority of the Borough of Zelienople received a permit from the Sanitary Water Board - Department of Health, a predecessor entity to the Department of Environmental Resources, authorizing it to make certain improvements to its existing sewage treatment plant and authorizing it to replace the existing interceptor sewer with a new eighteen inch interceptor sewer.

6. The replacement of the existing interceptor sewer with a new eighteen inch interceptor sewer would eliminate the infiltration of ground water and surface water which is causing the discharge of raw sewage to the waters of the Commonwealth.

7. In order for the new eighteen inch interceptor sewer to be used, modifications in the existing sewage treatment plant are necessary.

8. In 1970, Zelienople received a grant from the Federal government for the improvements to the existing sewage treatment plant and for the replacement of the existing interceptor sewer with a new eighteen inch interceptor sewer.

9. Prior to the receipt of this grant, Zelienople replaced approximately 3500 feet of the existing interceptor sewer with premium replacement pipe, using its own funds. To replace the remainder of the sewer line, approximately 2000 additional feet of new sewer pipe would be required.

10. Zelienople has not completed the replacement of the existing interceptor sewer, nor has it made the improvements to the existing sewage treatment plant.

11. Representatives of Zelienople, Harmony Borough, Jackson Township and Lancaster Township have held meetings to discuss the feasibility of establishing joint facilities for the treatment of sewage from those four municipalities.

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12. The Department has never issued an Order to Zelienople to join with Harmony Borough, Jackson Township and Lancaster Township or with any other municipalities to establish joint or regional sewage treatment facilities.

13. The Department has not revoked the Permit which the Municipal Authority of the Borough of Zelienpole received in 1968.

14. On May 10, 1972, a representative of the Department met with representatives of each of the aforementioned four municipalities and indicated that the Department favored joint or integrated sewage treatment facilities for these municipalities.

15. At the hearing on this matter, William Depner, a sanitary engineer and chief of the planning section in the Pittsburgh Regional Office of the Bureau of Water Quality Management of the Department, testified (N.T. 47) that the Department is about to "tell" the municipalities in the Zelienople area to treat their sewage on a regional basis.

16. Although the eighteen inch interceptor sewer is sufficient to convey the sewage generated in Zelienople to a treatment plant serving only Zelienople, it would not be large enough to convey the sewage generated from Zelienople, Harmony Borough, Jackson Township and Lancaster Township to a treatment plant under a joint or integrated sewage collection and treatment system.

17. The eighteen inch interceptor sewer might be integrated into a joint or integrated sewage collection system serving Zelienople, Harmony Borough, Jackson Township and Lancaster Township, although a larger interceptor sewer would have to be constructed for said joint system.

18. Zelienople would suffer a financial loss if it installed the new eighteen inch interceptor sewer at the present time and if it would later be required to participate in the expense of constructing a larger interceptor sewer which is necessary for a joint or integrated sewage collection and treatment system.

#### DISCUSSION

It is undisputed that untreated sewage is being discharged to the waters of the Commonwealth in Zelienople.

It is also undisputed that the major reason for this discharge is that ground water and surface water run-off have infiltrated the existing

interceptor sewer in Zelienople. This creates a situation where the quantity of raw sewage normally carried by the interceptor sewer and the quantity of ground water and surface water run-off which has infiltrated the interceptor sewer exceeds the hydraulic capacity of the treatment plant. As the result of this excess flow, the treatment plant is hydraulically overloaded, raw sewage bypasses the treatment plant and is discharged, without treatment, to the waters of the Commonwealth.

On April 1, 1972, the Department issued a two pronged Order to Zelienople, the first portion of which imposed a sewer connection ban and the second portion of which directed Zelienople to immediately take measures to discover and abate the infiltration occurrences on the sewer collection system, and to submit a detailed compliance report within sixty days from the date thereof.

It is clear that Zelienople is in violation of Section 202 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202, which provides, in pertinent part, as follows:

"SECTION 202 SEWAGE DISCHARGES

No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the Board or such person or municipality has first obtained a permit from the department. . . ."

It is also clear that the Department was authorized, under Section 203 of The Clean Streams Law, *supra*, 35 P.S. §691.203, to issue such an Order to Zelienople.

It was agreed that the replacement of the existing interceptor sewer with a new eighteen inch interceptor sewer would eliminate the infiltration of ground water and surface water which is causing the discharge of raw sewage to the waters of the Commonwealth. In fact, in 1968, the Municipal Authority of the Borough of Zelienople received a permit from the Sanitary Water Board - Department of Health, a predecessor entity to the Department, authorizing the replacement of the existing interceptor sewer with a new eighteen inch interceptor sewer. The permit also authorized the Authority to make certain improvements to the treatment plant. Furthermore, in 1970, Zelienople received a grant from the federal government for partial funding of the work authorized by the permit.

Although Zelienople replaced approximately 3500 feet of the

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existing interceptor sewer, the replacement project was not completed. Furthermore, Zelienople did not undertake to make the improvements to its treatment plant which were authorized by the permit.

Zelienople contends that it can not reasonably complete these projects. It contends that there are reasonable alternatives to the requirement, set forth in the Order, that it discover and abate all infiltration occurrences on its sewer collection system.

Zelienople has submitted several reasons in support of its contention, which are set forth, as follows:

1. The Department strongly favors the establishment of joint facilities for the treatment of sewage, the participants in which would be Zelienople, Harmony Borough, Jackson Township and Lancaster Township.

2. Zelienople would lose its grant authorization from the federal government if it were to proceed with said projects on an individual basis, in view of the Department's endorsement of joint facilities.

3. Zelienople would suffer significant financial loss if it were to complete these projects and then be directed to join with the other municipalities, since the existing treatment plant to which the improvements would be made would be abandoned in a joint arrangement and since the new eighteen inch interceptor sewer which would be built could not be used under a joint arrangement.

4. Zelienople cannot finance these projects from its revenues alone.

We hold that there are no alternatives to the requirement that Zelienople discover and abate all infiltration occurrences on its sewer collection system. Zelienople is and has been, by its own admission, in violation of The Clean Streams Law for a long period of time. Such violation continues on each and every occasion that untreated sewage from the sewer system reaches the waters of the Commonwealth.

Such violation must be abated in spite of the financial hardship which abatement activities might entail. Numerous cases sustain this view. In *Commonwealth ex rel Allesandrone vs. Borough of Coudersport*, 85 Dauphin 82 (1966), the Commonwealth brought an action in mandamus to enforce an order from the Sanitary Water Board that the Borough of Coudersport discontinue the discharge of sewage to the waters of the Commonwealth. Coudersport admitted the sewage discharge, but in its new matter it alleged that compliance with the order would be economically

unfeasible. The Court sustained a demurrer to this contention, holding, p. 85, as follows:

"Financial or other hardship will not excuse compliance with the mandates of the law or the Board. The contention that it is unconstitutional for an administrative agency to force a municipality into bankruptcy by using a mandate requiring the expenditure of large sums of money was dismissed by this Court in *Sanitary Water Board vs. Borough of Coudersport*, 81 Dauphin 178 (1963); *Sanitary Water Board vs. Wilkes-Barre*, 199 Pa. Super 492 (1962), affirming 78 Dauphin 328 (1962). Nor is it material that the defendants may have to exceed or closely approach their assessed valuation or incur expenditures in excess of their constitutional limit for bonded indebtedness. The Boroughs are given the authority to issue non-debt revenue bonds to finance sewage treatment works."

See also *Commonwealth ex rel Allesandrone vs. Borough of Confluence, et al.* 87 Dauphin 214 (1967); affd. 427 Pa. 540, 234 A.2d 852 (1967); *Commonwealth vs. Irwin Borough* 48 D & C2d 108 (1969).

The abatement of all infiltration occurrences in the Zelienople sewer collection system is essential for another very significant reason. It appears, as we understand the testimony at the hearing on this matter, that the infiltration of the sewer collection system caused the treatment plant to be hydraulically overloaded; it is this hydraulic overloading and the consequences thereof which gave rise to the imposition of the sewer connection ban. This sewer connection ban would, in all likelihood, not be lifted until such time as the treatment plant ceases to be hydraulically overloaded and the sewage carried thereto receives complete treatment. This sewer connection ban has already caused property owners great hardship. It is incumbent upon Zelienople to take measures necessary to put an end to it.

Zelienople does have several alternative methods by which it can effectively deal with this infiltration problem. It can install the new eighteen inch interceptor sewer to replace the existing interceptor sewer, and modify the existing treatment plant to accommodate this new interceptor. It can continue to replace portions of the existing interceptor as it has done in the past. It can install a larger interceptor sewer, which would accommodate the entire sewage load from Zelienople, Harmony Borough, Jackson

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Township and Lancaster Township, under a joint sewage treatment arrangement.

The Department must aid Zelienople in its decision as to which infiltration abatement alternative to employ, either by issuing an order to Zelienople and the other municipalities to construct and operate joint sewage collection and treatment facilities or by formally notifying Zelienople that it may proceed with its sewage collection and treatment on an individual basis.

Such action by the Department would enable Zelienople to initiate and complete the necessary infiltration abatement measures by construction and installation of those facilities which would be necessary under whatever long term system of sewage collection and treatment is deemed by the Department to be correct and proper for Zelienople. Such action by the Department would probably enable Zelienople to minimize its financial loss.

We recognize that the Department has not revoked the 1968 Permit which authorized, *inter alia*, the installation of a new eighteen inch interceptor sewer. In view, however, of the position which the Department took at this hearing, to-wit, that it favored joint or integrated sewage treatment facilities for Zelienople and the other municipalities and in view of the policy contained in Section 5 of The Clean Streams Law, *supra*, 35 P.S. §691.5, that the Department in issuing orders or permits must consider, where applicable, the feasibility of combined or joint treatment facilities, it would be unwise and uneconomical for Zelienople to build an interceptor the capacity of which would be insufficient for the future sewage volume from four municipalities, when it could just as easily install an interceptor sewer with sufficient capacity at the present time.

One problem remains. Although the Order of the Department directs Zelienople "to immediately take measures to discover and abate any and all infiltration occurrences" and to submit a detailed report setting forth all actions taken in compliance with the Order within sixty days from the date thereof, the Order does not provide a date on or before which the completion of the infiltration abatement project must be accomplished.

As there is nothing in this record which would give us insight into what a reasonable time for completion of such a project would be, we would strongly urge the parties to resolve this compliance date question in an amicable fashion.

If no amicable resolution is possible, the Department should issue an order to Zelienople relating to the date by which the infiltration occurrences must be abated. Such an order would be appealable to this Board and it would be necessary for us to take testimony.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.
2. Zelienople is in violation of Section 202 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202.
3. The Department properly issued a sewer connection ban on April 1, 1972, prohibiting further sewage connections to the existing sewer system which carries sewage for treatment to the existing Zelienople Municipal Authority Sewage Treatment Plant.
4. The Department properly ordered Zelienople to take measures to discover and abate all infiltration occurrences on its sewer collection system.
5. There are no alternatives to the requirement, contained in the Order of April 1, 1972, that Zelienople take measures to discover and abate all infiltration occurrences on its sewer collection system.
6. The Department must issue an order to Zelienople and to some or all of the following municipalities: Harmony Borough, Jackson Township, Lancaster Township, to construct and operate joint sewage collection and treatment facilities *or* the Department must formally notify Zelienople that it may proceed with its sewage collection and treatment on an individual basis.

#### ORDER

AND NOW, to-wit, this 5th day of FEBRUARY, 1973, it is hereby ordered as follows:

The Commonwealth of Pennsylvania, Department of Environmental Resources shall, within thirty (30) days from the date of this Order, issue an order to the Borough of Zelienople and to some or all of the following municipalities: the Borough of Harmony, the Township

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of Jackson, the Township of Lancaster, to construct and operate joint sewage collection and treatment facilities *or* the Commonwealth of Pennsylvania, Department of Environmental Resources shall, within thirty (30) days from the date of this Order, give formal notification to the Borough of Zelienople that it may proceed with its sewage collection and treatment on an individual basis.

The Borough of Zelienople shall, immediately upon receipt of the order from the Commonwealth of Pennsylvania, Department of Environmental Resources for the construction and operation of joint sewage collection and treatment facilities *or* immediately upon receipt of the formal notification from the Commonwealth of Pennsylvania, Department of Environmental Resources that it may proceed with its sewage collection and treatment on an individual basis, take and complete measures to discover and abate all infiltration occurrences on its sewer collection system.

The sewer connection ban shall remain in full force and effect until the Zelienople Municipal Authority Sewage Treatment Plant ceases to be hydraulically overloaded and until the sewage carried in the sewage collection facilities receives treatment of such quality as to cause the Borough of Zelienople to be in compliance with The Clean Streams Law and the applicable Rules and Regulations of the Commonwealth of Pennsylvania, Department of Environmental Resources.

The Board shall retain jurisdiction of this matter, and should either party require further fact finding or object to further actions or orders of the other, we shall act expeditiously to resolve such matters.

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*Meyersdale Municipal Authority*

**MEYERSDALE MUNICIPAL AUTHORITY** : **Docket No. 72-339**  
**MEYERSDALE BOROUGH**

**A D J U D I C A T I O N**

By **PAUL E. WATERS**, Member, March 2, 1973

This is an appeal by the Meyersdale Municipal Authority from the grant of the strip mining permit to M. F. Fetterolf Coal Company, Inc., for premises in Summit Township, Somerset County, Pennsylvania, adjoining the watershed area for the Sand Spring Reservoir of said

Authority.

The Sand Spring Reservoir is fed by subsurface waters, the source of which is not known. For this reason the Authority contends that the conduct of any strip mining operation in such proximity to the Sand Spring Reservoir watershed poses a threat or risk to the water sources for said reservoir and can possibly adversely affect the quantity and quality of the water supply. It is believed that the threat exists not only from blasting but also from the excavation of ground required for mining and removal of the coal.

The Authority serves a large number of customers in the Meyersdale area, including several thousand individuals, the public schools, a community hospital and several industries, so that a substantial public interest is involved in this matter.

#### FINDINGS OF FACT

1. M.F. Fetterolf Coal Company, Inc., is a Pennsylvania corporation and the holder of a permit from the Department of Environmental Resources authorizing it to conduct a strip coal mining operation in Summit Township, Somerset County under Application No. 4072BSM11 (N. T. 6, 34 and Comm. Ex. #1).

2. Meyersdale Municipal Authority is a municipality authority engaged in the business of providing water to the residents of the Borough of Meyersdale and to some residents in Summit Township, Somerset County, Pennsylvania (N.T. 44).

3. The Authority maintains a water supply reservoir known as the Sand Spring Reservoir which is located on a separate watershed to the east of and adjacent to the watershed on which the mining operation to be conducted (N. T. 8-10).

4. The area for which a strip mining permit was granted is within 200 feet of the Sand Spring watershed (N. T. 27, 105).

5. The exact source of the underground waters which feed the reservoir is presently unknown (N. T. 83, 84, 111).

6. Even if drainage from the mining operation could reach the reservoir of the Authority it would not have an adverse effect because the amount of drainage would necessarily be so small compared to the amount

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of water in the reservoir and also because of slight difference in alkalinity and iron between the water that could be expected from the mining operation and the water in the reservoir (N. T. 29, 30).

7. Surface water and drainage from the mining operation will not reach the Authority's reservoir (N. T. 123).

8. Immediately below the coal seam in this area is an impervious clay (N. T. 91) which, if undisturbed, would prevent any subsurface drainage from reaching strata that could result in a flow into the reservoir of the Authority (N. T. 125).

9. The Authority does not know where the sources are for the water entering into its reservoir (N. T. 83, 84).

10. The question about whether subsurface drainage from the mining operation can reach the Authority's water supply is essentially one of geological determinations (N. T. 133, 134).

11. Extensive geological work has been done in this area, and the best publication of such work is that of the witness, Dr. Norman Flint, of Pittsburgh, Pennsylvania who published *Geology and Mineral Resources of Southern Somerset County of Pennsylvania* (N. T. 85, 144).

12. All of the strata, including the coal bed, dip in a northwest direction away from the watershed on which the Authority's reservoir is located (N. T. 126).

13. Under the permittee's plan of drainage, mining will be slightly upgrade and toward the watershed divide so that any water that is intercepted flows into the portion of the mine already excavated (N. T. 185). If a mine void were encountered, no drainage would enter the void because of the slope back away from the void. The operator would then seal the void with an impermeable material, probably using the clay material from the pit floor (N. T. 188, 189).

14. An expert geologist such as Dr. Norman K. Flint, who testified as to comprehensive geological studies and research as to the geological structure of the subsurface strata at the general area here involved, admits that he cannot be absolutely certain that the water sources of the Sand Spring Reservoir will not be affected, but in his opinion the probability that the water will be affected is extremely low. (N. T. 168, 169).

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter.
2. M. F. Fetterolf Coal Company, Inc., is presently operating its strip coal mine operation in Somerset County pursuant to a permit issued by the Department of Environmental Resources.
3. There is no evidence that any drainage from the strip mine operation will result in pollution of the Authority's reservoir.
4. The Department has properly issued a mining permit to the Fetterolf Coal Co.

#### DISCUSSION

This case raises the interesting question of whether 100% certainty must exist that a coal mining operation will not at some time in the future pollute a nearby municipal water supply before a permit to mine such coal may properly issue.

Stated in these harsh terms, the case does call for considerable reflection. When it is observed however that no water supply ever has or can have a guarantee such as that sought in this case by Appellant, the matter comes to its proper perspective.

To require the carrying of a burden which is known in advance that no one could possibly carry - to insist on proof of something that all parties agree cannot be proven, serves no useful purpose and makes no sense to me. We will not pursue the shortcomings of this position further than to note that, if the requirement were imposed upon Fetterolf Coal Co., then the Appellant would be in a better position than every other water supplier in this State. It would have an absolute guarantee against all future contingencies no matter how unlikely or improbable that its water supply will for all time remain in its present state. I believe the citizens using the Appellant's water supply are entitled to great consideration, the benefit of any substantial doubt, and the exercise of extraordinary care to see that their water remains pure.

All of the expert testimony indicates that the determination of risk in this case is essentially a scientific one. We have observed and listened to Dr. Norman K. Flint, a geologist, who is acknowledged to be the authority on the area here in question. It is his opinion that the mining

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operation cannot and will not effect the Appellant's water supply.

In the final analysis, we are called upon to weigh the risk of harm to the water supply against the property rights of Fetterolf Coal Co. The Department is charged with the responsibility to issue permits such as the one here in question. Its personnel are trained to make the kind of decisions reached in this case. Our function is to review those decisions when called upon to do so for reasonableness and legality.

In our view, it would take a very slight, though real, risk of substantial harm to a water supply in order to justify the revocation of a permit to mine coal. However, there has been no proof of peril to the Appellant's water supply. Questions have been raised, suspicions voiced and possibilities explored, but the testimony which we accept is all to the contrary.

We are, nevertheless, mindful of the fact that the more distance between the operations of Fetterolf and the Appellant's water supply, the greater becomes the margin of safety. Fetterolf agreed not to carry on any mining operations indicated on the attached map of Moser Strip marked "area not to be strip mined". This area, which is the closest point to the Appellant's water supply, was eliminated by an Order of the Board of November 13, 1972, from the area authorized to be mined under the permit here in question.

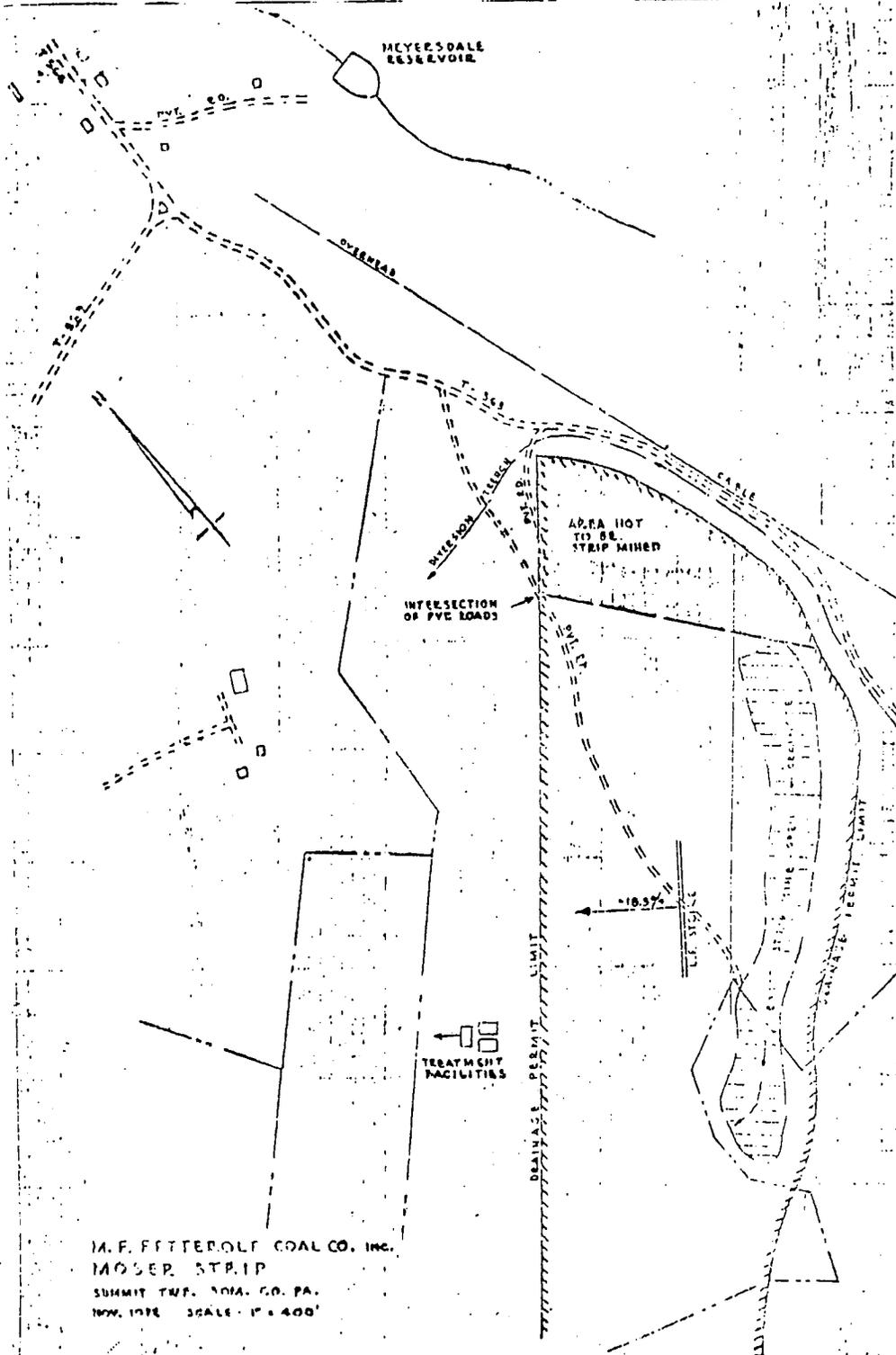
We have concluded that the above indicated limitation should remain in effect and make the following Order:

**ORDER**

AND NOW, this 2nd day of MARCH 1973, the grant of a permit under Application No. 4072BSM11 by the Department is hereby sustained and the appeal of Meyersdale Municipal Authority is hereby dismissed with the following condition: The Fetterolf Coal Co. shall carry out no mining operations beyond a line which is indicated by the darkened area on the attached map and designated as "area not to be strip mined."

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Meyersdale Municipal Authority



M. F. FETTEROLF COAL CO. INC.  
MOSEB STRIP  
SUMMIT TWP., 101A, CO. PA.  
NOV. 1978 SCALE: 1" = 400'



**FRAILEY TOWNSHIP**  
**(Borough of Tremont)**

: **Docket No. 72-271**

**A D J U D I C A T I O N**

By **GERALD H. GOLDBERG**, Member, March 9, 1973

This matter involves an Order of the Department of Environmental Resources of May 23, 1972, which requires Frailey Township to join with the Borough of Tremont in planning, financing and constructing joint sewage treatment facilities. The Borough of Tremont, in compliance with a previous Order of the Department, created the Tremont Sewage Authority, which employed engineers to plan and design a sewage treatment facility for the Borough. Further, it has indicated its willingness to enter into a "reasonable agreement" with Frailey Township, but the Township supervisors are unwilling to do so. Tremont is concerned that its applications for grants will be delayed by the fact that it is unable to comply with the Order of the Department of Environmental Resources of May 23, 1972, for reasons beyond its control. All of the necessary plans and designs for installation of a sewage treatment system for the Borough of Tremont have been completed, and have been filed for approval with the Department of Environmental Resources.

In its Notice of Appeal, and at the Hearing of this matter on Thursday, September 21, 1972, Frailey Township acknowledged that there is no public water system in the Township and no source of water for a public water system, and that the individual wells used by the residents are not adequate to operate a sewage disposal system. Their basic argument, however, is that Frailey Township cannot afford to join with the Borough of Tremont in a joint sewage treatment facility.

**FINDINGS OF FACT**

1. The parties and the issues in the above captioned matter are properly before the Environmental Hearing Board, which has jurisdiction thereof.
2. The record clearly indicates that sewage treatment facilities and methods in Frailey Township are inadequate to prevent unsanitary and unhealthful discharges into Good Spring Creek.

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3. Frailey Township, and the village of Donaldson, which is the only populated portion of the Township, is an economically depressed area. It has a total population of 354, consisting of about 195 children, 158 persons dependent upon Social Security and Public Welfare, and 68 non-working housewives. There are approximately 133 persons in the entire Township who are possible wage earners, capable of producing average earnings estimated to be approximately \$4,500 to \$5,000 per wage earner per year.

4. The total revenues received into the Township general fund for the year 1971 was \$17,575.37. There are no moneys available in the general fund at present to pay for engineering plans and studies, nor for engineering plans for a public collection and disposal system.

5. The present assessed valuation of all homes and buildings in the Township is \$181,320. The total assessed valuation, including coal lands, is \$579,188.

6. In addition to receiving pollution from the discharge of sewage resulting from residential use, Good Spring Creek is also polluted by mine acids and mine wastes from adjoining mining properties.

7. The sewage treatment program planned by the Borough of Tremont would, in the judgment of the Department of Environmental Resources, meet the effluent criteria for discharge to waters of the Commonwealth. The plans of the Borough of Tremont include Frailey Township. These plans, as currently proposed by Tremont, make provision for facilities which will, when constructed, enable Frailey Township to comply with the requirements of The Clean Streams Law of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.*

8. It is feasible as an engineering matter for the Borough of Tremont to construct and operate its sewage treatment facility, including provision for the collection and treatment of sewage emanating from Frailey Township, and to obtain reimbursement for that portion of the cost related to Frailey Township by direct charge to the residents of the Township, or by other methods of periodic reimbursement.

9. Frailey Township has made no attempt to borrow money to meet the expense of establishing a sewage treatment facility, either on its own initiative or in cooperation with the Borough of Tremont. The Township has made no attempt to explore the possibility of raising tax revenues for this purpose.

**DISCUSSION**

None of the parties denies that untreated or inadequately treated sewage emanating from Frailey Township, in clear violation of The Clean Streams Law, *supra*, Sections 201 and 202.

Nor do the parties contest the authority of the Department of Environmental Resources, acting under Section 203(a) of The Clean Streams Law, to order a municipality to construct a sewage treatment facility where such violations have been demonstrated to exist.

The Borough of Tremont, in compliance with the Order of the Department, has acted diligently in taking the steps necessary to comply with the Order. Frailey Township, on the other hand, has simply entered a plea of poverty, and, as the record clearly shows, has failed to cooperate with the Borough of Tremont in working out a feasible financial arrangement for a joint system.

Although it is true that Frailey Township is an economically depressed area; and, although its resources are limited, the record also clearly demonstrates that no real effort has been made to explore the financial resources available to the Township. Both private and governmental financing is available through a number of sources, and the Borough of Tremont has explored these sources. Frailey Township has not.

It is not for the Department of Environmental Resources or for this Board to dictate to the Borough of Tremont the manner in which it shall finance its participation in the joint sewage treatment system which the Department has ordered. Suffice it to say that the Township has not shown this Board that it has made a good faith effort to cooperate with the Borough of Tremont, nor has it demonstrated that it has exhausted its means of obtaining financial support for this essential work.

Under the circumstances, the Appellant not having contested the validity of the Department of Environmental Resources Order, and having merely raised the general excuse of alleged inability to finance its participation therein, the Appeal must be dismissed. Accordingly, we enter the following:

**ORDER**

The Appeal of Frailey Township, from the Order of the

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Department of Environmental Resources dated May 23, 1972, is hereby dismissed, and the said Township is hereby ordered to comply therewith without delay. Should Frailey Township fail or refuse to take diligent action in compliance with the Order of the Department of Environmental Resources and with this Order of the Environmental Hearing Board, the Department of Environmental Resources is hereby directed to take such action with respect to the said Township as may be necessary to impose such sanctions and penalties as are provided by law.

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*Bologna Mining Company*

BOLOGNA MINING COMPANY & COUNTY : Docket No. 71-101  
COMMISSIONERS OF WASHINGTON COUNTY,  
Intervenors :

A D J U D I C A T I O N

By GERALD H. GOLDBERG, Member, April 13, 1973

HISTORY OF THE CASE

This matter comes before the Board as the result of objections filed to the issuance of mine drainage permit #2668BSM4, to Bologna Mining Company, Cross Creek Township, Washington County.

The original application was submitted by Bologna Mining Company and received by the Department on May 10, 1967, followed by a second application which was later submitted to the Department. A permit was issued to the applicant on May 29, 1968, following which protests to the issuance of the permit were filed with the Department by Independence Township Municipal Authority, the Independence Township Board of Supervisors and the Avella Chamber of Commerce, all of whom were represented by John L. Brunner, Esquire, of Burgettstown, Pennsylvania.

A hearing was held on October 28, 1971, before Jack C. Sheffler, a Hearing Examiner for the Department of Environmental Resources, at which time the protestants were given a full and complete opportunity to present their objections to the issuance of the aforementioned permits.

Subsequent thereto, Mr. Sheffler prepared a draft Adjudication, which in effect overruled the objections of the protestants, and ordered the issuance of the aforesaid permit.

On April 17, 1972, the Honorable Michael H. Malin, former Chairman of the Environmental Hearing Board, ordered that the County Commissioners of Washington County be notified of the application of Bologna Mining Company for the mine drainage permit here in question, and be given an opportunity to request an appeal and be heard.

The Commissioners were ordered to file a Notice of Appeal in the form approved by the Board on or before May 5, 1972, and to take and file Exceptions to the proposed Adjudication. Following the issuance of this Order, the Environmental Hearing Board issued a Pre-Hearing Order, which further required the County of Washington to file a full and detailed Specification of its Objections and a full report with respect to its proposed Exceptions.

A subsequent hearing was held before the Honorable Gerald H. Goldberg, Member of the Environmental Hearing Board, on June 12, 1972. At that time, it was noted that the Board had never received from the County of Washington any pleadings in compliance with its Order of April 17, 1972. Mr. Leo M. Stepanian, counsel for Bologna, subsequently moved to dismiss the intervention of the Board of Commissioners of Washington County, on the ground that the said Commissioners were without standing, and had presented no evidence or objection in the law with respect to which the Environmental Hearing Board could act.

Washington County has been given every opportunity to perfect its Petition for Intervention. It has not been timely in any of its activities before the Board. Nor has it demonstrated that its intervention, even if uncontradicted, would affect the outcome of the instant case. In addition, Washington County has not established that its interest has been inadequately represented to date.

Although Washington County has been given an extension of time to conduct tests and studies in the subject area, we are not aware of the conduct of any such tests, nor have the results of such tests been forwarded to the Board.

Washington County did not avail itself of the opportunity to conduct studies and tests during the period between the well-publicized hearing of October 28, 1971 and the present date.

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Nor has Washington County demonstrated the likelihood of finding new data which would tend to alter the ultimate decision in the event such tests or studies were completed.

Such being the case, we find that Washington County has not discharged its burden of showing that it may influence the final outcome of this case. The said County has demonstrated a disregard for the rights of Bologna by failing to make timely responses to the Board's Orders. Washington County has neglected to submit Specifications of Objection in a form acceptable to the Board, and has made no attempt to submit specific objections to the draft Adjudication drawn by Hearing Examiner Sheffler and submitted to them. In contrast thereto, Bologna has at all times material hereto acted in accordance with the Rules of the Department and the Board, and deserves prompt and courteous consideration in this matter.

**ORDER**

The Petition to Intervene of the Commissioners of Washington County is hereby dismissed.

The Board hereby adopts and accepts the draft Adjudication of Hearing Examiner Jack C. Sheffler, which draft Adjudication is hereby incorporated herein and made a part hereof as fully as herein set forth.

The Department of Environmental Resources shall forthwith issue a permit authorizing the operation of a bituminous coal strip mine by Bologna Mining Company, subject to the following conditions:

(a) The Department of Environmental Resources "standard conditions" 1 - 12, 14, 15, 17 - 22, 29 - 31, 33, 35 - 40, shall be incorporated therein; and

(b) The following "special conditions" shall be added: if auger mining is to be conducted at this operation, the permittee shall submit to the Department a request for an auger mining safety permit, which permit must be in the operator's possession prior to commencing any auger mining on the area followed by the mine drainage permit.

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BETHLEHEM MINES CORPORATION  
Washington County

: Docket No. 72-170

### A D J U D I C A T I O N

By GERALD H. GOLDBERG, Member April 18, 1973

### HISTORY OF THE CASE

This matter comes before the Board as a result of a Complaint filed by the Bureau of Water Quality Management of the Department of Environmental Resources of the Commonwealth of Pennsylvania under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. 691.1 *et seq.* The Complaint alleges that on January 16 and 17, 1972, the Respondent, Bethlehem Mines Corporation, knowingly and willfully permitted a discharge of coal fines from its settling pond into Pigeon Creek, thus polluting Pigeon Creek for a considerable length. In reply, the Respondent, admitting that such discharge occurred, denies that it was willful or intentional. Respondent alleges that the discharge was wholly accidental, that it did not have and could not be charged with knowledge thereof, that it had taken, and continues to take every measure to prevent such discharges, and further that the discharge did not harm the aquatic life of the Creek, or otherwise cause serious injury to the waters of the Commonwealth.

A hearing in this matter was held on November 28, 1972, before the Honorable Gerald H. Goldberg, Member of the Board. Based upon the record, the Board finds as follows:

### FINDINGS OF FACT

1. Bethlehem Mines Corporation, a West Virginia corporation registered to do business in Pennsylvania, maintains an office at 701 East Third Street, Bethlehem, Pennsylvania, 18016, (Complaint and Answer, par. 2).

2. Bethlehem Mines owns, operates and maintains a deep bituminous coal mine in Ellsworth Borough, Washington County, Pennsylvania, which is known as Mine No. 51 (Complaint and Answer, par. 3).

3. As part of its industrial waste treatment facilities, Bethlehem

36. *Bethlehem Mines Corporation*

constructed and operates a large silt slurry settling pond known as No. 3 settling pond into which it pumps water used in its coal preparation plant for the settling of coal fines from such water (R, 88).

4. These treatment facilities are operated pursuant to mine drainage permit #466M116, issued to Respondent on June 30, 1967, by the Commonwealth (permit).

5. No. 3 settling pond is 2,200 feet long, an average of 300 feet wide and has an average freeboard of 5 feet. Its capacity is approximately 29,250,000 gallons (permit).

6. Fish live in this No. 3 settling pond (R, 92).

7. The water from No. 3 settling pond is used by the adjoining Chippewa Golf Course as a water supply for its greens and fairways (R, 92).

8. Clarified water from this No. 3 settling pond usually goes into the No. 2 clear water pond for storage until it is utilized in the preparation plant. (R, 94).

9. When the No. 2 settling pond is at capacity, the clarified water from the No. 3 settling pond is discharged directly into Pigeon Creek. This discharge water normally meets all State discharge requirements (R, 94-95).

10. Fish tend to congregate at the discharge point (R, 134-135).

11. In order to lower the level of the clarified water in its No. 3 settling pond, Bethlehem uses a pump which is located on styrofoam floats on the surface of said pond. This pump has a suction pipe which extends approximately 6 feet below the surface of the water level (R, 100-101).

12. During the normal process of discharging clarified water, the sediment at the bottom of the settling pond is normally coated with settled out coal fines and other sedimentations, which are periodically disposed of. (R, 87-94, 98, 236).

13. At approximately 8:30 a.m., on January 15, 1972, Bethlehem started to discharge water through the pump into Pigeon Creek from the No. 3 settling pond because the height of the clarified water in that pond at the time was approximately nine and one-half to nine and three-quarter feet, about one foot above the normal level (R, 101).

14. This discharge continued until approximately 7:00 a.m. on January 17, 1972, when an employee of Bethlehem discovered that the water being discharged from the settling pond into Pigeon Creek was discolored and turned off the pump (R, 108).

15. The discharge was inspected on January 16, at approximately 9:00 a.m., 1:00 p.m. and 8:00 p.m. At these inspections, the water from the discharge point was clear (R, 104-107). However, no observation was made of the discharge between 8:00 p.m. on January 16, 1972, until approximately 6:30 a.m. on January 17, 1972, by any employee of Bethlehem Mines, nor was the pumping of this discharge water performed under the supervision of any employee of Bethlehem Mines during that period (R, 124, 161).

16. Had an employee of Bethlehem Mines observed the discharge of black water from settling pond No. 3 prior to 6:30 a.m. on January 17, 1972, such discharge could have been terminated earlier.

17. No notice was given of said discharge to the Commonwealth or to any responsible company official on January 16, 1972. (R, 110, 111). The Bureau of Water Quality was not notified of the discharge until January 18, 1972, between the hours of 12:00 noon and 3:00 p.m., when Kas Sala, a local conservationist, called the Pittsburgh Office of the Bureau (R, 8, 47).

18. After receiving the telephone call from Mr. Sala, Mr. Terry Livingston, an Environmental Protection Specialist of the Bureau, met with Mr. Sala and Mr. William Martzell, a Commonwealth of Pennsylvania Waterways Patrolman at Pigeon Creek in the vicinity of Mine No. 51 (R, 8, 47).

19. Mr. Sala, Mr. Livingston, and Mr. Martzell observed at that time that Pigeon Creek was a black color from the point of discharge from settling pond No. 3 all the way to the Monongahela River, a distance of approximately eleven and one-half miles (R, 9, 45, 116, 129), and that Pigeon Creek was clear above the point of discharge from settling pond No. 3 (R, 9).

20. The change of color of the stream was caused by the coal fines from the settling pond having been discharged therefrom into Pigeon Creek and settling on the bottom of Pigeon Creek from bank to bank (R, 9-15, 167, 169, 170).

21. Below the point of discharge, Pigeon Creek is ten to eighteen feet wide and ten to fourteen inches deep (R, 9).

22. The discharge occurred in the area of Pigeon Creek which supported fish and other aquatic life (R, 25, 135).

23. Representative samples of the water of Pigeon Creek were

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taken above and below the point of discharge, and were properly analyzed by Lynn Schaffer, a Chemist for the Bureau of Water Quality (R, 15, 17, 18, 21, 22, Exs. A & B).

24. The findings as a result of this sample were that at the upstream sampling point, approximately 40 feet upstream from the settling pond, the concentration of suspended solids in Pigeon Creek was 20 parts per million, while at the downstream sampling point, ten feet below the discharge point, the concentration of suspended solids in Pigeon Creek was 600 parts per million (Ex. A, & B).

25. A concentration of suspended solids of 600 parts per million in Pigeon Creek would increase the drift rate of aquatic macro invertebrate which would decrease the food available to fish in the stream. It would also cause injury or death by covering up some aquatic organisms and would injure game vertebrates by injuring their gills (R, 62-65, 76). Such a concentration of 600 parts per million in Pigeon Creek would disrupt the entire eco-system of the stream (R, 65, 66, 76).

26. No report of the discharge of coal fines from the settling pond into Pigeon Creek was made by Bethlehem Mines to the Bureau until January 18, 1972, after Mr. Sala had called the Bureau and had also called Bethlehem Mines (R, 8, 47, 164, 164).

27. On January 18, 1972, Mr. Jules Kepenach, a Division Engineer for Bethlehem Mines, called the Bureau to report the discharge (R, 162, 163, 165).

28. Mr. William Angotti, a Draftsman with Bethlehem Mines, who is neither an Environmental Protection Specialist nor an employee in the company's Environmental Control Section, was assigned by the company to observe Pigeon Creek each day after the discharge of coal fines from the settling pond (R, 126, 127, 133). Mr. Angotti observed coal fines in Pigeon Creek below the point of discharge until approximately January 27, 1972 (R, 133), and observed no fish in Pigeon Creek on January 27, 1972 (R, 151, 152).

29. The earliest time that fish were observed in the stream by personnel of Bethlehem Mines was on May 3, 1972, when Bela Kerecz, a qualified Aquatic Biologist employed in Bethlehem Steel Corporation's Research Department Environmental Control Section, conducted an aquatic survey to investigate the effect of the discharge on the organisms living in the stream (R, 190-192, 195).

30. Mr. Kerecz found samples of aquatic life which included midge larvae caddis fly pupae and egg masses of other species, taken below the discharge point which, in his opinion, compared favorably with samples taken above the discharge point (R, 200-201, 197, 200).

31. The organisms found by Mr. Kerecz above the discharge point are tolerant organisms and the balance of the population in the sample indicated that the creek had poor water quality before it reached the discharge point (R 136, 201, 203-206).

32. Pigeon Creek is contaminated above the discharge point by aquatic pollution and silt (R, 203).

33. Aquatic life in the creek is depressed because of sewage which runs into it from various communities, including Ellsworth and Bentleyville (R, 136, 201, 203-206).

34. Mr. Kerecz was unable to make a direct comparison of the condition of Pigeon Creek downstream from the discharge point before and after January 18, 1972, since he had not made any survey prior to the discharge of coal fines from the settling pond (R, 208); further, Mr. Kerecz found no aquatic life on May 3, 1972, in Pigeon Creek downstream from the discharge point which he could identify as having a low tolerance to pollution (R, 213, 214).

35. Bethlehem Mines paid a fine of \$200.00 to the Pennsylvania Fish Commission in connection with the aforesaid discharge (R, 175, Ex. 5).

36. During the period of time when the pump was in operation there was an extreme fluctuation in temperature, dropping from temperatures as high as 68° F, on January 13th to a low of minus 10° F. on January 16th (R, 109, Ex. 6).

37. Due to the extreme drop in temperature on January 16, Bethlehem was faced with emergency conditions at its No. 51 mine. The low temperature caused freezing and breaking of lines and equipment in Bethlehem's Acid Mine Drainage Treatment Facility and other outside plant facilities, which could have caused acid mine water to flow into Pigeon Creek if repairs had not been undertaken immediately (R, 111-115).

38. As a result of these below freezing temperatures, ice accumulated on and around the pump causing it to sag below the level of the clarified water in No. 3 settling pond (R, 108-109).

39. As a result of this accumulation of ice and the resulting

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sagging of the pump, the suction pipe of the pump connect contacted water containing coal fines in the pond, and caused these coal fines to be discharged into Pigeon Creek (R, 11, 108-110, 169-170).

40. Since approximately 1967 Bethlehem Mines had never encountered a situation of this type in its operation of the treatment plant before, and had no knowledge of the possibility of its occurrence. The only prior serious discharge of coal fines into Pigeon Creek from Mine No. 51 occurred when a railroad car was accidentally backed into Bethlehem's black water static thickener by the rail carrier servicing No. 51 Mine, causing the thickener to overflow and discharge into the Creek. There have been several other non-serious accidents caused by leaking pipes. All of these incidents were reported, and corrective action was taken immediately (R, 95, 172, 179-180). Representatives of the Commonwealth of Pennsylvania Department of Health, Sanitary Engineering Division, frequently inspected Bethlehem's operation of its waste treatment facility, including taking samples of the water being discharged from the No. 3 settling pond (R, 141, 142).

41. The discharge occurred during a period of ten and one-half hours when the settling pond was left unattended, and there were no employees at Bethlehem Mines observing the discharge or the operation of the pump. The discharge could have been abated immediately upon its occurrence or could have been prevented, had the pump been attended during that period.

42. Bethlehem had established a specific internal procedure to be followed in the event a pollution incident occurred, which required that any discoloration of the Creek was to be reported to Mr. Julius Kepenach, the Division Engineer, or to Mr. William Angotti, who assisted Mr. Kepenach in regard to mine water facilities, so that they could notify the proper authorities (R, 109).

43. Due to emergency conditions which existed during the period in question, neither Mr. Kepenach nor Mr. Angotti, reported the incident until January 18, 1972. In their opinion, this report was made as promptly as was possible under the emergency circumstances existing at the time. (R, 110-111, 115, 129, 165).

44. In order to prevent any future incident of this type, Bethlehem has adopted a policy of operating the pump only under ideal

weather conditions and under constant surveillance (R, 117, 118).

#### CONCLUSIONS OF LAW

1. The discharge of dispensed solids into Pigeon Creek by Bethlehem Mines on January 16 and 17, 1972, was not willful, in the sense that the said discharge was not intended by Bethlehem Mines.

2. The discharge of suspended solids into Pigeon Creek by Bethlehem Mines, as aforesaid, was not negligent, in the sense that the sagging of the pumps due to ice accumulation, and the resulting discharge, were not the fault of Bethlehem Mines, and could not reasonably have been foreseen.

3. The fact that Bethlehem Mines did not have a standing policy of maintaining constant employee supervision over all pumping of water from settling pond No. 3, and did not maintain such constant supervision in this case, does not constitute a willful or negligent act on the part of Bethlehem Mines.

4. The notification of the Bureau of the accidental discharge here in question was not so unduly delayed as to constitute a violation of the applicable provisions of The Clean Streams Law and the Rules and Regulations of the Department.

#### DISCUSSION

The complaint of the Commonwealth in this matter is based upon two charges which it makes by its complaint:

(a) that Bethlehem Mines "willfully" discharged large amounts of liquid combined with coal fines into Pigeon Creek, thus polluting the stream, and

(b) that as a result of said discharge, Sections 301, 307 and 401 of The Clean Streams Law were violated.

At the hearing in this matter, and its proposed Findings of Fact and Conclusions of Law, the Commonwealth has not requested that the Board find, either as a matter of law or as an ultimate fact, that the alleged violations were willful. We do not so find. However, the Commonwealth alleges that the corporation permitted the discharge into the waters of the Commonwealth in excess of amounts permitted by the Department's

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Regulations, and that the corporation failed to notify the Department "forthwith" of the discharge contrary to Chapter 101, Section (2)a of the Department's Regulation.

In order to prove its charge that Bethlehem violated The Clean Streams Law and permitted the discharge of suspended solids in excess of concentrations permitted by the Department's Regulations, the Commonwealth must prove two things:

(1) the negligent and avoidable discharge by Bethlehem of suspended solids into Pigeon Creek; and

(2) A concentration of suspended solids in the discharge in excess of two hundreds milligrams per liter.

The sole basis for its contention that the discharge by Bethlehem was due to negligence and could have been avoided is the Commonwealth's citation of the fact that removal of the water from No. 3 settling pond was left unattended for a ten and one-half hour period between 8:00 p.m., the evening of January 16, 1972 and 6:30 a.m., the morning of January 17, 1972. The presumption employed by the Commonwealth is that the process of pumping water from a settling pond should *always* be done under twenty-four hour supervision. The Commonwealth does not and, indeed, cannot ask the Board to find that the sagging of the pump caused by accumulations of ice and the original discharge of solids were the fault of Bethlehem, or that such an accident could have been foreseen. The only basis in the record on which the Commonwealth can sustain its so-called presumption that constant supervision of settling pond pumping is required is the unsupported statement by Mr. Terry Livingston, an Environmental Protection Specialist employed by the Commonwealth, to the effect that the pumping of water from silt ponds is "always" done under supervision (R, 6-12). Mr. Livingston gave no basis for this statement, offered no testimony as to other instances in which he had observed such supervision, nor any evidence that he had any background in the operation of such a pumping process. On the other hand, testimony by Mr. Kepenach of the corporation that he had no knowledge of a similar incident ever occurring, and the statement of Mr. Angotti that State Inspectors had observed pumping operations at Bethlehem on various other occasions, and that no complaints had ever been received with respect to these inspections, indicates that Bethlehem had no knowledge of any such presumption prior to this time, and that the system was so designed as

to preclude the discharge of coal fines into Pigeon Creek through the pumping process, without the necessity for constant supervision, in the absence of an extraordinary situation such as that which here occurred. The fact is that the unexpected and unanticipated freezing weather which ruptured pipes throughout the treatment facility, occurring as it did over a weekend when most of the personnel of the Department were not at work, and necessitating the constant attention of Bethlehem Mines personnel to prevent and avoid even more serious discharges, makes it perfectly understandable that the incident was not noticed prior to the time at which it was abated.

The Board is aware of no basis for the statement of Mr. Livingston or the allegation of the Commonwealth that pumping of water from silt slurry ponds must always be supervised continuously over a twenty-four hour period. The Commonwealth offered no rule, regulation, or statutory standard which establishes such a practice; no testimony or other evidence was presented to the effect that such constant supervision of pumping is a normal industry practice, or even a necessary and desirable one.

We must therefore conclude that, in view of the weather conditions which prevailed, and from all of the other circumstances in this case, the discharge in question was purely accidental.

Nor can we conclude that the incident in question was negligent, in the sense that it could or should have been foreseen. The Commonwealth offered no evidence or allegation that the plant was improperly designed, and it is obvious that an unusual weather situation such as that which was here encountered could not have reasonably been anticipated by anyone.

The only other complaint which the Commonwealth has made is that Bethlehem did not report the incident to the Department immediately upon its discovery. The fact is that the corporation did immediately take measures to stop the discharge. The incident was in fact reported by a responsible corporation official within a day of its occurrence. We are aware of no statutory standard or definition which would lead us to believe that such a report does not meet the requirement of the Department to the effect that such incident be reported "forthwith". The requirement is set forth in Chapter 101, Section 2(a) of the Department's Regulations. The section provides that whenever any activity results in a discharge into the waters of the Commonwealth, it is the responsibility

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of the person in charge of the facility to "forthwith" notify the Department thereof. In accordance with this Regulation, Bethlehem had established a specific internal procedure to be followed whenever a pollution incident occurred. Basically, this procedure was to notify Mr. Julius Kepenach, Division Engineer, for the Bethlehem Mines, Ellsworth Division, which included Mine No. 51, who then in turn immediately informed the Department's Regional Office. This procedure was followed in the instant case. The Department's Regulations do not specify the time in which such a notification must be made and in the absence of such a directive, it must be presumed that notification is to be made in a reasonable time under the circumstances of the particular case: *Drumbar v. Jeddo Highland Coal Company*, 155 Pa. Super. 57, 60 (1933); *U. S. ex rel Carter v. Jennings*, 333 F. Supp. 1392.

It is important to note further that the Regulation requires that the notification be made by the person "in charge". That person was Mr. Kepenach. Mr. Emilio DiNardo, Supervisor of the Mine Preparation Plant, who shut the pump off at approximately 6:30 a.m. on January 17, 1972, testified that while he was aware of the fact that he had to notify Mr. Kepenach, who would in turn notify the authorities, he was unable to do so for approximately twenty-four hours because of problems around the mine caused by the overnight freezing conditions. The record shows that Mr. Kepenach notified the Department immediately upon learning about the discharge from Mr. DiNardo. The Board is of the opinion that that is all that is necessary in a situation such as this. As has already been noted, the freezing temperatures of the night of January 16, 1972, caused crisis conditions at the mine, and had these conditions not been attended to quickly, raw acid mine drainage might have been discharged into Pigeon Creek. Furthermore, since the pipe had been shut off, immediate notification would have been of no practical consequence, since nothing more could have been done. Section 605 of The Clean Streams Law, entitled "Civil Penalties", provides in relevant part:

"In determining the amount of the civil penalty, the Board shall consider the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors."

In the instant case, the discharge was not willful. The extent

of the damage to Pigeon Creek as a result of the discharge is impossible to determine, since no scientific evidence was available to or presented by the Commonwealth with respect to the previous condition of Pigeon Creek. It was necessary to rely upon visual observation and as the court said in *North American Coal Corp. v. Commonwealth*, at page 477, although visual evidence is admissible, when recognized scientific tests are available and practical, courts must insist upon their use in presentation. Although the blackening of the waters of Pigeon Creek was unsightly, based upon the evidence of Mr. Bela Kerecz, an Aquatic Biologist, doing postgraduate work in limnology at the Lehigh University Graduate School who, on May 3, 1972, made an aquatic study of Pigeon Creek above and below the point of the Mine No. 51 discharge, the waters of the entire creek are of such poor quality and contain such a limited number and variety of tolerant aquatic organisms, that it is not possible to determine the effect of the discharge of Bethlehem Mines. In any event, the uncontroverted testimony of Mr. Kerecz was that the effect of the discharge was either nonexistent or de minimus, and did no significant harm to aquatic life in the stream below the discharge point, and created no permanent damage or injury to Pigeon Creek.

There is no evidence to the effect that any moneys were expended for the restoration of Pigeon Creek as a result of the discharge.

Finally, it is the opinion of the Board that Bethlehem acted in good faith in this instance, and has taken all reasonable measures to correct this pollution problem. Since the discharge of January 18, 1972, it has installed three sets of styrofoam baffle floats in the pond to prevent the pump from sinking, and it has operated the pump only at times when the mine was in operation and only with constant supervision. Moreover, it appears from the record that Bethlehem Mines has agreed to do everything the Commonwealth could ask of it to prevent any recurrence of such an incident as this. Accordingly, it is the judgment of the Board that no penalty should be assessed in this case.

#### ORDER

For the foregoing reasons, the Complaint is dismissed.

CONCURRING OPINION

By **ROBERT BROUGHTON, Chairman**

I concur.

I agree that the evidence is overwhelming that the pollution complained of was not willful. I think it is also eminently clear that the one day delay in notification to the Department that the pollution incident had occurred was, under the circumstances, not culpable.

I also agree that the Commonwealth has the burden, in civil penalty cases, of proving that some penalty ought to be imposed.<sup>1</sup> Part of what goes into that proof is willfulness — which was not present here. Part of what goes into the proof is cost of prevention — which would have been here, the cost of keeping a man on duty continuously, 24 hours per day, 365 days per year. Within a broad range, the Board could probably take judicial notice that the cost would be several thousands of dollars per year. Part of that proof is also the value of the damage to the environment.

Here, the evidence showed little by way of any particular quantum of damage. This appears to be in part because the stream was already polluted. I do not think this case can be taken as indicating that pollution of an already polluted stream does no damage to the "waters of the Commonwealth". Finding No. 25, in the principal opinion, largely disposes of this. But even if such a finding could not be made, and even if we could not find such factors as delayed recovery times, for polluted streams being cleaned up, I would not be willing to conclude that pollution of an already polluted stream does not merit a civil penalty.

Rather, the single fact that compels concurrence seems to me to be that under the very limited and extraordinary facts of this case the Defendant was not at fault.

A temperature drop of nearly 80° F. occurred over a Sunday

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1. Section 605 of The Clean Streams Law, entitled "Civil Penalties," provides in relevant part:

"In determining the amount of the civil penalty the board shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors."

night. Having previously heard that "the weather was going to start changing a little bit", (R, 104), two of the foremen arranged to make frequent checks over the weekend of January 15 and 16, 1972. The last check was made on Sunday night, at 8:00 p.m., at which time the water that was being pumped was clear. (R, 105, Finding No. 15, principal opinion).

Furthermore, cold weather had occurred before, freezing the pond in question, but no instance of the pump sinking, with floating platform and all, had ever before been experienced. (R, 109-110, 119-120)

It is hard to argue that a temperature drop of the magnitude that occurred was reasonably foreseeable. And it is also hard to argue that the pollution incident that did occur would have been foreseeable even had the weather change been foreseen. About the only argument that can be made is that the various pipe-freezing problems *might* have been foreseen had the temperature drop been foreseen; and had the pipes been checked, the pump problem *might* have been discovered. While I agree that the standard of care in water pollution cases ought to be extremely high, I'm not sure I can conclude that even an extremely careful reasonable man, exercising an extremely high degree of care at the time, would have been at the right place at the right time, and prevented this particular pollution incident.

Therefore I must agree with my colleagues that there was no negligence on the part of Defendant in this case. (Conclusion of Law No. 2, principal opinion). And if there was no negligence, and no willfulness, then there was no fault. And if there was no fault at all I do not see how we could justly impose a civil penalty.

I concur specially only because I think the holding is limited to the unusual circumstances of this case, and wanted to emphasize the extremely limited nature of my concurrence.

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48. *Harger, William L. and Helen*

HARGER, William L. and Helen : Docket No. 72-161  
Cherry Township  
Butler, Pennsylvania

#### A D J U D I C A T I O N

By GERALD H. GOLDBERG, Member, April 27, 1973

William L. Harger and Helen Harger, his wife, the Appellants herein, own a large tract of land in Cherry Township, Butler County, Pennsylvania, upon which they desire to construct a mobile home park. They submitted an application to the Department of Environmental Resources (hereinafter, Department) for a sewage treatment plant permit. The plant was designed by Appellants' Engineer, Richard A. Deiss, P.E.

On October 5, 1971, the Department requested additional information, which was submitted by the Appellants on October 22, 1971. On January 5, 1972, the Department again requested additional information. This was submitted to the Department on February 2, 1972.

On February 15, 1972, the Department denied the permit, and the Appellants filed a timely Appeal with the Environmental Hearing Board.

There are two basic issues to which the Board must address itself in this case:

- (1) Whether the Department may deny a permit for a sewage treatment plant because the design of the plant failed to include a baffle to the outlet pipe,<sup>1</sup> and

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1. The system in question is a lagoon-type system in which solid waste would sink to the bottom of the lagoon, and clear water would be pumped from the lagoon into a stream. The pump, designated the "outlet structure", incorporates an outlet pipe one inch in diameter, through which the water flows from the pond into the stream. The baffle in question was described by Mr. Deiss as a "device to be in front of the outlet structure which would keep any floating solids from getting into the portion of the pond where the outlet structure is." It is important to note that, in requesting the addition of a baffle, the engineers for the Commonwealth gave the Appellant no guidelines, standards, description or other assistance in designing or constructing a device which would meet their requirements. As indicated by the findings of fact, *infra*, one of the reasons for such failure to specify the nature and design of the proposed baffle clearly is that the engineers for the Commonwealth had virtually no practical knowledge with respect to the nature and operation of this type of sewage treatment system, nor did they have any knowledge of any literature, standards, rules, regulations or criteria adopted by the Department of Environmental Resources or by any other agency of government, state, federal or local, with respect thereto. As to the expressed fear that, in the absence of a baffle, floating solids might be discharged through the outlet pipe, Mr. Deiss' testimony was to the effect that should any floating solids enter the one-inch diameter pipe, the result would be that the pipe would be clogged and air would immediately enter the pipe from its upper air-intake valve, thus filling the pipe with air and, in effect, immediately blocking any discharge whatsoever through the outlet pipe.

(2) Whether such permit may be denied because the application in question was submitted after Cherry Township adopted the Butler County Sewage Facilities Plan which was submitted to the Department in December of 1970, nine months prior to the submission of the application of Appellant for a sewage treatment permit.

This matter was first heard before the Honorable Gerald H. Goldberg, Member of the Environmental Hearing Board, on April 11, 1972. At the conclusion of that hearing, the parties were requested to submit additional information. A second hearing was held before the Board on November 21, 1972, at which time the parties stipulated that the notes of testimony taken at the initial hearing of the matter need not be transcribed and made a part of the record, for the reason that the issues raised during the course of that initial hearing are now deemed moot by all of the parties, and all of the issues presently before the Board are incorporated in the record with respect to the hearing of November 21, 1972.

#### SUMMARY OF TESTIMONY

Arthur E. Hall, Jr., an engineer for the Department of Environmental Resources, testified that he recommended denial of Appellants' permit because he determined a baffle necessary on the outlet pipe from the treatment lagoon proposed by Appellants (R,35-36). Mr. Hall started with the Department in December, 1971, (R,8) with a degree in chemical engineering, having had no engineering experience prior to starting to work with the Commonwealth (R,6). The Harger application was only the fourth or fifth application Mr. Hall had ever seen or worked on (R,6). Mr. Hall stated that in his opinion, which was concurred in by two other engineers of the Department, a baffle is necessary to prevent solids from entering the discharge pipe (R, 43-51). Mr. Hall further stated that the Department had required baffles on other systems similar to those of Appellant (R, 44), although he had personally never seen one (R, 12-13). In fact, Mr. Hall had only seen one or two lagoon-type systems such as this, and had never designed one (R, 12).

Mr. Hall further testified that he is not familiar with the literature, rules and regulations, standards or criteria used by other agencies of

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government with respect to this type of facility (R, 42), and that he had never seen an outlet design such as that in the application in actual operation (R, 46), nor had he ever made an investigation outside his office as to whether or not the designed facility which has been in operation in other areas is or is not operating correctly (R, 49).

There is no rule or regulation or standard of the Department of Environmental Resources which requires a baffle on this type of treatment facility (R, 11) and, in fact, in the past, Mr. Hall admitted that the Department has approved exactly the same type of facility using the same features as those in the application (R,9). In further testimony, Mr. Hall admitted that to his knowledge there have been no violations of floating solids from any of the other sanitary sewage facilities with identical design which have been in operation since June of 1971 (R, 51).

Richard Arthur Deiss is a Sanitary Engineer, registered with the Commonwealth of Pennsylvania since 1965 (R, 14). He was employed by the Commonwealth of Pennsylvania in the Department of Health for five years as Chief of the Facilities Section in Meadville, Pennsylvania (R, 15). His job was to review all applications such as the present application to determine whether or not they would comply with the rules, regulations and laws (R, 15). During his tenure with the Commonwealth, he worked on about 600 sewage applications of various types (R, 16). Since 1969, when Mr. Deiss formed a Consulting Engineering firm, he has personally designed about 10 sewage facilities of the same general type as Appellant's (R, 14,16).

During his tenure with the Commonwealth, Deiss was also in charge of the Operations Section responsible for the inspection and compliance of operating facilities (R,17). In his opinion, there is no need for a baffle on this type of a sewage system, since in his knowledge and experience, there has never been a violation of floating solids getting out through the outlet structure (R, 20).

The structure designed by Deiss is virtually identical to a number of other such sewage facilities designed by his firm, which have received permits from the Department of Environmental Resources, and which have exactly the same outlet design (R, 27, 28). None of these have ever been found in violation (R, 28). Mr. Deiss testified that he had designed an outlet structure which will prevent floating solids from leaving the pond, (R,22) without the necessity of a baffle (R,24). He admitted that he could

design a baffle, but such a baffle would violate some of the other requirements of the Department (R,23). In fact, in Mr. Deiss' judgment, the addition of such a baffle would have an inimical effect with respect to the operation of the sewage treatment plant (R, 32), and would make no difference with respect to the discharge of solid matter into the stream (R,32). Although there is a considerable amount of literature on the subject of treatment plant design, and Mr. Deiss testified that he is familiar with the rules, regulations and standards of the Federal Government and of those of other States, he knew of no requirement or recommendation for a baffle of the type requested by the Commonwealth (R, 31).

With respect to the second basis for the Department's refusal of Appellant's permit, Mr. Hall testified that in his opinion, the Department had no authority to issue a permit for a sewage plan not included in a municipal plan (R, 41, 42). He stated on cross-examination that the Appellant's proposed sewage system was not within the Butler County Comprehensive Sewage Plan, which had been adopted by Cherry Township as its Official Municipal Plan (R, 55, 58-60). This plan was submitted to the Department of Environmental Resources in December, 1970 (R,55) and approved by the Department of Environmental Resources on June 15, 1972, (R, 53). As hereinbefore noted, the application here in question was submitted to the Department on September 16, 1971. However, the application was not completed until the submission of additional information requested by the Department on October 22, 1971, and February 2, 1972.

On later redirect examination, Mr. Hall acknowledged that there exists a procedure in the Department's Rules and Regulations for the revision of municipal comprehensive plans (R, 64).

Under the County of Butler's and Cherry Township's Sewage Facilities Plan, no sewage treatment plants are planned in Cherry Township until 1978 (R, 61). There is no sewage treatment plant in Cherry Township at the present time (R, 62).

#### FINDINGS OF FACT

1. The Appellants are William L. and Helen Harger.
2. Appellant applied to the Department of Environmental

Resources for a permit for a sewage treatment system on September 21, 1971, nine months before Appellant submitted his application to the Department in September of 1971.

3. The Department has in the past approved exactly the same type of facility using the same design features as those submitted by Appellant.

4. There is no rule, regulation or standard of the Department which requires a baffle on Appellant's sewage treatment facility.

5. There is no rule, regulation, standard or literature of the Federal or any state Government which makes reference to a baffle of the type requested by the Commonwealth.

6. The design as submitted will adequately preclude the discharge of solid matter into the stream.

7. The addition of a baffle would not make any difference with respect to the discharge of solid matter into the stream.

8. The addition of such a baffle would have an inimical effect with respect to the operation of a sewage treatment plant.

9. The facility in question is located in Cherry Township, Butler County, Pennsylvania.

10. Cherry Township is included in Butler County.

11. Cherry Township adopted the Butler County Sewage Facilities Plan nine months prior to the date of initial submission of Appellant's application to the Department. For this reason, it was impossible for the Appellant's sewage treatment facility to be included in the Cherry Township application.

12. Under the Butler County Sewage Facilities Plan approved by the Department, no sewage treatment plants are planned in Cherry Township until 1978. There are no sewage treatment plants in Cherry Township at the present time.

13. There is a procedure in the Rules and Regulations of the Department and in the law for the revision of a Comprehensive Municipal Sewage Treatment Plan.

#### DISCUSSION

The purpose and express intent of the Pennsylvania Sewage Facilities Act of January 24, 1966, P.L. 1535, 35 P.S. 750.3, is to establish a comprehensive plan for the development of adequate sewage needs for

municipalities. In the instant case, it is quite obvious that with respect to the Appellants, the plan adopted by Cherry Township and approved by the Department is totally inadequate to meet the needs of Mr. and Mrs. Harger. There are no sewage treatment plants in Cherry Township at the present time. Under the comprehensive plan adopted by the Township, no such plant will be built until 1978. The law and the Department's regulations do provide for alteration of such a plan, where such alteration is appropriate. Where, as in the instant case, it is patently obvious that such alteration is not only appropriate, but necessary to protect the interest of the citizens of the Township, clearly such a procedure should be followed. To deny an application for a needed sewage treatment permit on the ground that such application was submitted subsequent to the approval of a comprehensive sewage treatment plan, and is not in conformity therewith because the comprehensive plan does not call for the construction of sewage treatment facilities until 1978, is our opinion, an arbitrary and improper exercise of the Department of Environmental Resources' authority.

The purpose of the law is to serve the people, and not to deprive them of needed facilities, especially where, as in the instant case, the facilities are being constructed at the expense of the citizens who need them.

With respect to the question of a baffle, we have here a situation in which a design was submitted by an experienced sanitary engineer. Mr. Deiss has had a great deal of experience, both with the Commonwealth of Pennsylvania as a reviewer of applications such as the present one, in which capacity he worked on about 600 sewage applications, and as a consulting and designing engineer, in which capacity he has designed about 10 sewage facilities similar to those of the Appellants.

Mr. Hall, which obviously acting in good faith, lacks both the educational and experience qualifications of the Appellants' engineer. He is not familiar with the type of sewage facility designed by the Appellants' engineer; he is not familiar with the literature, regulations, rules, standards and criteria used by other agencies of government with respect to this type of facility; he has made no investigation outside his office as to whether or not the facility identical to this in operation in other areas is or is not operating correctly; he is aware of no violations from any of the other sanitary sewage facilities with identical design in operation since June of

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1971; he has never visited the proposed site of the sewage facility; and, in brief, the weight of his opinion and testimony cannot compare with that of the Appellants' engineer, Mr. Deiss.

The law provides ample remedies in the event that the facility, once constructed and in operation, should cause pollution. Mr. Deiss, a reputable and experienced engineer, has testified that in his judgment, there is virtually no possibility of such pollution. However, should such pollution occur, the Department has its remedy.

In view of the foregoing, we conclude as follows:

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.
2. The Appellant has complied with the provisions of the Pennsylvania Sewage Facilities Act and the rules and regulations of the Department.
3. The action of the Department in refusing the Appellants' permit is improper.
4. The facility proposed by the Appellant will adequately protect the public health and prevent pollution.
5. The appellant is entitled to a permit in accordance with his application.

Accordingly, we issue the following order:

#### ORDER

The Department of Environmental Resources shall issue a permit to the Appellant forthwith. The Department shall further take such action as may be necessary and proper to cause the appropriate amendment of the County of Butler Sewage Facilities Plan, as provided by the Pennsylvania Sewage Facilities Act of January 24, 1966, P.L. 1535, 350 P.S. 750 etc. and the Department's own rules and regulations.

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**EDWARD L. CONLEY**

: **Docket No. 72-440**

**A D J U D I C A T I O N**

**By PAUL E. WATERS, Member, May 8, 1973**

This action is an appeal from the revocation of a permit granted to Appellant Edward L. Conley, to install a septic tank for sewage disposal on his building lot in New Hanover Township. The permit was issued by the Township, whose authority to issue permits was subsequently taken over by the Commonwealth.

The issue involved is delicate and complicated by the fact that Mr. Conley, now pressed economically, has on hand a piece of realty purchased at some sacrifice to build a home for his family, has now been instructed that he may not legally build that home. In short, he cannot sell it and he cannot use it for its intended purpose. He therefore questions whether he has received just treatment.

**FINDINGS OF FACT**

1. Appellant Edward L. Conley is an adult individual residing with his wife and children in Gilbertsville, Pennsylvania.
2. On or about June 7, 1971, the Appellant had settled on the purchase of a building lot located in New Hanover Township, Montgomery County, Pennsylvania.
3. The building lot is located less than two miles from the Appellant's present place of residence.
4. Prior to purchasing the lot, the Appellant contacted the Engineering firm of Urwiller and Walter to have them conduct soil tests to determine the suitability of the lot for an on lot site sewer system.
5. The test results given to the Appellant were satisfactory and application was made to the proper Township authorities for the issuance of a permit for the sewer system prior to June of 1971.
6. The Township issued Permit No. 097252 to the Appellant for the installation of an on-lot sewer disposal system on or about May 15, 1971.
7. The Appellant had intended to complete the construction of a home on the lot, but soon after the digging for a foundation was

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begun, financial reasons made it impossible for the Appellant to continue construction.

8. The Appellant put the lot up for sale, and a sign so indicating was placed thereon.

9. A similar permit had been granted by New Hanover Township for the lot adjoining the Appellant's property, and construction proceeded to completion.

10. On August 2, 1971, Chapter 71, Administration of Sewage Facilities Act, Rules and Regulations, were adopted by the Commonwealth, and revised April 20, 1972.

11. On June 6, 1972, the Commonwealth of Pennsylvania Department of Environmental Resources notified the Secretary of New Hanover Township that the Township's Authority to issue permits under and administer the Pennsylvania Sewage Facilities Act was revoked immediately.

12. The reason given for the revocation of the Township's authority was the improper issuance of a permit to one Justin L. and Mary V. Mullin on May 30, 1972.

13. Sometime in November of 1972 an agent of the Department of Environmental Resources, while inspecting the property adjoining the Appellant's lot, by accident noticed a "For Sale" sign on the Appellant's lot, and decided to investigate further.

14. The Department agent found evidence of a high-water table and determined that the soil was not proper for an on site system.

15. On November 9, 1972, the owner of the lot adjoining the Appellant was notified that his on site system was approved although it did not meet State requirements, inasmuch as the house was already completed.

16. On November 19, 1972, the Appellant was notified that his Permit No. 097252 was revoked due to the soil conditions.

17. In January of 1973, the Department made a further and more detailed study of the Appellant's lot, without notifying him of its intention to do so. A search warrant was obtained for this purpose and the Chief of Police was present.

18. At the inspection in January of 1973, a soil scientist for the Department again determined that the lot did not meet State standards for the installation of an site disposal system.

### DISCUSSION

This case is a clear example of the value of rules of law that are applied equally to all men regardless of their economic standing. One man of modest means without counsel, against the government of his State with all of its resources, regardless of the merits of his cause, would not stand a chance for success but for our system of justice.

Edward L. Conley, hereinafter called the Appellant, set out to do what the American dream said that he should do, i.e., to build a new home closer to his job, for his wife and children. Mindful of the intricacies of his endeavor he consulted with experts, a lawyer to obtain a good title in the transfer and an engineer to determine whether the lot he desired to buy was suitable for its intended purpose.

After all indications were in the affirmative, the Appellant applied for and received a permit for an on-lot sewage disposal system for New Hanover Township, where his building permit authorized him to construct a home. Thereafter, during the initial stages of digging for a foundation, unforeseen financial difficulties arose and construction was halted.

It is at this point, the plot began to thicken. By chance, an agent of the Department of Environmental Resources, while inspecting a lot adjoining the one owned by the Appellant, decided that it would be a good idea since he was already in the area on another matter, to check the Appellant's lot to see if the soil was suitable for an on-lot system. Without any notice to the Appellant, and without any warrant of any kind he simply went onto the private property and began his "investigation". It was no surprise when he determined, by a hand instrument, that the Appellant's lot was just as unsuitable as the lot next door, which was his subject of original interest. The agent went back to his office, determined who owned the lot, found out that a permit had been issued by the Township, and sent a letter to the Appellant revoking the same.

One of the reasons for concern at the adjoining property was the fact that the Township had issued at least one permit improperly, and its authority to administer the program was terminated by the State Department of Environmental Resources on June 6, 1972. The Appellant's permit appeared to have been another result of the Township's impropriety in handling the Sewage Facilities Act. The Regulations under which the Department acted in revoking the Appellant's permit were promulgated on

August 2, 1971, two months after the Appellant had made his purchase and received the permit. It is therefore my opinion that the Department had no right to revoke the permit here in question. The Sewage Facilities Act, 35 P. S. 750.1 in the absence of regulations does not authorize the Department to revoke a permit granted by a municipality.<sup>1</sup>

The same result must be reached for another reason. The law provides where a representation is made and another is induced to rely thereon, the person making the representation is estopped from denying the validity thereof after the second party has with justification changed his position in reliance thereon. *West Mifflin Borough v. O'Toole*, 108 P.L.J. 95, *Sunseri v. Sunseri*, 358 Pa. 1, *Com. ex rel. Hensel v. Philadelphia*, 153 Pa. 47. The doctrine of Estoppel could not be more clearly operative than here. The Appellant was induced to believe that he had a good, valid and proper permit issued to him by the Township which, it is not disputed, was authorized to issue the permit. There was nothing more that the Appellant could have done to protect himself. The Commonwealth now proposes to revoke the permit after the Appellant has purchased the lot and started construction. He was specifically asked at the hearing:

"MR. WATERS: Would you have purchased this lot in June, would you have gone through with that purchase if you had known there was a problem with the permit?

"MR. CONLEY: I certainly would not."

We believe that the Department is estopped from now revoking a permit granted by one with authority to do so, without a showing of fraud or some improper conduct on the part of the Appellant. *National Cash Register Co. v. Shurber*, 41 Pa. S. 187.

Another matter which deserves mention at this point is the manner in which this whole affair was conducted. We believe that, where the Department intends to go onto the private land of another and there is no urgency to the intrusion as here, at the very least some notice should be given to the owner so that he might elect whether or not he desires

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1. We do not decide the extent of the authority under the regulation in question.

to be present with or without counsel to protect his interests. In my opinion this should not be done as a matter of mere courtesy but as a matter of right. The Appellant was not being charged with a crime and he was available in the County. If the Chief of Police was to be invited, as on the second intrusion when the warrant was obtained, why not the Appellant himself, whose interest is more tangible?

Finally, we believe that if we were to uphold the revocation of the Appellant's permit it would be in violation of the Equal Protection Clause of the U. S. Constitution.<sup>2</sup> The record indicates that the reason the Department's agent went to the scene was to inspect a sewage system installed on an adjoining lot under a permit previously issued by New Hanover Township. It so happened that this lot owner was financially able to complete his home. The soil conditions were substantially the same. Nevertheless the permit was not revoked, and the installation was approved by the Department. The fact is that the only difference between the adjoining owner and the Appellant is that the former was in a better economic position to obtain mortgage money. I submit that under our Constitution this is not a sufficient distinction. I reject any attempt to deal with our citizens in this fashion and I believe the U. S. Supreme Court would do no less.

We are of course, mindful of the fact that the only legitimate interest the Department has is to prevent pollution of the waters of the Commonwealth and forestall any future health hazard from a malfunctioning septic system. The Appellant should want no less. It may be that an injunction should be issued to prevent these conditions. The Board is without the power to issue an injunction, nor was it sought. We decide today, only that the permit which was issued in this case may not be revoked on the facts and the laws before us. What, if any, future action is called for, must abide the event.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction of the

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2. It not only proscribes the enactment of discriminatory laws, but also the discriminatory enforcement of laws which are fair on their face. *Yick Wo v. Hopkins*, 118 U. S. 356. See also *Note, Discriminatory Law Enforcement and Equal Protection from the Law*, 59 Yale L. J. 354.

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parties and the subject matter.

2. The Department has no authority to revoke a permit granted by a municipality authorized to issue it prior to August 2, 1971.

3. The Department is estopped from revoking a sewage disposal permit issued by a Township with authority to do so where there is no showing of wrongdoing on the part of the permittee and he has changed his position by purchasing a lot and starting construction, prior to the revocation.

4. The Equal Protection Clause of the U. S. Constitution requires that a citizen may not be dealt with differently by the State in issuing or revoking permits under substantially the same fact situation.

5. The Environmental Hearing Board does not have injunctive powers.

#### ORDER

AND NOW, this 8th day of MAY 1973, it is hereby ordered that the appeal of Edward L. Conley is sustained and the letter of revocation issued by the Department of Environmental Resources on November 17, 1972, is hereby declared to be null and void.

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*Edgewood Manor*

EDGEWOOD MANOR  
Caln Township  
Chester County

: Docket No. 72-261

#### A D J U D I C A T I O N

By GERALD H. GOLDBERG, Member, May 29, 1973

This is an appeal from an Order of the Department of Environmental Resources dated May 17, 1972, denying Appellant permission to connect three (3) houses to the Caln Township sanitary sewer system. A hearing was held on October 2, 1972, before Robert W. O'Donnell, Esquire, Hearing Examiner.

### FINDINGS OF FACT

1. Appellant, John P. Trevaskis, Jr., is the owner of lots #3, #5 and #8, Edgewood Manor, Caln Township, Chester County, having purchased those lots in 1968.

2. There is presently a modular home erected on lot #3 and a similar home erected on lot #8; lot #5 being vacant.

3. A permit for on site sewage disposal for lot #3 was received in July, 1971. A building was subsequently received for lot #3.

4. The Department of Environmental Resources by Order issued December 17, 1969 to Caln Township Municipal Authority prohibited further connections to said Authority's sewerage system without a permit from the D.E.R.

5. No building permit for any of the lots in the case had been issued to Appellant on or before the date of the ban.

### DISCUSSION

Appellant does not contend that a building permit was issued to him prior to the date of the sewer ban or that his were buildings whose occupation predated the ban or that undue governmental delay caused him to come under the ban.

Appellant contends that the harm to the environment resulting from his sewer connection would be minimal. This is true for most requests to make a sewer connection when these requests are considered individually. The applicable standard however, is a rigid one. An exception will be made only where there is *no* increase in sewage flow. The purpose of this rule is to accommodate replacement of sewage facilities, not the installation of new ones. The Appellant fails to satisfy the spirit or the letter of the rule since his requested connection is new and would, by his own admission, increase the flow of sewage.

Appellant relies on the hardship caused him as a basis for relief. The evidence of hardship consisted solely of his statement that a substantial amount of money had been invested in the construction of two houses and that on-site disposal of the sewage was impossible.

Appellant has failed to sustain his burden of showing that the order was improper and accordingly the action of the D.E.R. in failing to grant the requested exception was proper.

62. *Edgewood Manor*

#### CONCLUSION OF LAW

The Department of Environmental Resources properly denied Appellant's request for an exception to the ban on connections to Caln Township sanitary sewer system.

#### ORDER

The appeal of John P. Trevaskis, Jr., from the order of the Department of Environmental Resources dated May 17, 1972, is hereby dismissed.

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*Mrs. Cyril G. Fox*

MRS. CYRIL G. FOX : Docket No. 73-078  
NATURAL LANDS TRUST, INC.  
and  
COMMUNITY COLLEGE OF DELAWARE COUNTY

#### A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, June 12, 1973

This appeal raises initially a question whether Article I, Section 27, of the Constitution of Pennsylvania, the "Environmental Declaration of Rights," requires the Department of Environmental Resources (Department to consider factors other than those explicitly enumerated in The Clean Streams Law; Act of June 22, 1937, P.L. 1987, as amended 35 P.S. §691.1 *et seq.*, before granting a permit to construct a sewer interceptor. Appellants claim that the Amendment, Article I, Section 27, requires in effect an environmental impact statement, after the model of those acquired by §102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (NEPA). Appellee, and especially the intervenors, the Delaware County Community College for whose benefit, primarily, the interceptor line would be constructed, and the Central Delaware County Authority, argue that Article I, Section 27, is not self-executing, and that if it is self-executing these Appellants do not have standing to raise the issue before this Board, and that in any event it would not be violated by issuing a permit in this case for this sewer interceptor.

This interim opinion will deal with the first and second issues, and partially with the third.

(1) The Commonwealth Court has resolved for us the question whether or not Article I, Section 27, is self-executing. In *Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commonwealth 231, 302 A.2d 886 (1973) that court held squarely that Article I, Section 27, is self-executing. Even if we disagreed with the Commonwealth Court we would be bound by that holding.

But we do not disagree. Article I, Section 27, provides as follows:

**"Natural resources and the public estate**

Section 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

(Adopted May 18, 1971.)

The first sentence of that Amendment recognizes a specific legal right in the people, and makes that right a constitutional right. The second two sentences make the management of Pennsylvania's public natural resources subject to the public trust doctrine. Judge Mencer dissented from the Gettysburg Battlefield Tower case holding that the Amendment is self-executing, based largely on doubts that the first sentence contains a sufficient standard of performance to be self-executing. How pure is "pure" water? How clean is "clean" air? 302 A.2d at 895-897 (extensively quoting Judge Silvestri, in *Allegheny County v. United States Steel Corp.*, No. 160, April Term 1972, Court of Common Pleas of Allegheny County). With respect to the first sentence, the majority on the Commonwealth Court felt that there was a sufficient standard, 302 A.2d at 892.

But even Judge Mencer's doubts do not apply to the public trust provisions of Article I, Section 27. It may be necessary to develop a common law with respect to defining a set of standards to interpret the first sentence, as he says. But there are several centuries of development of common law principles relative to the duties of trustees. Once the Constitution declares that the Commonwealth is trustee of Pennsylvania's

public natural resources, no legislation is needed to determine what are the duties. As the Department noted in its brief, there is ample precedent that the duties and responsibilities of a "public" trustee are closely analogous to the duties of a "private" trustee under ordinary common law trust principles. *Emigrant Co. v. County of Wright*, 97 U.S. 339 (1877); *Stearns v. Minnesota*, 179 U.S. 223 (1900).

The Legislature *may* act, as it has in the field of private trusts, e.g. Fiduciaries Act of 1949, Act of April 18, 1949, P.L. 512, as amended, 20 P.S. §§720.101, *et seq.*, Principal and Income Act of 1947, Act of July 7, 1947, as amended, 20 P.S. §§3470.1 *et seq.*; but there is ample common law precedent to tell us in some detail just what the Commonwealth must do to discharge its duties as trustee, without such codifying and/or redefining statutes.

For some synopsis of those duties, generally, see *Scott on Trusts*, Ch. 7, "The Administration of the Trust." See also Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471 (1970); Cohen, "The Constitution, the Public Trust Doctrine, and the Environment," 1970 Utah L. Rev. 388 (1970); Montgomery, "The Public Trust Doctrine in Public Land Law," 8 Willamette L. J. 135 (1972); 39 Penna. L. Enc., "Trusts" §181-196, and Pennsylvania cases cited therein. The duties of the Commonwealth as trustee will be discussed in part following our discussion of the issue of standing, and there will be a subsequent hearing to determine whether those duties have been discharged in this case.

(2) Pennsylvania has long recognized that the public has an interest in charitable trusts (of which we may take the public trust to be a special case), generally, *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A.2d 582 (1962), *Wiegand v. The Barnes Foundation*, 374 Pa. 149, 97 A.2d 81 (1953); *Commonwealth v. The Barnes Foundation*, 398 Pa. 458, 159 A.2d 500 (1960). But the Attorney General, as the representative, *parens patriae*, of the public has been the recognized, even the required, party to defend and guard that interest in litigation, *In re Garrison's Estate*, 391 Pa. 234, 137 A.2d 321 (1958); *Commonwealth v. The Barnes Foundation*, *supra*. Pennsylvania court decisions have not been especially favorable to citizen standing in public interest disputes, generally, see Broughton, "The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of H.B. 958," 41 Pa. Bar Assn. Q. 421, 431-434 (1970)

(and *Commonwealth of Pennsylvania Legislative Journal*, Session of 1970, Volume 1, No. 118 (April 14, 1970) pages 2271-2281); *Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises*, 428 Pa. 350, 237 A.2d 342 (1968). In charitable trust cases, we have discovered no case where a private citizen or citizens group has been allowed to intervene or to represent the public interest; In *re Garrison's Estate*, *supra*, held that indeed the Attorney General is a necessary party in cases involving charitable trusts, and must be notified.<sup>1</sup>

It is hard to argue, however, that a citizen cannot bring suit on his own behalf to protect a constitutional right. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, *supra*, at 492; *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955); *Lackey v. Sacoolas*, 411 Pa. 235, 191 A.2d 395 (1963). The last two cases involved violations of criminal statutes passed in part to insure that constitutional rights would not be infringed but the principles enunciated would seem to be applicable here.

In particular, in a public trust case, if the government of the Commonwealth is trustee, and the Attorney General is counsel for the government of the Commonwealth, it is difficult to see how realistically, standing to raise questions of whether the trustee has properly discharged its duties can be limited to the Attorney General, even if he is normally regarded as counsel for the public, *parens patriae*. That would result in a practical holding that only the trustee could question its own performance of duty. We conclude that members of the public — at a minimum, affected members of the public — must be given standing to bring actions to compel the trustee to properly perform its duties.

In this particular instance, the Legislature has already provided a method, a procedure, for challenging whether the actions of at least one agency of the trustee with respect to granting a permit to construct a portion of a sewage treatment facility were reasonable and in accordance with law. That agency is the Department of Environmental Resources, and the procedure is an appeal to this Board. Act of December 3, 1970, P.L. 834 (amending the Administrative Code of 1929, Act of April 9, 1929,

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1. Since an Assistant Attorney General presented a brief in this case, and participated in oral argument, it cannot be seriously argued, here, that the Attorney General was not notified of this proceeding.

P.L. 177, as amended), 71 P.S. §510-21. We conclude that we have jurisdiction to consider this appeal, including these issues, and that these Appellants have standing to prosecute this appeal, based on these issues among others.

(3) What are the duties of the Commonwealth, as trustee? More specifically, what were the duties of the Department in issuing this particular permit?

The trustee has the duty to use reasonable care in administering the trust. In *re Lerch's Estate*, 399 Pa. 59, 159 A.2d 506; In *re Mereto's Estate* 373 Pa. 466, 96 A.2d 115 (1953); *Restatement of Trusts* 2d, §174. The trustee also has the duty to use reasonable care to preserve the trust, In *re Borden's Trust*, 358 Pa. 138, 56 A.2d 108 (1948), *Restatement of Trusts* 2d §176. The latter requirement may be scarcely necessary where one class of beneficiaries is "generations yet to come." The literal constitutional command is "to conserve" see the discussion of the requirement to invest, *infra* at footnote 2.

In making a decision, ostensibly under The Clean Streams Law, 35 P.S. §691.1 *et seq.*, and/or the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, 35 P.S. 750.1, *et seq.*, does the requirement of reasonable care mean that the Department must consider factors other than those enumerated explicitly in those acts? The Community College of Delaware County argues that, even if Article I, Section 27, is self-executing, it does not automatically amend those prior acts. Two cases are cited. *Coatsville Gas Co. v. Chester County*, 97 Pa. 476 (1881) is not relevant - - it deals with a question of statutory interpretation, and the Pennsylvania Constitution of 1874 was held inapplicable. In *re Georges Township School Directors*, 286 Pa. 129, 133 A. 223 (1926) holds, 133 A. at 225-226, that in interpreting the intent of the framers of a constitutional amendment, it should not be lightly presumed that existing legislation was intended to be overridden or repealed. We do not do so here. We instead apply the general rule of legislative interpretation, that if two enactments can be interpreted so as to make sense when read together, they should be so interpreted. *Parisi v. Philadelphia Zoning Board of Adjustment*, 393 PA. 458, 143 A.2d 360 (1958); *City of Pittsburgh v. Pa. Public Utility Commission*, 3 Pa. Commonwealth 546, 284 A.2d 808 (1971). On the other hand, if they cannot be so interpreted, the Constitution must prevail.

We believe that the Constitution does require that some comprehensive planning, of the type suggested by Appellants, is necessary. We are hesitant to say that Article I, Section 27, requires a full scale environmental impact statement, with all of the details spelled out in the National Environmental Policy Act, *supra*; but we do hold that, at a minimum, the specific values spelled out in the first sentence of Article I, Section 27, must be considered fully, in some form. Even that may not be sufficient if a strong enough case is made out that other "relevant" factors should have been considered. *Flowers v. Northhampton Bucks County Municipal Authority*, 57 D. & C. 2d 274 (1972); *Camp Hill Borough Condemnation*, 43 D. & C. 2d 418 (1967). We only hold, at this point, that the factors listed in the first sentence of Article I, Section 27, are relevant and must be considered. And we hold that the longer range impact of this project on the values, as an indirect effect, due to the possible development impact of constructing this sewer interceptor, must be considered.

We also hold that any planning process that does not give serious consideration to (a) alternative methods of using the resource in question<sup>2</sup>, and (b) alternative methods of attaining the objective sought by the permit applicant, does not constitute an exercise of reasonable care. See Prest and Turvey, "Cost Benefit Analysis: A Survey", 75 Econ. J. 683 (1965); Carlin, "The Grand Canyon Controversy: Lessons for Federal Cost-Benefit Practices," Committee on Interior and Insular Affairs, 90th Congress 1st Sess. 507-13 (1967); Carlin, "Water Resources Development in an Environmentally Conscious Era," 7 Water Resources Bull. 221 (1971); McKean, R., *Efficiency in Government Through Systems Analysis* (Wiley, 1958) esp. Ch. 3. The fundamental concept of cost in economics is "opportunity cost" — the opportunities foregone by selecting a particular alternative. Where so many of the factors involved in a decision such as the one involved in this case, relative to how to use and invest the trust property, are intangible, then any reasonable care given to the decision must carry through an analysis of alternative uses of the public natural resource in question, so that the opportunity cost of selecting any one alternative

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2. A private trustee does have the duty to "invest" the trust assets. In the case of the public trust, at least of land resources, preservation may be one form of investment that must be considered. At a minimum, alternative present uses must be analyzed.

68. Mrs. Cyril G. Fox

can be clearly grasped and rationally considered in terms of the other alternatives foregone.

In the instant case, it does seem clear that the Legislature may delegate to municipalities the authority to perform certain of the duties the Commonwealth has as trustee — though there may be some remaining obligation on the part of the government of the Commonwealth itself to see that these duties are in fact performed, and to see that the totality of the effects of this project are rationally dealt with by some single agency. See, e.g., Article X, Section I, of the Constitution of Pennsylvania, and the Public School Code of 1949, Act of May 11, 1949, P.L. 1089, as amended, 24 P.S. §§1-101 *et seq.* It appears reasonable that the Department of Environmental Resources, which was organized with the object of bringing all environmental problems under a single cabinet official, may be that agency. But we are not certain based on the record before us, that Article I, Section 27, has been violated.

We are not sure whether, in this case, the various planning activities referred to in oral argument — *inter alia*, the Comprehensive Plan for Marple Township, the "537 Study" of the Central Delaware County Authority, the planning done in connection with establishing the Delaware County Community College — are sufficient to satisfy the requirements of Article I, Section 27, of the Constitution. Consequently a hearing will be scheduled to determine what planning has taken place, and to receive further argument relative to the reach and the limits, of what is required by Article I, Section 27.

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MRS. CYRIL G. FOX  
NATURAL LANDS TRUST, INC.

: Docket No. 73-078

and  
COMMUNITY COLLEGE OF DELAWARE COUNTY

AMENDED  
A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, June 18, 1973

This appeal raises initially a question whether Article I, Section 27, of the Constitution of Pennsylvania, the "Environmental Declaration of Rights," requires the Department of Environmental Resources (Department) to consider factors other than those explicitly enumerated in The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 *et seq.*, before granting a permit to construct a sewer interceptor. Appellants claim that the Amendment, Article I, Section 27, requires in effect an environmental impact statement, after the model of those acquired by §102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-47 (NEPA). The Intervenor, the Delaware County Community College (for whose benefit, primarily, the interceptor line would be constructed), and the Central Delaware County Authority, argue that Article I, Section 27, is not self-executing, and that if it is self-executing these Appellants do not have standing to raise the issue before this Board, and that in any event it would not be violated by issuing a permit in this case for this sewer interceptor.

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But we do not disagree. Article I, Section 27, provides as follows:

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(3) What are the duties of the Commonwealth, as trustee? More specifically, what were the duties of the Department in issuing this particular permit?

The trustee has the duty to use reasonable care in administering the trust. In *re Lerch's Estate*, 399 Pa. 59, 159 A.2d 506; In *re Mereto's Estate* 373 Pa. 466, 96 A.2d 115 (1953); *Restatement of Trusts* 2d, §174. The trustee also has the duty to use reasonable care to preserve the trust, In *re Borden's Trust*, 358 Pa. 138, 56 A.2d 108 (1948), *Restatement of Trusts* 2d, §176. The latter requirement may be scarcely necessary where

one class of beneficiaries is "generations yet to come." The literal constitutional command is "to conserve" see the discussion of the requirement to invest, *infra* at footnote 2.

In making a decision, ostensibly under The Clean Streams Law, 35 P.S. §691.1 *et seq.*, and/or the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, 35 P.S. 750.1, *et seq.*, does the requirement of reasonable care mean that the Department must consider factors other than those enumerated explicitly in those acts? The Community College of Delaware County argues that, even if Article I, Section 27, is self-executing, it does not automatically amend those prior acts. Two cases are cited. *Coatsville Gas Co. v. Chester County*, 97 Pa. 476 (1881) is not relevant - - it deals with a question of statutory interpretation, and the Pennsylvania Constitution of 1874 was held inapplicable. In *re Georges Township School Directors*, 286 Pa. 129, 133 A. 223 (1926) holds, 133 A. at 225-226, that in interpreting the intent of the framers of a constitutional amendment, it should not be lightly presumed that existing legislation was intended to be overridden or repealed. We do not do so here. We instead apply the general rule of legislative interpretation, that if two enactments can be interpreted so as to make sense when read together, they should be so interpreted. *Parisi v. Philadelphia Zoning Board of Adjustment*, 393 PA. 458, 143 A.2d 360 (1958); *City of Pittsburgh v. Pa. Public Utility Commission*, 3 Pa. Commonwealth 546, 284 A.2d 808 (1971). On the other hand, if they cannot be so interpreted, the Constitution must prevail.

We believe that the Constitution does require that some comprehensive planning, of the type suggested by Appellants, is necessary. We are hesitant to say that Article I, Section 27, requires a full scale environmental impact statement, with all of the details spelled out in the National Environmental Policy Act, *supra*; but we do hold that, at a minimum, the specific values spelled out in the first sentence of Article I, Section 27, must be considered fully, in some form. Even that may not be sufficient if a strong enough case is made out that other "relevant" factors should have been considered. *Flowers v. Northhampton Bucks County Municipal Authority*, 57 D. & C. 2d 274 (1972); *Camp Hill Borough Condemnation*, 43 D. & C. 2d 418 (1967). We only hold, at this point, that the factors listed in the first sentence of Article I, Section 27, are relevant and must be considered. And we hold that the longer range impact of this project on the values, as an indirect effect,

due to the possible development impact of constructing this sewer interceptor, must be considered.

We also hold that any planning process that does not give serious consideration to (a) alternative methods of using the resource in question<sup>2</sup>, and (b) alternative methods of attaining the objective sought by the permit applicant, does not constitute an exercise of reasonable care. See Prest and Turvey, "*Cost Benefit Analysis: A Survey*", 75 Econ. J. 683 (1965); Carlin, "*The Grand Canyon Controversy: Lessons for Federal Cost-Benefit Practices*," Committee on Interior and Insular Affairs, 90th Congress 1st Sess. 507-13 (1967); Carlin, "*Water Resources Development in an Environmentally Conscious Era*," 7 Water Resources Bull. 221 (1971); McKean, R., *Efficiency in Government Through Systems Analysis* (Wiley, 1958) esp. Ch. 3. The fundamental concept of cost in economics is "opportunity cost" — the opportunities foregone by selecting a particular alternative. Where so many of the factors involved in a decision such as the one involved in this case, relative to how to use and invest the trust property, are intangible, then any reasonable care given to the decision must carry through an analysis of alternative uses of the public natural resource in question, so that the opportunity cost of selecting any one alternative can be clearly grasped and rationally considered in terms of the other alternatives foregone.

In the instant case, it does seem clear that the Legislature may delegate to municipalities the authority to perform certain of the duties the Commonwealth has as trustee — though there may be some remaining obligation on the part of the government of the Commonwealth itself to see that these duties are in fact performed, and to see that the totality of the effects of this project are rationally dealt with by some single agency. See, e.g., Article X, Section I, of the Constitution of Pennsylvania, and the Public School Code of 1949, Act of May 11, 1949, P.L. 1089, as amended, 24 P.S. §§1-101 *et seq.* It appears reasonable that the Department of Environmental Resources, which was organized with the object of bringing all environmental problems under a single cabinet official, may be that agency. But we are not certain based on the record before us, that Article I, Section 27, has been violated.

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We are not sure whether, in this case, the various planning activities referred to in oral argument — *inter alia*, the Comprehensive Plan for Marple Township, the "537 Study" of the Central Delaware County Authority, the planning done in connection with establishing the Delaware County Community College — are sufficient to satisfy the requirements of Article I, Section 27, of the Constitution. Consequently a hearing will be scheduled to determine what planning has taken place, and to receive further argument relative to the reach and the limits, of what is required by Article I, Section 27.

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*City of Uniontown*

CITY OF UNIONTOWN

: Docket No. 72-203

A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, June 18, 1973

This case comes before the Environmental Hearing Board on an Appeal by the City of Uniontown (Uniontown) from an Order of the Division of Water Supply and Sewage, Department of Environmental Resources (Department), dated April 27, 1972, requiring Uniontown to

"Within sixty (60) days from the date of this Order, negotiate, develop and execute, with North Union Township, such agreements and other documents as are necessary to implement the actions described in Paragraph 2 above in accordance with the schedule set forth in an Order to North Union Township, a copy of which is attached as Exhibit "A" and incorporated herein. Copies of said agreements shall be submitted to the Department's Regional Sanitary Engineer within seven (7) days of execution."

This Order was one of a series of orders issued by the Department, about the same date, covering the Monongahela River Basin, seeking to bring into being and to rationalize and consolidate sewage treatment facilities for the entire basin, or that part of it lying in Pennsylvania.

Uniontown appealed on the grounds (a) that it already had an effective sewage treatment plant and was not (and was not accused of being) in violation of The Clean Streams Law, Act of June 22, 1937, P.L. 1987,

as amended, 35 P.S. §691.1 *et seq.* and (b) that the time limit for reaching agreement was too short.<sup>1</sup>

Uniontown raises in its Appeal a fundamental issue not thus far dealt with by the Board. That issue is whether the Department has the authority to order a municipality that is not in violation of The Clean Streams Law, *supra*, to negotiate and enter into an agreement with a neighboring municipality that *is* violating The Clean Streams Law, to treat all or part of the violating municipality's sewage. Although the general validity of consolidation, or regionalization, orders of the type herein has been litigated and decided on several occasions, e.g. *Department of Environmental Resources v. Township of Armagh*, Environmental Hearing Board Docket No. 72-331, the validity of a consolidation order issued to a municipality which is not itself in violation of The Clean Streams Law has not thus far been litigated.

A hearing was held on Monday, April 2, 1973, before Robert Broughton, Chairman of the Environmental Hearing Board, at which the principal findings of fact were stipulated to by the parties.

#### FINDINGS OF FACT

1. North Union Township, Fayette County, is discharging and permitting to be discharged untreated and inadequately treated sewage into the waters of the Commonwealth which has resulted in water pollution and other health nuisances in portions of the Township.

2. The best available waste water management plans indicate that at least some of said portions of North Union Township, Fayette County, may feasibly be sewered to the presently existing sewage treatment system of the City of Uniontown, Fayette County ("City").

3. The City's sewage treatment system has the capacity to absorb at least some of the waste load generated by North Union Township.

4. The city has a complete sewage system and is presently enlarging the sewage treatment facilities, all in accordance with state requirements and approval. The City has entered into a contract with South Union Township for transmission of its sewage through existing city sewer

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1. The time limit, after several continuances at the request of both parties, is no longer relevant.

lines and treatment thereof at the sewage treatment plant. A copy of this contract is attached as Exhibit "A". The City has offered and is willing to negotiate a similar contract with North Union Township; however, North Union Township has refused to participate in meaningful negotiations.

5. The regionalization of North Union Township with the City's sewage treatment system is necessary in order to obtain state certification under Departmental Regulation 91.31 and federal funding for the construction of facilities to abate North Union Township's sewage discharges.

6. The City is not guilty of any violations of The Clean Streams Law or any other laws of the Commonwealth relative to water pollution or health nuisances. The only violations cited are on the part of North Union Township and not the City.

7. North Union Township has, *inter alia*, been ordered to negotiate and agree with the City to plan, design, finance, construct, and operate joint sewerage facilities; a copy of which Order form a part of the record in this case. North Union Township has withdrawn its Appeal from this Order.

#### DISCUSSION

The major issue, as noted above, is a legal one: whether the Department can order a municipality that is treating its sewage, and is not in violation of The Clean Streams Law, to negotiate and enter into an agreement with another municipality — one that is violating The Clean Streams Law — to treat all or part of that municipality's sewage.

Two basic subsidiary issues are raised by this contention: First, that the Order in question is not authorized by The Clean Streams Law or applicable regulations promulgated thereunder (and that if regulations authorize the Order they in turn are not authorized by The Clean Streams Law). Second, that if The Clean Streams Law is so interpreted it is unconstitutional as a deprivation of the property of Uniontown without due process of law.

Uniontown argues that the orders contemplated by the Regulation and by The Clean Streams Law are meant to be applied only to municipalities that are in violation of the law. While this may have been

true prior to the 1970 amendments to The Clean Streams Law, Act of July 31, 1970, P.L. 653, amending the Act of June 22, 1937, P.L. 1987, as amended, see *Commonwealth ex. rel. Sennett v. Borough of Irwin*, 91 Dauph. 270, 272-273 (1969), interpreting Section 202 of The Clean Streams Law as it then read, the Legislature added in 1970 a new section, 35 P.S. §691.203, which reads (Emphasis Added)

"(a) *Whether or not a municipality is required by other provisions of this act to have a permit for the discharge of sewage*, if the department finds that the acquisition, construction, repair, *alteration*, completion, *extension* or operation of a sewer system or treatment facility is necessary to *properly provide for the prevention of pollution* or prevention of a public health nuisance, the department may order such municipality to acquire, construct, repair, *alter*, complete, *extend*, or operate a sewer system and/or treatment facility. Such order shall specify the length of time, after receipt of the order, within which such action shall be taken.

(b) The department may from time to time order a municipality to file a report with the department *pertaining to sewer systems or treatment facilities owned, operated, or maintained by such municipality* or pertaining to the effect upon the waters of the Commonwealth of any sewage discharges originating from sources within the municipality. The report shall contain such plans, facts, and information which the department may require to enable it to determine whether existing sewer systems and treatment facilities are adequate to meet the present and future needs or whether the acquisition, construction, repair, alteration, completion, extension, or operation of a sewer system or treatment facility should be required to meet the objectives of this act. *Whether or not such reports are required or received by the department, the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act.* Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, *alter*, complete, *extend*, or operate a sewer system or treatment facility, *or to negotiate with other municipalities for combined or joint sewer systems or treatment facilities.* Such orders may prohibit sewer system extensions, additional connections, or any other

action that would result in an increase in the sewage that would be discharged into an existing sewer system or treatment facility."

It is certainly true that the *reason* for orders such as the one in issue must be to reduce or eliminate stream pollution. But the argument Uniontown makes would have us read into that section a limitation that where consolidation, or joint treatment, is the best way to eliminate stream pollution, the Commonwealth may order consolidation only where none of the municipalities being consolidated already operates an effective sewage treatment plant. In such cases (if Uniontown's argument is accepted) the municipality that is operating that plant could not be required to negotiate and agree with the others.

It is true that in *this* case, those are not the facts. In this case, the municipality that is already operating a treatment plant (Uniontown) is willing to negotiate, and one of the others is balking. But the argument Uniontown makes would apply to the converse situation as well. If it were Uniontown that was balking, Uniontown would argue that no effective consolidation order could be issued.

We cannot agree that the Department was intended to be restricted in such a manner. The philosophy of interpretation exemplified by the recent Pennsylvania Supreme Court decision in Commonwealth of Pennsylvania v. Harmar Coal Co., \_\_\_\_\_ Pa. \_\_\_\_\_, A.2d \_\_\_\_\_ (1973) would impel us to interpret The Clean Streams Law liberally to effect its purpose. The interpretation urged upon us would contravene the policy directives of the Act. The declaration of policy in The Clean Streams Law, 35 P.S. §691.4(5), states that the achievement of the goal of clean, unpolluted water for Pennsylvania "requires a comprehensive program of watershed management and control." Section 5 of the Law, 35 P.S. §691.5(a)(3) requires the Board and the Department, in issuing orders, to consider the "feasibility of combined or joint treatment facilities".

Section 203 of the Law, 35 P.S. §691.203, is not explicitly limited as Uniontown would have us limit it, and to so limit that section would strip it of usefulness in many cases, albeit perhaps not in this case, *so long as Uniontown remains willing to negotiate.*

We conclude that where the proper provision for the prevention of pollution from sewage discharges from any source would be most quickly and efficiently accomplished by ordering the City of Uniontown, or any other municipality operating a sewage treatment plant, to negotiate and

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enter into an agreement with another municipality that has no such plant, an order of the Department to do so is valid under The Clean Streams Law.

This conclusion requires us to deal with the question whether The Clean Streams Law as so interpreted is unconstitutional as a taking of property without due process of law, or as an interference with the obligation of contracts. While this was not briefed by Uniontown, the issue was alluded to, and should be disposed of.

It is well settled that municipalities are creatures of the State, and that the State may consolidate municipalities, and provide for whatever disposition of municipal property it sees fit. *Troop v. Pittsburgh*, 254 Pa. 172 ( ); *Pennsylvania Co. v. Pittsburgh*, 226 Pa. 332 ( ); *Driskel v. O'Connor*, 339 Pa. 556 (1940); *Poor District Case (No. 2)* 329 Pa. 410 (1938); *Hunter v. Pittsburgh*, 207 U.S. 161 (19 ). The court in the later case clearly enunciated the principle that seems to have been followed consistently in other cases, 207 U.S. at 178-179:

"Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. ... The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. ... The State ... at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The

power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

Based on these principles there appears to be no question that the application of the Order in question to the City of Uniontown is constitutional.

Uniontown raises one other contention which, though not strictly relevant to the issues in this appeal, seems to explain in part fact that the City insisted on pursuing this Appeal to trial, even though it was willing to negotiate with North Union Township, and even though North Union Township had withdrawn *its* appeal.

Sometime in the summer of 1972, the State Insurance Commissioner, Herbert S. Denenberg, sought information from the Department of Environmental Resources regarding all matters pending before the Environmental Hearing Board, or the Courts of the Commonwealth, which had not been resolved or where settlement did not appear likely. These were subsequently used to compile a list of "polluters" which was (apparently) widely distributed to insurance companies and lending institutions by Commissioner Denenberg. The purpose of the list was set forth in the first and last paragraphs of the cover letter:

"This is an advisory notice to supply insurance companies with information which will aid them in administering investment policies which are designed to eliminate and control pollution.

\* \* \*

"This notice is designed to aid those companies and to encourage all insurance companies to adopt and implement investment policies which are designed to reduce pollution."

A large proportion of the time at the hearing on April 2, 1973, was devoted to a discussion of the propriety of the Department's inclusion of the City of Uniontown on this list. The City argued that it was not polluting, only questioning the legal right of the Commonwealth to compel it to negotiate and enter into an agreement when it was *not* in violation of The Clean Streams Law - - a right that is only now being determined. Furthermore, the City argues that it was not even in violation of the Order in question (and which it was appealing) since it had done everything in its power to bring about negotiations.

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Regardless of the legal right of Commissioner Denenberg to issue a list such as the one issued, and regardless of the legal right of the Department to supply information to Commissioner Denenberg,<sup>2</sup> it does seem that Uniontown has a point. The manner of using the information smacks a little of yellow journalism, and in fact, the City of Uniontown probably was somewhat unjustly smeared with what was too broad a brush.<sup>3</sup> The implicit assumption behind the publication of the list was that none of the Appellants were right. Certainly as of the time of publication, that had not been proven with respect to Uniontown.

Furthermore, the publication of such a list implicitly says to persons considering taking an appeal from a Departmental Order, "Appeal if you want, but you should know that you are subjecting yourself to random harassment by this Department." It is one thing for the Department to bring legal action for an injunction, civil or criminal penalties, or contempt, in the absence of a supersedeas, as suggested by Dr. Goddard in his letter of November 2, 1972, to Mayor Eugene E. Fike, of Uniontown. That is provided by Law, and there are specific defenses, also provided by law, for such actions. Such legal action is part of the accepted legal process. For a State governmental agency to subject a citizen or a municipality to extra-legal harassment of various kinds, as a result of that citizen or municipality questioning the legality of the agency's action, does, at a minimum, offend one's sense of fair play, even if one could not say it was clearly illegal.

#### CONCLUSIONS OF LAW

1. The Order in question is valid and authorized by The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1-691.1001.

2. The Order as issued is constitutional.

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2. The Environmental Hearing Board's files are public records in any event, AND the information sought could not have legally been withheld, no matter who requested it, and for whatever purpose.

3. One legislative analogy to the requirement "To negotiate and agree" is found in the National Labor Relations Act, which requires both employers and labor unions to bargain collectively 29 U.S.C. §§ 158(a)(5) and 158(S)(3), and which defines collective bargaining as follows, 29 U.S.C. §158(d):

"To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of a written contract incorporating any agreement reached if requested by either party, but

**ORDER**

The City of Uniontown is hereby ordered to enter into negotiations with the Township of North Union immediately as called for in the Department's Order of April 27, 1972. If agreement has not been reached by July 16, 1973, the areas of disagreement shall be resolved by an Order of the Department specifying the terms under which Uniontown shall treat the sewage of North Union Township, which Order shall be issued by July 31, 1973, subject to appeal to this Board.

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*Richard Garland*

RICHARD GARLAND

: Docket No. 73-066

**A D J U D I C A T I O N**

By PAUL E. WATERS, Member, June 19, 1973

This matter comes before the Board as an appeal from the refusal by the Department of Environmental Resources hereinafter "Department" to grant a permit for a holding tank for appellant Richard Garland of Montgomery County, Pennsylvania. The Department takes the position that it has no authority to grant such permits as this is entirely a Township

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Footnote 3 (Continued)

such obligation does not compel either party to agree to a proposal or require the making of a concession...."

Neither the Order in question nor 35 P.S. § 691.203, both quoted, contained the final qualification relative to not having to make concessions. That raises a possibly perplexing question as to how, when agreement is not reached, a court, or this Board should determine which party *ought* to have made concessions—whose fault it is that agreement was not reached. While the ultimate agreement should be fair, the remedy for a failure to reach agreement would presumably be for a court, or perhaps even this Board in a proper case, to impose a consolidation arrangement by Order. Here, it would seem to be at least questionable whether, when Uniontown has made a proposal, and North Union Township has refused to discuss its objections to that proposal (See transcript pp. 24-28), Uniontown could be said to be refusing to negotiate. If anyone is in violation of the Order at this time, it would appear to be North Union Township, not Uniontown.

84. *Richard Garland*

matter. The Township has apparently taken no official action regarding holding tanks, and appellant is left with nowhere to turn to solve a very real problem of sewage disposal at the site of his property.

#### FINDINGS OF FACT

1. Appellant Richard Garland is an adult individual owning a converted five bedroom double house on Gravel Pike, Marlboro Township, Montgomery County, Pennsylvania.

2. The premises have been unoccupied for two years and substantial work has been done to make the old house, without running water and with only a privy, into a nice living accommodation consisting of two apartments.

3. Appellant applied to the Department for a permit to install a holding tank and was refused on February 22, 1973.

4. The privy which was in use at the house is a nuisance and health hazard and, although this is not of serious nature and would require no independent action on the part of the Department, when a citizen on his own initiative desires to improve the situation it is unreasonable for the Department to thwart that effort.

5. Appellant is able to get a person to empty the holding tank at regular intervals, at an authorized disposal site.

6. There is some question whether the present proposed holding tank has a warning device as required by law.

7. The Township of Marlboro has not passed an ordinance regulating the use of holding tanks.

#### DISCUSSION

The Department in this case finds itself in the unusual position of defending the status quo when change for a better environment is clearly indicated by the facts. The position which it takes is brought about because the regulations generally give the authority to deal with holding tanks to the municipality in which it is to be located.

In this case, the Township has failed to act by ordinance either granting or refusing the right to its citizens to install holding tanks in

appropriate cases. We cannot construe the Township's inaction as a declaration that no one can ever have a holding tank under any circumstances. This would raise serious constitutional questions which we do not reach by this adjudication.

It is our feeling that under the Regulations of the Department this is an appropriate case for a permit to be issued notwithstanding the absence of Township action. The Regulations specifically authorize such permits where "necessary to abate a nuisance or public health hazard" (71.61 (4)).

The Appellant has spent substantial time and money to improve an old run-down unimproved house by putting in new and modern conveniences. He naturally desires to eliminate the perhaps century old outside privy with all of its unsanitary concomitance by the use of a modern holding tank and indoor plumbing. The Department has refused him a permit to do so. This refusal is clearly unreasonable.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and subject matter of this appeal.
2. The Department does have the authority to issue permits for holding tanks under 71.61(b) of its Rules and Regulations when necessary to abate a nuisance or public health hazard.
3. The holding tank permit should be issued to appellant as a means to discontinue the use of a privy which under the facts we find to be a nuisance and public health hazard.
4. The Department's refusal to grant the requested permit was unreasonable under the facts of this case.

#### ORDER

AND NOW, this 19th day of JUNE, 1973, after hearing held and due consideration of the appeal filed, the Department is hereby ordered conditional upon satisfactory showing of a warning device and a contract for proper emptying, to issue a permit for the installation of a holding tank on appellant's property in Marlboro Township, Montgomery County, Pennsylvania.

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86. *Clinton Township*

**CLINTON TOWNSHIP  
BOARD OF SUPERVISORS**

: **Docket No. 73-019**

### **A D J U D I C A T I O N**

By **PAUL E. WATERS, Member, June 19, 1973**

This matter comes before the Board as an appeal from the issuance of a sewage treatment permit (No. 6672401) granted by the Department of Environmental Resources [hereinafter referred to as Department] to Loren Dixon [hereinafter Dixon] for installation of a treatment system to discharge into an unnamed tributary of the Tunkhannock Creek in Wyoming County, Pennsylvania. The Appellant, Clinton Township [hereinafter called Township], is opposed to the permitted discharge into the Creek because it is very shallow during part of the year and is used by children for recreation. The appeal is also joined by a few nearby residents.

### **FINDINGS OF FACT**

1. The Appellant, Clinton Township, is located in Wyoming County, Pennsylvania and the Tunkhannock Creek and its tributaries flow therein.
2. On December 28, 1972, the Department granted a sewage treatment facility permit to Loren Dixon for the construction of a treatment facility to discharge into an unnamed tributary of the Tunkhannock Creek.
3. The tributary is considered by the Commonwealth study as suitable only for treated waste assimilation (Code 2).
4. The plant design criteria is for 320 population, with a waste flow of 22,400 gallons per day and a five day BOD of 54.4 pounds per day of raw waste.
5. The plant will be an extended aeration aerobic treatment plant with filters which under optimum conditions, is designed to produce a biochemical oxygen demand (BOD) removal of about 95%.
6. The plant will have a pump designed for uphill pumping, one backup pump in case the first one fails plus a third emergency pump.
7. The Department prepared a comprehensive pollution report to determine the treatment required to protect the waters of the Commonwealth by the Dixon treatment plant.

8. The plant design meets all Department requirements and exceeds the minimum requirements in some respects.

9. The 1,000 feet length of the unnamed tributary between the discharge and South Branch Tunkhannock Creek flows through an area of heavy underbrush and has no existing use.

10. A few children do play in or near the stream from time to time although the amount of flow and the location are not conducive.

11. It was not economically feasible to have the plant discharge directly into the Tunkhannock Creek.

#### DISCUSSION

The Appellants in this case have presented two main objections to the issuance of a sewage treatment permit to Loren Dixon, the permittee, by the Department.

First, they object because the plant discharge is to go into a small tributary of the Tunkhannock Creek, which tributary has a very low flow and is sometimes used by children nearby.

It is clear to me, even without regard to the discharge itself, the area here in question is not a recreation area by any stretch of the imagination. It is, of course, far beyond the scope of these proceedings for me to suggest the duties of parental care which flow from our decision today. But I believe they should be apparent.

The basic inconsistency in Appellants' case on this point I must mention, because the argument before the Board has sunk by its own weight. The Appellants have pitched a good bit of their case on the children in the area using this tributary as a summer playground, for which I have previously found it to be ill-suited. The facts indicate, and the Appellant has agreed, that there is hardly any flow during the summer months. Counsel for the Appellant even stated that the "stream" becomes dry in summer. The question that then arises is — how can children be attracted to play or wade in a dry stream?

More importantly, and the real basis for my decision on the appeal objection concerning the stream uses, is based on the fact that the plant discharge will be of a high quality and will not further limit any proper use presently made of the stream in question.

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The second of Appellants' objections to the permit seemed more like an effort to obtain information on the part of the Township than real opposition. The question raised is, who is to maintain the treatment facility? The Township is concerned, and rightly so, that it will not have to take over the enforcement of plant maintenance.

The Commonwealth, of course, will continue as the overall enforcer of our pollution laws and The Clean Streams Law. The Township has taken on no new responsibility. In addition, the permit has a condition which provides that if a larger joint facility is constructed the plant in question could no longer operate as a separate facility.

The Department admits that enforcement of plant standards is a continuing problem and does depend to some extent on complaints from interested citizens. Clearly, the Appellants can serve a useful purpose in this regard, and we have no doubt that their vigilance will be unending.

Although there was some discussion concerning the use of another effluent discharge point, we do not feel that this becomes relevant to our decision until there is substantial evidence presented to show some reason why the place already selected is improper. This has not been done.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the persons and subject matter of this appeal.
2. The Department has fully considered all of the statutory requirements in issuing permit number 6672401 for the Loren Dixon sewage treatment plant.
3. The sewage treatment permit was properly issued.

#### ORDER

AND NOW, this 19th day of JUNE, 1973, after hearing and due consideration of the appeal filed in this matter, the Department's permit issuance is hereby sustained and the appeal of Clinton Township, *et al.*, is hereby dismissed.

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**Sellersville Borough** : **Docket No. 72-173**  
**Bucks County, Pennsylvania** :

**A D J U D I C A T I O N**

**By ROBERT BROUGHTON, Chairman, July 31, 1973**

This matter is before the Board on an Appeal filed by Sellersville Borough (Sellersville) from an Order of the Department of Environmental Resources (Department).

In this Order, dated March 10, 1972, the Department made findings that the sewage treatment facilities of the Perkasio Borough Authority (Authority) to which the Sellersville sewer collection system is "tributary" was receiving a waste load equal to or in excess of the load for which the facilities were designed and that such "hydraulic overloading" of these facilities was resulting in pollution or a danger of pollution to the waters of the Commonwealth.

In this Order the Department directed Sellersville to prohibit any additional discharge into its sanitary sewer system without written authorization from the Department, with the exception that such prohibition did not apply to connections to approved sewers serving new construction for which Sellersville had issued building permits prior to the date when it received the Order. The Department also directed Sellersville to submit a letter setting forth procedures being taken to enforce the prohibition of such connection to its sewer system.

In its Appeal Sellersville contended that on dates prior to the issuance of the Order both it and the Authority had retained an engineering firm to study the location and reduction of excess water which was entering the collection systems in each municipality, that the sewer connection ban was detrimental to Sellersville for the reason that it would create a freeze on additional revenues (presumably from increased real estate tax collections created by new construction) and create a financial impediment to corrective action by Sellersville, that the Order was unduly restrictive and that the Order was arbitrary, capricious and without justification in the law.

In its Pre-Hearing Memorandum, Sellersville contended that the Order which imposed the sewer connection ban on Sellersville was invalid and improper for several reasons, as follows:

1. The Department did not give Sellersville prior notice that

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the Authority sewage treatment facilities were not capable of treating additional sewage;

2. There was no pre-order finding by the Department that Sellersville was in violation of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended; 35 P.S. §§691.1 *et seq.*;

3. The Department was bound to give Sellersville a reasonable opportunity to study and to alleviate the problems which gave rise to the alleged violations of The Clean Streams Law, *supra*;

4. Since the Sellersville sewer system operation was not directly related to the violation at the Perkasio Borough Authority sewage treatment facilities, the Department was required to find that remedies other than a sewer connection ban would be inadequate to effect a correction of the violation;

5. The Department did not consider economic hardships upon Sellersville when the sewer connection ban Order was issued;

6. The Order was unconstitutional.

Hearings on this Appeal were held before M. Melvin Shralow, Esquire, Hearing Examiner, on September 7 and September 29, 1972.

In its Memorandum of Law, filed following the conclusion of the hearing, Sellersville contended that this Order was invalid because Sellersville was not given a hearing prior to the issuance thereof and because there was no prior notice to Sellersville that the Order was going to be issued.

The Board makes the following:

#### FINDINGS OF FACT

1. The Authority owns and operates a sewage treatment plant and a sewer collection system, a permit for the use and operation of which was issued by the Sanitary Water Board of the Pennsylvania Department of Health, an agency whose duties and functions have been assumed by the Department.

2. This sewage treatment plant is a trickling filter plant, providing secondary treatment.

3. This sewage treatment plant was designed to provide treatment for an average daily flow of 1,375,000 gallons per day.

4. Treated effluent from this sewage treatment plant is

discharged to Perkiomen Creek.

5. Sellersville owns and operates a sewer collection system.

6. On August 5, 1957, Sellersville and the Authority entered into an Agreement, under the terms of which the Authority granted to Sellersville the right to discharge the sewage collected in the Sellersville sewer collection system into the sewer collection system of the Authority, from which it would be transported to the Authority sewage treatment plant for treatment and disposal. This Agreement was in effect on March 10, 1972, the date of this Order.

7. Under Section 3 of said Agreement, Sellersville agreed that the sewage collected in its system would contain no storm water, roof, surface or cellar ground water drainage. Under Section 5 of said Agreement, Sellersville agreed to continually operate its sewer collection system and to keep and maintain the same in good repair and operating condition at all times.

8. The Sellersville and Authority sewer collection systems have been and are being infiltrated by large quantities of ground water run-off and surface water run-off.

9. Some of this infiltration in Sellersville is coming from illegal connections such as perimeter drains, downspouts, pumps and cellar drains.

10. Between June 1970, and May 1971, the daily flow of sewage and ground and surface water run-off carried to the Authority sewage treatment plant from the two sewer collection systems exceeded 1,375,000 gallons per day 35 per cent of the days in said period.

11. The Department had notice of the existence of the infiltration of the two sewer collection systems and of the fact that the Authority sewage treatment plant was, from time to time, receiving more than 1,375,000 gallons per day of sewage and ground and surface water run-off in June 1971.

12. In June 1971, the Department had no evidence that such overloading of the Authority sewage treatment plant created a situation where the said sewage treatment plant was not efficiently treating the sewage flowing thereto.

13. The Authority and Sellersville were also aware of this problem of infiltration of the two sewer collection systems in 1971 and, early in 1972, they jointly retained an engineering consulting firm to perform a study of same.

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14. The Authority sewage treatment plant is equipped with a bypass pipe.

15. When the flow to a sewage treatment plant is so great that the pumps cannot pump the sewage into the plant for treatment, the excess flow is permitted to bypass the plant and to be discharged, without treatment, from the bypass pipe directly to the receiving stream.

16. The Department has delegated to the Bucks County Department of Health, through the latter's Division of Sanitary Engineering, the duties of inspecting sewage treatment plants in Bucks County and of determining whether said plants are in compliance with the law, applicable regulations and permit conditions.

17. On January 4, 1972, Peter J. Noll, an environmental protection specialist employed by the Bucks County Department of Health, inspected the Authority sewage treatment plant.

18. On January 4, 1972, Mr. Noll observed raw sewage being discharged from the bypass pipe to Perkiomen Creek.

19. On January 4, 1972, Mr. Noll observed Perkiomen Creek to be gray in color, to be somewhat malodorous, and to have bits of paper floating in it.

20. Everett C. Hogg is a sanitary engineer, employed by the Bucks County Health Department, who inspected the Authority sewage treatment plant and the interception sewers leading thereto on February 15, 1972.

21. On February 15, 1972, Mr. Hogg observed raw sewage flowing from two manholes on the main interceptor sewer and being discharged to Perkiomen Creek.

22. On February 15, 1972, Mr. Hogg observed substantial quantities of raw sewage being bypassed around the treatment plant and being discharged to the Northeast Branch of Perkiomen Creek.

23. On February 15, 1972, Mr. Hogg observed that an in-flow meter, located on the pump discharge of the pump which removes raw sewage from the wet well of the plant and discharges it to the treatment area thereof, registered an in-flow at the rate of 1,900,000 gallons per day.

24. A report of an inspection of the Authority sewage treatment plant made by environmental protection specialist Noll on February 24, 1972, revealed that raw sewage was entering the bypass pipe.

25. The discharge of raw sewage to Perkiomen Creek has created pollution thereof and creates a public health hazard.

26. Between June 1, 1971, and May 1972, daily flows of sanitary sewage and ground and surface water run-off carried to the Authority sewage treatment from the two sewer collection systems exceeded 1,375,000 gallons per day 52 per cent of the days.

27. Raw sewage has been discharged from the bypass pipe to Perkiomen Creek subsequent to March 10, 1972.

### DISCUSSION

By virtue of a written Agreement dated August 5, 1957, by and between Sellersville and the Authority, the sewage collected in the Sellersville sewer collection system has been discharged to the Authority sewer collection system, from which it has been transported, together with the sewage collected in the Authority sewer collection system, for treatment at the Authority sewage treatment plant.

Although Sellersville expressly agreed that the sewage collected in its sewer collection system would contain no storm water, roof, surface or cellar water drainage, and that it would keep and maintain its sewer collection system in good repair and operating conditions at all times, this clearly has not been the case.

The Sellersville sewer collection system, together with the Authority sewer collection system, have been and are being infiltrated by large quantities of ground water run-off and surface water run-off.

The Department received reports from representatives of the Bucks County Department of Health, in June 1971, that the Authority sewage treatment plant was, from time to time, being overloaded as the result of the combination of sewage and the large quantities of water being carried to it by virtue of the infiltration of the collection systems.

There was no evidence, in June 1971, that such overloading of the sewage treatment plant created a situation where the sewage being carried thereto was not receiving efficient treatment. The Department did, however, contemplate the issuance of an infiltration correction order as the result of the information which it received in June 1971.<sup>1</sup>

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1. At no time relevant to this proceeding was an infiltration correction order issued to the Authority or to Sellersville by the Department.

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The situation changed dramatically on January 4, 1972. On that date Peter J. Noll, an environmental protection specialist employed by the Bucks County Department of Health, inspected the Authority sewage treatment plant and observed raw sewage being discharged from a bypass pipe at the plant to the waters of the Commonwealth, to-wit, Perkiomen Creek. This finding was verified by Everett C. Hogg, a sanitary engineer employed by the Bucks County Department of Health, on February 15, 1972. Mr. Hogg observed large quantities of raw sewage being bypassed around the treatment plant and being discharged to Perkiomen Creek.

These findings gave rise to the Order of March 10, 1972, in which the Department imposed a sewer connection ban upon Sellersville, with certain exceptions not relevant to this proceeding.<sup>2</sup>

Section 202 of The Clean Streams Law *supra*, 35 P.S. §691.202, provides, in pertinent part, as follows:

"§691.202 SEWAGE DISCHARGES

No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the Board or such person has first obtained a permit from the department . . . ."

When, as here, raw sewage is discharged from a bypass pipe directly to Perkiomen Creek, it is obvious that there is a violation of Section 202, *supra*. See *F & T Construction Company, Inc. v. Department of Environmental Resources*, 6 Pa. Commonwealth 59, 293 A.2d. 138, 140 (1972).

Since this bypassing is occurring at a sewage treatment plant which is neither owned nor operated and maintained by Sellersville, we must decide, initially, whether Sellersville is in violation of said Section.

The Sellersville sewer collection system has been and is being infiltrated by large quantities of ground water run-off and surface water run-off. As the result of the increased flow to the Authority sewage treatment plant caused, at least in part, by this infiltration, the pumps at the plant are incapable of pumping the entire flow into the treatment area. Bypassing occurs and raw sewage is discharged into the waters of the Commonwealth.

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2. The sewer connection ban did not apply to connections to approved sewers serving new construction for which Sellersville had issued building permits prior to the date when it received the Order.

We conclude that in permitting this infiltration of its sewer collection system to exist and, with the attendant consequences of this infiltration, Sellersville is in violation of Section 202, *supra*.

Our conclusion is buttressed by the following language contained in Section 202, *supra*:

" . . . . For the purposes of this section, a discharge of sewage into the waters of the Commonwealth shall include *a discharge of sewage by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth.*" (Emphasis Supplied)

This provision is clearly applicable to Sellersville.

We next turn to the question of whether the Department had the authority to issue this sewer connection ban Order to Sellersville.

Section 5 (d) (2) of The Clean Streams Law, *supra*, 35 P.S. §691.5 (d) (2) provides that the Department shall have the power and that its duty shall be to issue such orders as may be necessary to implement the provisions of The Clean Streams Law, or the rules and regulations of the Board.

Section 203 of The Clean Streams Law, *supra*, provides, in pertinent part, as follows:

"§691.203 MUNICIPAL SEWAGE

. . . . .

(b) . . . . . the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act . . . . . Such orders may prohibit sewer system extensions, additional connections, or any other action that would result in an increase in the sewage that would be discharged into an existing sewer system or treatment facility."

Section 610 of The Clean Streams Law, *supra*, provides, in pertinent part, as follows:

"§691.610 ENFORCEMENT ORDERS

The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act. Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the Permittee, or any person or municipality is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department: . . . . The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act. An order issued under this section shall take effect upon notice, unless the order specifies otherwise. An appeal to the board of the department's order shall not act as a supersedeas: Provided, however, That upon application and for cause shown, the board or the Commonwealth Court may issue such a supersedeas. The right of the department to issue an order under this section is in addition to any penalty which may be imposed pursuant to this act. The failure to comply with any such order is hereby declared to be a nuisance."

We find that, in these sections, the Legislature has provided clear authority to the Department to issue the type of order which was issued to Sellersville. We conclude that the Department was not required to give notice to Sellersville that it was contemplating the issuance of this Order, nor was the Department required to enter into a fact finding hearing prior to the issuance of this Order.

Sellersville takes the position that Sections 203 (b) and 610 of The Clean Streams Law, *supra*, each require the Department to make positive findings as to the necessity for its orders and that notice and a hearing are prerequisites to the validity of those findings.

Sellersville directs our attention to certain language contained in Section 91.33 (b) of Chapter 91 of the Rules and Regulations of the Department, adopted September 2, 1971, as further authority for its position. That language is as follows:

"§91.33 PERMIT REQUIREMENTS

. . . . .

(b) No person or municipality shall authorize or permit the added discharge of sewage or industrial wastes into a sewer, sewer system, or treatment plant owned or operated by such person or municipality without written authorization from the Department *where such person or municipality has previously been notified by the Department that the sewer, sewer system or treatment plant is not capable of conveying or treating additional sewage or industrial wastes*, or is not operated or maintained in accordance with the permit or applicable orders, rules and regulations." (Emphasis Supplied)

We find that the "previous notification" required can be and is, in this case, in the form of the Order which was issued to Sellersville.

Furthermore, Sellersville has overlooked the existence of the provisions contained in Section 20 of the Act of December 3, 1970, P.L. 834, No. 275, 71 P.S. 510-21, which act was added to the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, 71 P.S. 510-1 *et seq.* This Section provides, in pertinent part, as follows:

"§510-21 (Adm. Code §1921-A)  
ENVIRONMENTAL HEARING BOARD

. . . . .  
. . . . .

(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.

(d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas."

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We conclude that this Section certainly provides authority to the Department to, *inter alia*, issue an order without previous notification to the party against whom it is directed.

When such an order is issued, the party against whom it is directed may request a supersedeas to stay its enforcement, which Sellersville did not do, or appeal to this Board for a review of the validity of the order, which Sellersville has done.

Sellersville argues that under fundamental principles of due process, applicable to administrative proceedings as well as judicial proceedings, the Department could not validly issue this Order without prior notice and hearing.

It is well established, however, that due process of law is not denied when prescribed administrative procedure is faithfully pursued upon due notice and with an opportunity to be heard before the matter becomes final. *Commonwealth, to Use of Unemployment Compensation Fund v. Lentz*, 353 Pa. 98, 44 A.2d 291 (1945); See also, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 549 (1950); *R. A. Holman & Co. v. Sec.*, 112 U.S. App. D.C. 43, 47, 299 F2d. 127, 131, Cert. den. 370 U.S. 911 (1962).

The Legislature has provided a statutory procedure in both The Clean Streams Law,<sup>3</sup> *supra*, and in Section 20 of the Act of December 3, 1970, *supra*, 71 P.S. 510-21, sufficient to insure that Sellersville is not deprived of its due process rights. This procedure is clearly being followed in this proceeding.

In summary, we hold that the Department has the statutory authority to issue a sewer connection ban order to Sellersville. We also hold that the Department has satisfied its burden of presenting sufficient evidence to justify its imposition of the ban on any additional discharge into the Sellersville sanitary sewer system. *F & T Construction Company v. Department of Environmental Resources, supra*.

One issue remains, that of the economic hardship visited upon Sellersville and its property owners by virtue of this Order.

We hold that the violations of The Clean Streams Law *supra*, by Sellersville, which formed the foundation for the issuance of this Order, must be abated in spite of the financial hardship which abatement activities to cure such violations might entail. See *Commonwealth ex rel Allesandrone*

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3. Section 7, 35 P.S. §691.7.

*v. Borough of Coudersport*, 85 Dauphin 82 (1966); *Commonwealth ex rel Allesandrone v. Borough of Confluence, et al.*, 87 Dauphin 214 (1967); affd. 427 Pa. 540, 234 A.2d 852 (1967).

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.
2. Sellersville is in violation of Section 202 of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202.
3. The Department properly issued a sewer connection ban on March 10, 1972, prohibiting additional discharge into the Sellersville sanitary sewer system.

#### ORDER

AND NOW, this 31st day of JULY, 1973, the Order issued by the Department of Environmental Resources on March 10, 1972, is hereby affirmed, and the Appeal of Sellersville Borough is dismissed.

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*Dresser Manufacturing Company*

DRESSER MANUFACTURING COMPANY : Docket No. 72-265

#### A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, July 31, 1973

This is a civil penalties case brought by the Commonwealth of Pennsylvania Department of Environmental Resources (hereinafter Department) against Dresser Manufacturing Division of Dresser Industries, Inc., (hereinafter Dresser) based on alleged discharges of oil to an unnamed tributary to Marsh Creek (a tributary of Pine Creek) from the Defendant's plant in Delmar Township near Wellsboro, Tioga County, Pennsylvania (hereinafter Wellsboro Plant).

Dresser makes pipe fittings at its Wellsboro Plant. In the course

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of a number of different operations, various kinds of oil are used. It is the disposal of the residual — used — oil that is at issue in this case. Three specific disposal problems were dealt with: (1) A subsurface disposal system for the overflow from the Bonderizer tanks, consisting of a septic tank and leach beds lying to the northeast of the Defendant's building (Tr. 79; Commonwealth Exhibits 2, 6, 8, 9, 12, 15, 19, 21, 23; Respondent's Exhibits B, C, D, E). This, it was complained by the Department and by at least one neighbor (Tr. 102-113, Exhibits C-1, 14, 18), resulted in pollution of groundwater, specifically wells used for drinking water in the vicinity of the plant. (2) Metal turnings from the pipe threading operations are placed in scrap carts, and the oil allowed to drain from them. (Tr. 133, 164; Exhibits C-2, 6, 8, 9, 12, 15, 16, 19, 20, 21, 23; R-B, C, D, E). This oil was originally drained to the ground (Exhibits C-6, 8, 9, 12), but subsequently a concrete trough and a holding tank were to receive these drippings, which were then hauled away. (Exhibits C-8, 12, 15, 19, 20, 21, 23; R-B, C, D, E). (3) Oil emissions from a "concrete headwall" — a drainage pipe that discharged to the end of a drainage ditch to the east of (behind) the Wellsboro Plant building, the end of the pipe being set in concrete in such a way as to form a "headwall" at the upper end of the ditch (Tr. 158, 176-177; Exhibits C-19, 20, 21, 23; R-B, C, D, E).

(1) Factually, the first of these cannot be said to be well proved. It could reasonably be held that pollution of groundwater was proved to have occurred prior to July 31, 1970 (Exhibits C-6, 9), but was corrected — or was not clearly proved not to have been corrected — following that date.

The date July 31, 1970, is significant because that is the date when Section 605 of The Clean Streams Law, Act of July 31, 1970, P.L. 653, amending the Act of June 22, 1937, P. L. 1987, as amended, 35 P.S. §691.605, permitting civil penalties for violations of The Clean Streams Law, became effective. It appears to have been the assumption of the Department, at the hearing, that civil penalties could be assessed for violations prior to that date. We do not agree. To apply a remedy such as this to actions that took place prior to the statutory enactment of the remedy would be to subject persons who performed those acts to a substantially greater legal risk than they could have contemplated at the time they performed the act. The fact that we may think the acts of

the Defendant were bad should not affect our view of the fairness - - or, we should say, unfairness - - of subjecting Dresser to a large financial liability that was not provided for by law at the time it did the acts that gave rise to the liability. See §3 of the Statutory Construction Act of 1972, Act of December 6, 1972, P.L. \_\_\_\_\_, No. 290, 1 Pa. §§1926, which provides for a presumption against giving a law retroactive effect. We do not find any persuasive reasons for overcoming that presumption in this case.

There is a larger problem with assessing civil penalties against Dresser on account of pollution of groundwater from its underground disposal system, however. The complaint charges, specifically, a discharge "into a wet weather ditch and/or a storm water drain and/or Marsh Creek." Neither this Board, nor Commonwealth Court, nor the Supreme Court, has yet decided exactly what detail is required in a complaint for civil penalties. Neither the statute nor our own Rules of Procedure resolve that question. We hold now that as a matter of due process the Defendant must be put on reasonable notice as to exactly what he (or she or it) is accused of. A complaint need not necessarily specify a violation in terms of milligrams per liter, type of oil, and the like. Pre-Hearing Memoranda and discovery may provide detail. But it should give notice sufficient that the Defendant may know, from the Complaint itself, what experts, for example, should be retained to rebut the accusations, what records should be examined to find whether there was a violation and what corrective action should be taken to prevent a similar occurrence in the future. While it may be true as a technical matter of hydrology, that underground water and surface water are inseparable, that fact does not necessarily prove that in any particular instance a pollutant introduced into groundwater necessarily also pollutes any particular body or stream of surface water, or even surface waters generally. As a matter of due process, we do not feel that the complaint in this case gives reasonable notice to the Defendant that it would have to defend against a charge of polluting groundwater.

Perhaps in this case, where there was a month between the presentation of the Department's evidence and the presentation of the Defendant's evidence, during which month the Defendant in fact hired an expert to investigate and rebut the groundwater pollution charges introduced

by the Commonwealth at the first hearing, it could be argued that the lack of notice was not prejudicial. There are two answers to this: (a) Where due process is concerned, the outcome should not be allowed to depend on happenstance. Granted that the Defendant's expert made an investigation of the groundwater problem, it is not plausible that the investigation was as thorough as it could have been had notice been afforded earlier. To the extent it might have been more thorough, prejudice exists. (b) Given the duality of reasons for dismissing as to the groundwater pollution problem, a diminution in the quantum of prejudice resulting from the insufficiency of the complaint is irrelevant.

(2) The drainage from the scrap carts was the subject of numerous tests (Exhibits C-6, 9, 15, 16, 19, 20, 21, 23). Unfortunately, only one of these, of a sample taken January 28, 1973, specifies the concentration of the oil (Exhibit C-16). In other samples, the presence of oil was confirmed by visual tests, some denominated "infrared" (I.R.) and/or "ultraviolet" (U.V.) with no chemical testing, so far as we can tell. If the tests were spectroscopic in nature, they may well have been the best way of determining the identity of the oil. In some of the testing, this was apparently the object - - see e.g., Exhibits C-6, C-9. Spectroscopic investigation however, is not sufficient to determine concentration - - or if it can be with respect to some pollutants, even oil, quantitative analyses were not performed here.

The ruling of the Commonwealth Court in *Bortz Coal Co. v. Commonwealth*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971) and *North American Coal Corp. v. Commonwealth*, 2 Pa. Commonwealth Ct. 469, 279 A.2d 356 (1971), appears to us to state a principle analogous to the "best evidence rule," especially as that rule was formulated historically, see Cleary, Ed. *McCormick on Evidence* 559 *et seq.* (2d Ed., 1972).<sup>1</sup> Visual evidence of something like oil pollution is admissible and can be treated by us as substantial evidence of the existence of oil pollution, see §44 of the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, 71 P.S. §1710.44, only if there is some good reason why laboratory analysis of the concentration of oil is not available. See also

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1. See especially Note 10, p. 560, where Thayer, *Preliminary Treatise on Evidence at the Common Law*, 507 (1898) is quoted: "...The fact that any given way of proof is all that a man has must be a strong argument for receiving it if it be in a fair degree probative; and the fact that a man does not produce the best evidence in his power must always afford strong ground of suspicion." (Emphasis Supplied)

*United States Steel Corp. v. Commonwealth*, 7 Pa. Commonwealth 429, 437-8, 300 A.2d 508, 512 (1973). Even in such a case, visual identification should probably be regarded somewhat cautiously, since other things can sometimes mimic oil, in terms of the iridescent appearance of an oily film on a water surface as that iridescence appears to the naked eye (see e.g., in this case, Tr. 217-218).

Here, the tests that were made may have overcome the second caution — there were comparisons made, for example, between different samples (e.g., Exhibits C-6, C-9) — so the material in the water may fairly be taken to have been oil. The problem is that the tests did not show concentrations — and §97.63 of the Regulations of the Department specifies that a violation exists if the concentration is over 30 milligrams per liter (ppm), or if oil is visible, *if and only if* there is good reason why laboratory tests for concentrations were not available (as we interpret the opinion in *Bortz, North American*, and *U.S. Steel, supra*).

Here, there is no good reason why laboratory tests for concentrations were not available. Samples were taken (see, e.g., Exhibits C-6, C-9, C-19, C-20, C-21, C-23) and analyzed, apparently, by the same laboratory that analyzed the type of oil (see Exhibit C-21, Tr. 159). Under the circumstances, we can find no good reason why quantitative chemical analyses to determine concentrations of oil were not made.

Accordingly, the only violation related to drippings from the scrap carts for which we can really justify assessing a penalty, on the basis of the evidence, is the violation occurring on January 28, 1971 (Tr. 80-102; Exhibit C-16, 17).

In that instance, the Department's representative, Mr. Howard Stabley, accompanied a representative of the Fish Commission, Mr. Hoover, in response to an anonymous telephone complaint, to observe an employee of Dresser pumping out the holding tank that had been constructed to receive the drippings from the scrap carts (Exhibits C-8, 12, 16). The two men arrived apparently as the pump was about to be shut down, and after watching for several minutes observed an employee come out of the Dresser building and withdraw a hose from the holding tank (Tr. 82-83). They then engaged him — a Mr. Davis — in conversation and elicited from him the admission that he had been instructed to pump out the holding tank. There was some conflict in

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testimony as to whether Mr. Davis had been instructed to pump out oil or not (Tr. 86, 101). Dresser argued that he was instructed to pump out only the surface water that would have flowed into the tank, the object being to avoid having to pay to truck away large quantities of rain water.

There was no testimony, however, that Mr. Davis was instructed to make the necessary calculations or observations to make certain that only water, not oil, was in fact pumped (Tr. 99, 101-102). As it happened, a sample was taken of the material that was discharged which showed 30% oil — equivalent to 300,000 parts per million, or about 10,000 *times* the amount allowed by law. Incredibly, neither the representative of the Department nor the representative of the Fish Commission looked into the tank to see whether Mr. Davis had simply pumped until fluid stopped going through the pump or whether he had perhaps been watching to try to avoid pumping oil (Tr. 88, 100).

We do not have sufficient evidence, quite, to conclude that this discharge was willful. We can, and do, conclude that the discharge of oil in the concentration found could have occurred only as a result of a complete failure to take any precautions to insure it would not happen. While not willfulness, this is at least gross negligence, negligence so great as to be evidence of a complete disregard for the consequences of the action taken.

(3) The third discharge complained of, the discharge of oil-bearing wastes from the drainpipe at the "concrete headwall" (see Exhibit C-2), is subject to many of the same objections as outlined in our discussion of the scrap cart discharge, above. Specifically only two samples can be said to have revealed a concentration: (1) A sample taken March 14, 1972, by George Fetchko (Exhibit C-21) showed 760 ppm of oil. (2) A sample taken February 3, 1972, by George Fetchko (Exhibit C-20) showed oil, but the laboratory indicated that a separate bottle must be sent for the parts per million of oil. (Tr. 159, Exhibit C-20).

With respect to the second, however, Mr. Fetchko did indicate that in the collection bottle there was approximately one-half inch of oil. Simple arithmetic calculations reveal that the depth of liquid in the bottle would have to have been more than 13,888 feet in order for there to be one-half (1/2) inch of oil and also an initial concentration of less than

30 ppm.<sup>2</sup> Unfortunately, we do not know how approximate Mr. Fetchko's "approximately one-half (1/2) inch" (Tr. 158) was — even one-fourth (1/4) inch of oil in the top of a bottle would almost undoubtedly be more than 30 ppm, however. The more important unknown is the shape of the sample bottle. We do not know that it was standard; we know nothing about it. If it had a very wide base and a very narrow neck, the imputed concentration might be significantly less.

Despite the fact that we can say that the concentration in this sample was probably greater than 30 ppm, we are not willing to bridge the uncertainties in such a way as to ultimately impose a monetary liability, based on this sample. The degree of uncertainty is simply too high.

Hence, we conclude that the only violation for which we can impose a civil penalty occurred on March 14, 1973. With respect to that violation, the Defendant argued that it was not fully known where the oil came from. It was alleged that the pipe drained the nearby road, the Defendant's parking lot and portions of the Wellsboro Plant (Tr. 161-2). Even if the oil that was found emanated from the parking lot, we think that the Defendant should be held responsible, based on the reasoning in the Pennsylvania Supreme Court's decision in *Harmar Coal Co. v. Department of Environmental Resources*, Docket No. Civil 89-90 (Decided March 16, 1973). Such drainage would be occasioned by the Defendant's operation, in the sense that if Defendant were not operating its plant, the discharge would not occur. It would be the Defendant's responsibility to treat it.

But we are convinced that oil concentrations of this magnitude are unlikely to have emanated from either the parking lot or the road. There was no testimony that it was raining that day, or that any recent accident on the road had occurred that would be likely to result in any significant proportion of the contents of the discharge from the "concrete headwall." On the day in question, the storm drains in the parking lot

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2. 1,000,000 divided by 30 would give 333,333, the number of half-inches high the bottle would have to be in order to account for a concentration of 30 ppm., assuming the bottle was cylindrical, or at least that all sides were perpendicular to the bottom. 333,333 divided by 24 (the number of half-inches per foot) gives 13,888.

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were lifted, and Mr. Fetchko testified "there was no visible flow in these storm grates" (Tr. 161-2). If there was no visible flow there, then there must not have been much storm water drainage from the road either. The only place left is the plant itself.

We conclude that the oil in the sample taken that day could only have come from the Defendant's Wellsboro Plant.

Two legal defenses are raised with respect to the second charge, one of which also applies to the third. First, it is claimed that assessing a civil penalty for pumping out the holding tank on January 28, 1971, would be double jeopardy, since the Defendant has already paid a fine to the Pennsylvania Fish Commission. Technically this is a criminal fine even though paid under the "field settlement" provisions of The Fish Law, §§200, 279 of the Act of May 2, 1954, P.L. 448, as amended 30 P.S. §§200, 279. Section 605 of The Clean Streams Law, *supra*, explicitly provides that civil penalties may be sought in addition to criminal penalties or injunctive relief. This, it seems to us, is proper. *Commonwealth v. Diefenbacher*, 14 Pa. Super. 264 (1900); *Commonwealth v. McMenemy*, 122 Pa. Super. 91, 184 A. 679 (1926); and see Annotation, "Conviction or Acquittal in Criminal Prosecution as Bar to Action for Statutory Damages or Penalty," 42 A.L.R. 2d 634 (1955). Civil penalties are analogous to damages in an intentional tort case, however, both compensatory and punitive. C.f. Prosser, *Torts* 9-26 (4th ed. 1972). In a case where the act complained of was both an intentional tort and a crime, it might happen that the Defendant might pay a criminal penalty and also pay damages — both compensatory and punitive — to the injured party. In this case the injured party is the public, and it does not seem to us to be double jeopardy to require payment into the Clean Water Fund a sum of money by way of civil penalties that will partially substitute for the unavailability of tort damages in a case where the injury is diffused so widely through the public that no particular citizen can reasonably recover individually. Samuelson, "The Pure Theory of Public Expenditures", 36 Rev. of Economics and Statistics 387 (1954). The article filed with the supplemental brief of Respondent on July 11, 1973, Polelle, "The Illinois Environmental Protection Act: Constitutional Twilight Zone of Criminal and Civil Law," July, 1973, Illinois Bar Journal 584, presents some interesting arguments, but we are not convinced that they are correct as applied to the situation here. The Illinois statute appears to emphasize much the criminal aspects

of the enforcement process. The Clean Streams Law is much more analogous to tort damages — compensatory and punitive — than to criminal process. We hold that the assessment of civil penalties in this case is not double jeopardy.

The second legal objection applies to both the second and the third pollution incidents (and would presumably also apply to the first, as well, were we not dismissing that on other grounds). That objection is based on the Department's letter of April 26, 1972, ordering the Defendant to clean up, and then stating:

"This Department is contemplating legal action against Dresser Manufacturing for the discharge of oil. However, in lieu of such legal action this Department will accept a contribution of \$1,000 made payable to the Clean Water Fund as provided by Section A of "The Clean Streams Law" — and there is a citation. In order to forestall such legal action, this contribution should be received in this office no later than May 15, 1972."

Dresser argues strenuously that this constituted attempted extortion within the meaning of §318 of the Penal Code, Act of June 24, 1939, P.L. 872, as amended, 18 P.S. §4318.

Our initial reaction was that, even if this was extortion, that might affect whether the perpetrator should be prosecuted for violation of the Criminal Code, but it should not necessarily affect the question of whether the Defendant had or had not violated The Clean Streams Law, *supra*, and §97.63 of the Department's Regulations, nor did it affect what the Defendant's liability under that law ought to be — that is, what the Defendant ought to pay by way of civil penalties. On further consideration, however, the Board's general "overseeing" or "supervisory" function with respect to the Department, Act of June 4, 1945, P.L. 1388, 71 P.S. §510.21(b); *McNabb v. United States*, 318 U.S. 332 (1943); *Rea v. United States*, 350 U.S. 214, 216-217 (1956); see Davis, *Discretionary Justice*, esp. 215 *et seq.* (1969); would seem to require that we consider the propriety and fairness of Departmental action even when the fundamental issue is whether an enforcement remedy should be imposed against someone whom (or which) the Department is prosecuting. *McNabb v. United States*, *supra*; *Rea v. United States*, *supra*; *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 643, 646-655 (1960).

Considered in this light, we think that there is some merit in the Defendant's complaint. We do think it is clear that the quoted paragraph was based on an attempted settlement of an action pursuant to §8(a) of The Clean Streams Law, *supra*, added by the Act of July 31, 1970, P.L. 653, 35 P.S. 691.8(a), and not §8(b), 35 P.S. §691.8(b), as argued by Defendant on oral argument (Tr. of Oral Argument, p. 33-34). On the other hand, if they had paid the \$1,000, as asked, what legal action would they have been protected against? Civil penalties, criminal action, or all possible legal actions?

We do not think that the defect in the letter is serious enough to be considered extortion — though, as noted above, that question is not really within our jurisdiction. We have, in fact, been able to discover no case, including all of those cited by Defendant in its briefs,<sup>3</sup> where the "threat" of an officer to use his legal office, in violation of the extortion provision of the Criminal Code, *supra*, was to recover money for the Commonwealth itself. *A fortiori*, we doubt whether the Criminal Code applies where the legal action that was threatened and might have been brought would have required (by statute) payment into the specific Commonwealth fund into which the officer sought to have payment made.

Furthermore, we do not go so far as to say that it is improper for the Department to attempt to settle cases out of court prior to bringing any kind of legal action. Such settlement attempts are common in purely private litigation, and perfectly proper for the Department, so long as it is completely clear on both sides what the legal basis for such pre-litigation settlement is, and as long as it is completely clear what legal action is being settled.

We do not think anything of the sort was completely clear in this case, however. The letter of April 26, 1972, or any letter of this type, should have been more specific. The Defendant should not have been left to guess what legal action it would be protected against, and what the legal basis for the letter was, or left with the impression that there was something extortionate about the offer or compromise. The spirit,

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3. *Commonwealth v. Francis*, 201 Pa. Super. 313, 191 A.2d 884 (1963); *Commonwealth v. Wilson*, 30 Pa. Super. 26 (1906). A number of cases strongly imply by the way they define extortion that the crime is limited to the taking of money for the officers own benefit. See, e.g. *Commonwealth v. Burdell*, 380 Pa. 43, 110 A.2d 193 (1955); *Commonwealth v. Hopkins*, 165 Pa. Super. 561, 69 A.2d 428 (1950).

at least, of the requirement of due process and of the Administrative Agency Law, *supra*, was violated. We believe we have an obligation to see to it that this kind of violation does not occur. While the Department is not obligated, see 71 P.S. §510.21, to follow the procedures set by the Administrative Agency Law, *supra*, we think it is obligated to act with fairness, especially in cases where this Board is not involved as a "safety valve" on these points. Based on this and on our overseeing or supervisory function relative to the Department's procedures, we will reduce the amount of the penalties somewhat, although not to zero, as requested by the Defendant. *Elkins v. United States, supra*; c.f. *People v. Cahan*, 44 Cal. 2d434, 282 P.2d 905 (1955).

Relative to the amount of penalties, we have found that the January 28, 1971, discharge was substantial; and very close to wilful. There was no testimony relative to the harm to the waters of the Commonwealth, nor of the cost of cleaning up. There was no testimony that Marsh Creek supported fish life, and was stocked (TR. 93); we can take judicial notice that oil is not generally helpful to aquatic life, and that oil in drinking water tastes bad. We find that a penalty of five thousand (\$5,000) dollars would be proper. This is reduced by one-third (1/3) based on the argument made above with respect to the letter of April 26, 1972.

Relative to the discharge of March 14, 1972, from the concrete headwall, there was no testimony relative to willfulness, the harm to the waters of the Commonwealth, or the cost of cleaning up. There was not even, in this instance, any definitively conclusive testimony as to where the oil in question came from, though as noted above it is impossible to believe that the quantity of oil involved came from the road or parking lot. Again, we can take notice of the unhelpfulness of oil discharges to aquatic life, as a general matter. We find that a penalty of \$1,000 would be proper; this is reduced by one-third, based on the argument made above with respect to the letter of April 26, 1972.

By way of summary, the Board makes the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

- (1) Defendant operates a plant in Delmar Township, Tioga

110. *Dresser Manufacturing Company*

County, Pennsylvania, near Wellsboro, where it uses oils of various kinds in connection with the manufacture of pipe fittings.

(2) On January 28, 1971, the Defendant pumped water and oil, having a concentration substantially greater than 30 milligrams per liter, out of a holding tank at its Wellsboro Plant into the waters of the Commonwealth.

(3) On March 14, 1972, the Defendant discharged oil having a concentration greater than 30 milligrams per liter into a ditch on its property, which ditch, if it was not waters of the Commonwealth, drained into waters of the Commonwealth.

#### CONCLUSIONS OF LAW

(1) The Board has jurisdiction over the subject matter of this case, and over the person of the Defendant.

(2) The acts of the Defendant, set forth in Findings of Fact numbered (2) and (3), *supra*, violated The Clean Streams Law, *supra*, and §97.63 of the Regulations of the Department, promulgated under The Clean Streams Law.

(3) The letter of April 26, 1972, from the Department to the Defendant, does not constitute extortion, within the meaning of the Criminal Code, *supra*. Nevertheless, it is proper and desirable for this Board to take the request for money contained in that letter into account in setting the amount of civil penalties.

(4) The amount of \$4,000 in civil penalties is just and proper in this case, considering all the factors required to be considered by us under §605 of The Clean Streams Law, *supra*, 35 P.S. §691.605, including factors not expressly listed therein, but which we believe are relevant.

#### ORDER

AND NOW, this 31st day of JULY, 1973, it is ordered that the Defendant pay four thousand (\$4,000) dollars civil penalties into The Clean Water Fund. The Prothonotary of Tioga County is hereby ordered to enter these penalties as liens against any property of the aforesaid Defendant, Dresser Manufacturing Company, with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth

for entry of the lien on the docket.

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*Berks Associates, Inc.*

BERKS ASSOCIATES, INC.

: Docket No. 72-309

A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, July 31, 1973

This is a civil penalties case brought by the Department of Environmental Resources (Department) against Berks Associates, Inc., (Berks) a corporation that operates a plant in Douglasville, Pennsylvania, in which it re-refines - - recycles - - used automobile crankcase oil. The complaint is based on an alleged discharge of approximately three million gallons of waste sludge from one or more lagoons at the Defendant's plant on November 13, 1970. Hearings were held before the Honorable Michael H. Malin, then Chairman of the Environmental Hearing Board, on October 30, 1972, and October 31, 1972, at the State Office Building in Philadelphia.

The Board makes the following

FINDINGS OF FACT

(1) Berks is a Pennsylvania Corporation, having its principal place of business in Douglasville, Union Township, Berks County, Pennsylvania. (Answer, 6th Defense, Para. 2; Exh. D-5)

(2) At its principal place of business, Berks is engaged in the reprocessing of used automobile crankcase oil. (Answer, 6th Defense, Para 2; Tr. 159)

(3) In connection therewith, certain residuals or waste products, are produced which, as of November 13, 1970, were stored in lagoons on Berks' premises. (Tr. 27-31)

(4) The lagoons are adjacent to the Schuylkill River, upstream from several municipal water supply intakes, including those for Pottsville and Phoenixville, Pennsylvania. (Tr. 93)

(5) The waste material in said lagoons consisted of residuals from the re-refining process consisting of various long chain hydrocarbons, derived

112. *Berks Associates, Inc.*

from motor oil and gasoline, and lead compounds derived from gasoline. (Tr. 51-52, 11-12; Ex. C-2)

(6) On November 13, 1970, following several days of rain, two lagoon walls gave way, releasing approximately three million gallons of oil compounds into the Schuylkill River. (Answer, 6th Defense, Para. 5; Tr. 87, 45-50; Exh. C-1)

(7) Prior to the break on November 13, 1970, the lagoons had less than two feet of "freeboard" — the vertical distance between the top of the liquid and the top of the lagoon wall — on several occasions; in addition, the walls were in places excessively narrow and in need of shoring up. (Tr. 32-43, 50-51, 59, 68-9, 72-73; Exh. C-2)

(8) Berks had, previous to the breach on November 13, 1970, been notified on numerous occasions by the Department that, in the Department's opinion, the lagoon walls needed strengthening. (Tr. 72-76, 59)

(9) Following the discharge, the Commonwealth, including the Department of Environmental Resources or its predecessor, and the Fish Commission, expended \$8,680.45 in monitoring, testings and various other activities related to determining the magnitude of the danger to the public from said spill, and protecting the public from said danger. (Tr. 114-125)

(10) The Federal Government also became involved extensively in the monitoring and cleanup effort following the discharge. (Tr. 95, 127, 128, 130)

(11) The concentration of lead in the material in the lagoon was tested, prior to the spill, at 10,000 parts per million (ppm). (Tr. 51, 126) Phenol concentrations were also high. (Tr. 107) This was widely reported to and known by the officials who were monitoring the effects of the discharge. (Tr. 93)

(12) Because of the spill, a number of municipal water companies were forced to shut down for varying periods of time. (Tr. 93, 126, 128)

(13) Following the discharge at least a thirty mile stretch of both banks of the Schuylkill River was covered with oil. (Tr. 107, 126)

(14) In Fairmount Park, Philadelphia, following the discharge and because of it, several hundred geese were unable to fly. (Tr. 126)

(15) According to one Commonwealth witness, this was the largest oil spill he had ever seen, aside from those caused by Agnes. (Tr. 99)

(16) Given the magnitude of the discharge, and the reported (and plausible) concentrations of lead in the discharged material, the activities of the Commonwealth, local governments, and the Federal Government were reasonable.

(17) Between November 10, 1970, and November 13, 1970, approximately 2-1/4 to 2-1/2 inches of rain fell in the vicinity of Berks' plant. (Tr. 15-16)

(18) Had the lagoons been properly maintained, with the required amount of freeboard, the breach and discharge would not have occurred. (TR. 68, 72-76)

(19) Berks spent approximately \$40,000 prior to the discharge in question investigating ways to reuse the waste material that had been stored in the lagoons. (Tr. 163, 179)

(20) As of the time of the hearing, Berks had discovered ways to reuse the material formerly disposed of in the lagoons, and the lagoons had been filled in and were no longer being used. (Tr. 162, 172)

(21) Shortly following the discharge in question Berks filed a petition in the United States District Court for the Eastern District of Pennsylvania for an arrangement with creditors under Article XI of the Bankruptcy Act. (Exh. D-5)

(22) Said action was settled by Berks paying its creditors in full. (Tr. 175-6)

(23) Berks is not now insolvent, nor would an obligation in any amount up to and including \$10,000.00 be such a hardship to Berks that insolvency would be made imminent or even probable.

#### DISCUSSION

The only real issue raised is the amount of the civil penalties. See *Commonwealth v. United States Steel Co.*, 7 Pa. Commonwealth 429, 441-2, 300 A.2d 508 (1973). With respect to this, several subsidiary legal issues were raised by Defendants.

(1) Whether the fact that the lagoons in question were no longer being used should be taken to reduce the penalty to zero. (2) Whether the Defendant's precarious financial condition should be taken into account. (3) Whether the utility of the Defendant's operation with respect to other environmental problems not directly at issue in this case should be considered by the Board in setting the amount of civil penalties. (4) The

degree of fault or negligence on the part of Berks. (5) The Defendant also contests whether the expenditures made by the Commonwealth in connection with a discharge are relevant to setting the amount of civil penalties and, if so, whether the expenditures made by the Department in this case were necessary and reasonable in connection with this spill.

(1) We do think that the fact the lagoons are no longer being used is relevant. One factor that can be used to assess the degree of willfulness or negligence is whether the Defendant has taken steps to see that the incident will not be repeated. The fact that Berks is now recycling the waste material, and that a repetition of this incident will not occur, should be taken in mitigation of whatever civil penalties we assess; we do not conclude, as Defendant would have us to conclude, that a nominal penalty should be awarded on this ground, especially where, as here, other considerations argue for a very substantial penalty. Civil penalties are analogous to punitive *and* compensatory damages in courts. The listing of both willfulness and harm to the waters of the Commonwealth as factors we must consider in assessing civil penalties almost forces this conclusion. See Prosser, *Torts* 7-23 (4th Ed. 1971). The fact that this particular Defendant can no longer be deterred from another similar violation, because of actions taken to correct the situation, may argue for lessened civil penalties — on the punitive side of the damage consideration — but that does not affect the compensatory damage aspect of civil penalties, nor does it necessarily argue for no punitive damage whatsoever where, as here, corrective action should have been taken before the incident.

(2) With respect to whether the Defendant's precarious financial condition should be taken into consideration to reduce the penalties we assess, we do accept the argument that punitive damages, at least, should not be awarded in such a way as to bankrupt individuals or corporations altogether — though we think that argument is stronger as the degree of willfulness becomes less.

Here, based on the facts, we cannot see that such a principle has any application. The Defendant has simply not shown itself to be in precarious financial condition (see Finding of Fact No. 23). Further, the degree of negligence here is substantial. Repeated warnings were issued by the Department. Finally — almost predictably — two of the lagoon walls failed, and a large quantity of oil sludge poured into the Schuylkill River. The magnitude and chemical composition of the spill would justify

a compensatory damage award of more than \$10,000.00 (the maximum that can be awarded), without any punitive damages being assessed at all. Under the circumstances, we do not think that Defendant's claim of financial precariousness is at all relevant.

(3) Nor do we think that the Defendant's past or potential future contribution to saving oil or preventing waste oil from being poured into the sanitary sewers of Philadelphia (Tr. 153-154) by its recycling operation has any relevance. Most persons who pollute, we may conclude, are doing something that is otherwise useful to society. There may be exceptions, but those exceptions are not to be found in the ranks of electric power companies, steel companies, paper companies, housing contractors, or oil reprocessors. *c.f. Lampert v. Reynolds Metals Co.*, 372 F.2d 245 (C.A. 9, 1967). The Legislature did not require the cessation of water pollution only for those whose primary activities are not otherwise useful. It required the cessation of pollution for all of us. To try to assess the relative social utility of the primary activity of different polluters in every civil penalty action would engage us in endless debates, without any observable standard of comparison. We think such an exercise would be without benefit to litigants, frustrating to litigants and to us, and harmful to the ends the Legislature sought to achieve by The Clean Streams Law.

(4) We have already commented upon the degree of fault on the part of Berks. Repeated warnings were given. The lagoons were overfilled and undermaintained. We cannot characterize the ultimate breach as willful, although we do conclude that there was great negligence.

(5) Are the expenditures made by the Commonwealth in the course of determining the extent of the damage and in trying to minimize it relevant? We think so.

Section 605 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605, requires us to consider *inter alia*, harm to the waters of the Commonwealth or its uses. The simple statement that three million gallons of oil sludge containing high concentrations of lead and phenol was discharged suggests that damage was great. One measure of that harm is the cost of the actions taken to minimize it, and the cost of determining the extent of the damage. The latter is a necessary part of the former -- it is not possible to know what to do to correct an incident such as this, or to minimize the damage, unless one has rather precise knowledge of the exact extent of the damage.

We do not say that the costs of Departmental surveillance and corrective action should be automatically billed to the Defendant. To do so might be to imply the converse: that when the Department got to the scene of a spill too late to do anything such as it did here, then our evaluation of the "harm to the waters of the Commonwealth" should be reduced, perhaps even to zero. Such an argument would be patently specious. We say only that the Department's costs are relevant evidence when considering the amount of the harm to the waters of the Commonwealth, and its uses.<sup>1</sup>

Here, we also conclude that the expenditures were reasonable, under the circumstances. An emergency situation was created by the Defendant's negligence. A large oil spill, reported to contain 10,000 ppm lead (Tr. 93), was coursing toward a number of municipal water intakes. The potential for injury to human health is obvious (the drinking water standard is 0.05 ppm 1 20-thousandths of what was in the spilled material, Tr. 93). We cannot conclude that every man-hour expended during this emergency was *necessary*. Not enough testimony was submitted to reach that conclusion (Exh. C-1; Tr. 114-125). We can and do conclude that, given this type of emergency, the man-hours expended were *reasonable*.

We note that, in this case, the actual harm to the waters of the Commonwealth and its uses were substantial. The potential harm to both the water and especially its users was even greater. Given that the compensatory damage aspect of civil penalties in this case was easily as great as the maximum allowed by law, it is difficult to see how any partial mitigation of the punitive damage aspect due to any of the above factors can affect the ultimate outcome.

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1. Unfortunately for the Defendant's argument relative to the reasonableness of what it argued were duplicative expenditures by the Department, by the Federal Government and by local authorities, the reason for the relevance of the evidence, assuming such duplication was reasonable (given the emergency), would tend to mean that we should increase, not decrease, the total civil penalties. If it was reasonable for all the levels of government involved to act as they did to protect the river and its users, then it is not unreasonable to admit evidence of that total expenditure as probative of the value of the injury to the river and its uses.

**CONCLUSIONS OF LAW**

(1) The Environmental Hearing Board has jurisdiction over this case and over the person of the Defendant.

(2) The Defendant's acts in negligently permitting a large quantity of sludge deriving from the reprocessing of automobile crankcase oil, and bearing various oil and gasoline residuals, including lead compounds and phenol, was in violation of The Clean Streams Law, §401 of Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §401, and §§97.63 and 101.4 of the Rules and Regulations of the Department.

(3) In view of the high degree of negligence present in this case, combined with the high degree of harm to the waters of the Commonwealth, the Board concludes that a penalty of \$10,000.00, the maximum the law allows for a discharge of less than one day's duration, would be just and proper in this case.

**ORDER**

AND NOW, this 31st day of JULY, 1973, in accordance with Section 605 of The Clean Streams Law, 35 P.S. §691.605, civil penalties are assessed against Berks Associates, Inc., in the amount of \$10,000.00. This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Berks County is hereby ordered to enter these penalties as liens against any property of the aforesaid Defendant Berks Associates, Inc., with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

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118. *Robert F. Froehlke*

<b>ROBERT F. FROEHLKE</b>	<b>Docket No. 72-341</b>
Secretary of the Army	:
Room 3E 718 Pentagon Building	:
Washington, D.C. 20310	:
<b>DANIEL E. DUGGAN</b>	:
Commanding Officer	:
U. S. Army Ammunition Plant	:
Scranton, Pennsylvania 18501	:
<b>CHAMBERLAIN MANUFACTURING CORPORATION</b>	:
Scranton Army Ammunition Plant	:
P. O. Box 1307	:
156 Cedar Avenue	:
Scranton, Pennsylvania	:

**A D J U D I C A T I O N**

By **ROBERT BROUGHTON**, Chairman, July 31, 1973

This case arises on a Complaint for Civil Penalties filed by the Department of Environmental Resources on September 5, 1972, against Chamberlain Manufacturing Corporation, the operator of the United States Army Ammunition Plant at Scranton, Pennsylvania, against Daniel E. Duggan, Commanding Officer of that facility, for the United States Army, and Robert F. Froehlke, Secretary of the Army. The Complaint charged a number of specific violations of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, *et seq.*, and the Regulations of the Department promulgated thereunder, including: (1) discharge of oil in amounts exceeding 30 parts per million; (2) discharge of substances harmful to aquatic life; (3) discharge of industrial waste without adequate treatment; (4) discharge of industrial waste without a permit; (5) discharge of industrial waste in violation of The Clean Streams Law and the Regulations of the Department without notifying the Department.

The Defendants ignored the Complaint and did not file an answer within fifteen (15) days as required by §21.22 (b) of this Board's Rules of Procedure. On October 19, 1972, a Default Judgment was issued against them. That Default Judgment ordered that a hearing be held for the purpose of fixing the amount of civil penalties to be assessed. That hearing was held in the Lackawanna County Court House, Scranton, Pennsylvania on December 18, 1972. Present were Gerald C. Grimaud, Esquire,

representing the Commonwealth and James W. Walker, Esquire, an Assistant United States Attorney, purporting to represent the Defendants. Mr. Walker objected to the jurisdiction of the Board, alleging this was a suit against the United States, barred by the doctrine of sovereign immunity. Upon that objection being overruled, at least tentatively at that time for the purpose of going forward, Mr. Walker left. A two page Memorandum on the question of this Board's jurisdiction, citing several cases, was also filed. That was the extent of the Defendant's participation in this case(!).

The Board makes the following Findings of Fact.

1. Defendant, Robert F. Froehlke, is Secretary of the United States Army and is in command of all United States Army installations. (Default Adjudication)

2. Defendant, Daniel E. Duggan, is Commanding Officer of the United States Army Ammunition Plant located in Scranton, Pennsylvania. (Default Adjudication)

3. Defendant, Chamberlain Manufacturing Corporation, is a foreign corporation organized under the laws of Iowa and having a Certificate of Authority to do business in the Commonwealth. Defendant (Chamberlain) is the operating contractor for the Scranton Army Ammunition Plant which is a totally United States Government owned facility. (Default Adjudication)

4. All Defendants were duly served with the necessary Pleadings and were properly made aware of the instant action against them. (Tr. 2-6)

5. The United States Army Ammunition Plant of Scranton, Pennsylvania (hereinafter sometimes referred to as the "plant" or the "ammunition plant"), consists of six (6) buildings, including three (3) production buildings on 15.3 acres of land. Commonwealth Exhibit 1 (Commonwealth exhibit hereinafter designated by the letter ("C")) (C-3, Default Adjudication)

6. The primary function of the ammunition plant is the production of metal parts for 155 millimeter and 175 millimeter ammunition shells. (C-1, C-3)

7. More than 1,000 persons are employed at the ammunition plant and work is carried on in three shifts per day. (C-1)

8. The ammunition plant has three different water collection

120. *Robert F. Froehlke*

systems: domestic, industrial and storm. (C-3)

9. No laboratory tests are run by any of the Defendants on the waste-water coming from the plant, no laboratory facilities are available for this purpose, and no operating records are maintained on waste-water discharges. (C-3, Tr. 47)

10. The discharge of industrial waste from the plant flows into Roaring Creek, a tributary to the Lackawanna River into the Susquehanna River Basin, and has a flow in excess of 1.5 million gallons per day. ("MGD") (C-1, C-3, Tr. 28)

11. The industrial waste which makes up said primary discharge contains the following contaminants: oil, phosphate, copper, chromium, zinc, lead, iron, manganese, magnesium, cadmium, sulphates, fluorides and suspended solids. (C-5, 8, 9, 20, 21, 29; Tr. 60, 69, 70, 83, 90-94)

12. Oil, in excess of 30 parts per million ("ppm"), is a principal contaminant contained in the subject industrial waste causing damage to the waters of the Commonwealth. (C-6 through C-12, 15-19, 22-28; Tr. 12, 67-69, 72, 74-76, 78-79, 85-86.)

13. Another principal contamination also creating an extremely toxic condition in the receiving stream, is a combination of heavy metal compounds contained in the subject industrial waste discharge which results in a highly synergistic condition, such that the condition of pollutants is far more damaging to the receiving stream than any single one of the pollutants would be, taken by itself. (Tr. 93-94)

14. The subject industrial waste discharge, containing aforesaid contaminants, is a continuous discharge and has continued, at least from the year 1963 to October 4, 1972, when the last tests were made at and in the vicinity of the subject ammunition plant's discharge. (C-5 through C-19, C-22 through C-29; Tr. 12, 15, 35-36, 40 54-55, 58, 60, 64-79, 81-82, 85-86, 90, 94)

15. Domestic wastes are collected in a separate collection system and discharged to the Scranton Sewer System. (C-1)

16. There is no treatment of any industrial waste at this plant. (C-1; Tr. 48: Default Adjudication)

17. The subject plant has no industrial waste discharge permit from the Pennsylvania Department of Environmental Resources and there is no intention to secure one. (Tr. 42; Default Adjudication)

18. The manager for Defendant Chamberlain Manufacturing Corporation believed at the time of the hearing, on advice from counsel, that no permit was necessary. (Tr 52)

19. No one at the ammunition plant has ever notified the Department of Environmental Resources of any particular polluttional discharge into the waters of the Commonwealth. (Tr. 51, Default Adjudication)

20. The subject industrial waste at point of discharge, as well as in Roaring Creek downstream from the point of discharge, has a cloudy, milky appearance with black globules apparent. (Tr. 15, 19, 58; and various photographs introduced into evidence.)

21. A large portion of the industrial waste-waters which make up the subject discharge comes from an area in the installation known as the forge shop, and that flow amounts to over 1.5 MGD discharged into Roaring Creek. (C-1, C-3)

22. The forge shop waste-waters consist of cooling water, waste-water from forge presses, leakage and exhaust water from the high pressure hydraulic system, and floor drainage, the principal pollutants being grease and oil from the high pressure hydraulic system and metal pollutants in the production process. (C-1, C-3; Tr. 37-38)

23. Tests conducted by the United States Army Environmental Hygiene Agency indicated a concentration of 149 parts per million (ppm) of grease and oil in said waste-waters. (C-1)

24. Approximately 200,000 gallons per day ("GPD") of oil leakage and bleed-off is discharged from the hydraulic system in the high pressure system area of the forge shop (the fluid containing about one part of oil in 76 parts of water, i.e., 13,300 ppm) to Roaring Creek without treatment. (C-3, Tr. 37-38)

25. Approximately 180,000 GPD of industrial waste containing small scale particles of iron are discharged from the descaling operation in the forge shop, to Roaring Creek without treatment. (C-3, Tr. 38)

26. Approximately 6.5 MGD of water containing small amounts of guench and hydraulic oil contaminants is used for cooling purposes and waste-water therefrom is discharged directly into Roaring Creek without treatment. (C-3)

27. Phosphate sludge tanks, after the majority portion of the sludge is suitably disposed of, are flushed, with a portion of the waste-water

122. *Robert F. Froehlke*

going into Roaring Creek untreated. (C-3)

28. Two 1,250 gallon alkali tanks of biodegradable cleaners are discharged into Roaring Creek, untreated, approximately once per month. (C-3)

29. Whenever necessary, the heat exchangers at the installation are cleaned with a compound known as Borzin (containing Borzin, oil and scale) and then flushed into Roaring Creek untreated. (C-3)

30. Condensation drained from the oil storage tanks, containing small quantities of #6 fuel oil that was bled off with the condensation water is collected in the tank farm area and approximately once per month this waste-water is discharged directly into Roaring Creek without treatment. (C-3)

31. Approximately 300,000 GPD of water containing various unnamed additives is used for cooling purposes in the forge shop area. This water is discharged into Roaring Creek untreated. (C-3; Tr. 41)

32. In various portions of the installation the floors and drains are covered with a thick coating of graphite grease. The floor drains discharge directly into Roaring Creek. (Tr. 35, 44, 81-82)

33. Roaring Creek is in relatively good condition biologically upstream from the subject point. Pollution sensitive invertebrates and fish live in that portion of the stream. (C-29; Tr. 91)

34. The subject discharge of industrial waste is of such a nature and contains such combination of contaminants that no fish could live even one half mile downstream from the subject discharge. (Default Adjudication; C-6. C-29; Tr. 64, 91-94)

35. Downstream from the subject discharge in contrast to the condition upstream from the discharge, the biological community is "very, very depressed", the invertebrate population which lives there is "very, very restricted", and the "overall conditions" are very polluted. (Tr. 92)

36. The continuous and knowing discharge by the Defendants of a large quantity of obviously badly contaminated industrial waste is so willful as to amount to a malicious disregard of State water quality laws and of the health and welfare of the citizens of Pennsylvania on the part of the Defendants. (Entire Transcript of testimony)

37. Over the years at least from 1963 through October 4, 1972, the Defendants disposed of polluting substances without taking all necessary measures to prevent such substances from reaching the waters of the

Commonwealth.

38. Respondents placed an oil separator in the installation in "the fall of 1972" and a water diversion system was installed on or about October 30, 1972, so as to cut down on some of the pollution to Roaring Creek. (Tr. 40, 55)

39. However, industrial waste-waters containing some contaminants, in quantities not known to this Board, continue to be discharged into Roaring Creek. (Tr. 38, 41, 44, 45)

### DISCUSSION

Two major issues are presented for decision: First, does this Board have jurisdiction over the action, or is our jurisdiction barred by operation of the doctrine of sovereign immunity? Second, assuming we do have jurisdiction, what should be the amount of the civil penalties imposed?

#### I. JURISDICTION

Central to this case is whether the action is one against the named individual Defendants in their capacity as agents of the United States, seeking to impose liability upon them for carrying out their duties as such agents, or is it seeking to impose liability against them for violations of law unrelated to or independent of their duties as agents of the United States.

If the actions complained of — the polluting of the waters of the Commonwealth, the failure to obtain a permit, etc. — were the actions of the United States, then this action is barred by the doctrine of sovereign immunity or, what is the same thing for our purposes, the jurisdiction of this Board would be barred since the action would then be an action against the United States, and jurisdiction would be limited to the Federal courts. (28 U.S. C. §1346)

Whether the action is so barred depends upon whether the individual Defendants can be said to have been violating The Clean Streams Law and the regulations promulgated thereunder in the course of their duties as federal officials and contractors, or whether in doing so they were acting outside the scope of their duties as federal officials.

If the Defendants were acting entirely outside the scope of their authority, then the suit cannot be viewed as one against the United States. See, generally, Byse, "Proposed Reforms in Federal 'Non-Statutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harvard L. Review. 1479 (1962), and Ausness, "The Effect of Sovereign Immunity on Environmental Protection Suits against Government Officials," 6 Valparaiso L. Rev. 1, 3-7 (1971), and cases cited therein.

Since it does appear to be clear that the manufacture of ammunition at this facility is authorized by law, generally (and for purposes of this decision we explicitly assume that to be so), the question must be whether the individual Defendants in performing those duties in such a way as to violate State anti-pollution laws, become personally liable for such violations. As already noted, *supra*, Assistant United States Attorney James W. Walker, Esquire, appeared at the hearing on December 18, 1972, in Scranton, Pennsylvania, and filed a Memorandum of Law citing seven cases to support the Defendants' position that this is in reality a suit against the United States Government, and therefore barred by the doctrine of sovereign immunity.

Perhaps the leading case on this issue, is *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). There, *Plaintiff, Domestic & Foreign Commerce Corporation* brought suit to enjoin the sale of certain surplus coal to any other person, claiming that the War Assets Administration had already sold the coal to it.

Pursuant to a demand from the government, the Plaintiff had tendered a letter of credit in order to preserve its right under its original bid for the coal; the War Assets Administrator (originally a man named Littlejohn — Larson was substituted in the course of the litigation) claimed that a cash deposit was required and therefore treated the tender of the letter of credit as a breach of contract, and refused to deliver the coal. The United States Supreme Court made an analogy to the field of agency law, 337 U.S. at 695:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would

be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law, of torts. But the action itself cannot be enjoined or directed since it is also the action of the sovereign."

Two significant points distinguish this case from *Larson*.

(1) In this case, we are concerned not with a case where the relief sought would require action or inaction by the government, but with the very exception alluded to in the quoted passage, and dealt with extensively in both the majority and dissenting opinions. Even if the general activity is authorized, and even if the act would be regarded as the act of the principal, the agent is not necessarily immunized from tort liability. The fact that the principal in this case is immune from suit under the doctrine of sovereign immunity does not mean the agent is. As the Supreme Court put it, 337 U.S. at 694:

"An agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent's action, because tortious, is, for that reason alone, ultra vires his authority. An argument to that effect was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected."

See also *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549 (1922), discussed with approval in both the dissent, 337 U.S. at 718 *et seq.*, and the majority, 337 U.S. at 686 and 702 (footnote 26) opinions in *Larson*. The position of *United States Fleet Corp.* in the *Sloan Shipyards* case seem especially closely analogous to the position of *Chamberlain Manufacturing Corp.* in this case, except that here it is not jurisdiction over property that is at stake — it is liability for a wrong committed against the citizens of Pennsylvania and the United States. A *fortiori*, if suit was not barred in *Sloan Shipyards*, it is not barred here. *United States v. Sherwood*, 312 U.S. 584 (1941), and *United States v.*

*Shaw*, 309 U.S. 495 (1940), both cited by Assistant United States Attorney Walker in his Memorandum filed with the Board, are both cases where the remedy sought would have to have been rendered against the Government, not the agent. They are not, therefore, relevant here. The Commonwealth in this case does not seek to require or to enjoin action by the United States Government, it seeks to impose civil penalties — analogous to tort liability — upon the individuals responsible for polluting the waters of the Commonwealth.

(2) Secondly, it is not possible to conclude, here, that the actions of the individuals responsible for polluting the waters of the Commonwealth were authorized. On the contrary, the Federal Water Pollution Control Act as it was in force when the polluting activities of the Defendants occurred, provided as follows, 33 U.S.C. §1171:

"(a) Each Federal agency (which term is used in this section includes Federal departments, agencies, and instrumentalities) having jurisdiction over any real property or facility, or engaged in any Federal public works activity of any kind shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purpose of this chapter in the administration of such property, facility, or activity . . . ."

The 1972 Amendment to this Act did not change the basic import of this section — if anything they made it even more forceful. 33 U.S. C. §1323, added October 18, 1972, provides:

"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, Interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so . . . ."

The Presidential action referred to in the section in force in 1970<sup>1</sup> may be found in a series of Executive Orders, the most recent of which, Executive Order No. 11507,<sup>2</sup> has been in force from February 5, 1970, to the present, provides in relevant part:

"Section 1. Policy. It is the intent of this order that the Federal Government in the design, operation, and maintenance of its facilities *shall provide leadership in the nationwide effort to protect and enhance quality of our air and water resources.*

"\* \* \*

"(c) The term 'facilities' shall mean the building, installations, structures, public works, equipment, aircraft, vessels, and other vehicles and property, owned by or constructed or manufactured for the purpose of leasing to the Federal Government.

"(d) The term "air and water quality standards" shall mean respectively *the quality standards and related plans of implementation, including emission standards, adopted pursuant to the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended, or as prescribed pursuant to Section 4(b) of this order.*

"\* \* \*

"Sec. 4. Standards. (a) *Heads of agencies shall ensure that all facilities under their jurisdiction are designed, operated, and maintained so as to meet the following requirements:*

(1) *Facilities shall conform to air and water quality standards as defined in Section 2 (d) of this order . . .*

"\* \* \*

"(3) The use of municipal or regional waste

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1. The most recent enactment of that section, and the one quoted, was signed by the President on April 3, 1970, after the earliest pollutional incidents complained of in this action, but well before July 31, 1970, the date when the civil penalties provisions of The Clean Streams Law were enacted, Act of July 31, 1970, P.L. 653, amending the Act of June 22, 1937, P.L. 1987, as amended.

2. 35 F.R. 2573, 1973, Vol. 3, U.S. Code Congressional & Administrative News 6218; Executive Order No. 11507 superseded Executive Order No. 11282 of May 26, 1966, and Executive Order No. 11288, of July 2, 1966. Although Executive Order No. 11507 was issued prior to the effective date of the 1970 amendments to the Federal Water Pollution Control Act, *supra*, there is no other relevant Presidential action. Certainly no Presidential action that we have been able to discover, or that has been referred to our attention, has been taken that would exempt the subject ammunition plant from the law. Cf. *California v. Davidson*, 3 E.R.C. 1157 (Interlocutory Ruling, not published in F. Supp.) (N.D. California, 1971)

collections or disposal systems shall be the preferred method of disposal of wastes from Federal facilities. Whenever use of such a system is not feasible or appropriate, the heads of agencies concerned shall take necessary measures for the satisfactory disposal of such wastes, including:

(A) When appropriate, the installation and operation of their own waste treatment and disposal facilities in a manner consistent with this section.  
" \* \* \*

(4) *The use, storage, and handling of all materials, including but not limited to, solid fuels, ashes, petroleum products, and other chemical and biological agents, shall be carried out so as to avoid or minimize the possibilities for water and air pollution.* When appropriate, preventive measures shall be taken to entrap spillage or discharge or otherwise to prevent accidental pollution. Each agency, in consultation with the respective secretary, shall establish appropriate emergency plans and procedures for dealing with accidental pollution." (Emphasis Added)

When one interprets these laws, as well as the Executive Order, in light of the Congressional Declaration of Policy in the Federal Water Pollution Control Act, 33 U.S.C. §1151 and, more particularly, in light of the National Environmental Policy Act of 1969, 42 U.S.C. §4312-4347 (NEPA), it is clear that those in charge of operating the United States Army Ammunition Plant at Scranton, Pennsylvania, were required by Federal law to comply with The Clean Streams Law, *supra*, and the regulations promulgated thereunder. Section 102 of NEPA, 42 U.S.C. §4332, provides as follows:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, . . ."

The policies of NEPA, it is fair to say, call for an interpretation of the relevant Federal Statutes that would limit, rather than encourage, pollution from Federal facilities 42 U.S.C. §§4321, 4331. It follows that the acts of the Defendants complained of in this case were in violation of Federal law as well as Pennsylvania Law.

The authority of the Defendants in operating this facility clearly does not include the authority to pollute the waters of the Commonwealth

in the manner complained of in this case. It may well be that a suit directly against the United States Government would be barred by the doctrine of sovereign immunity<sup>3</sup> — although where a government takes actions in what appears to be deliberate disregard of the welfare of its citizens, the doctrine of sovereign immunity can only be described as pernicious and obstructive of the ends of justice. See e.g. *Larson v. Domestic & Foreign Corp.*, 337 U.S. at 707. But "where an officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do, or he is doing it in a way which the sovereign has forbidden." 337 U.S. at 689. Where the acts of the agents of the United States are in violation of the laws of the United States as well as the laws of Pennsylvania, those agents cannot claim that they are immunized on the grounds their acts were authorized.

One other line of cases must be distinguished. This line is represented perhaps most clearly by *Johnson v. Maryland*, 254 U.S. 51 (1920). In that case a criminal action was brought against a post office employee for operating a postal vehicle without a license required by Maryland law. The court, per Holmes, Jr., held 254 U.S. at 57:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons

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3. This case is clearly distinguishable from such cases as *Ohio v. Thomas*, 173 U.S. 276 (1899), where the administrator of a soldier's home used oleomargarine instead of butter at the home in violation of Ohio law, and *Mayo v. United States*, 319 U.S. 41 (1943), where fertilizer was distributed in violation of Florida registration and labeling laws by agents of the Soil Conservation Service. In those cases, the Supreme Court found that the acts of the agents of the United States, and the manner of performing those acts, were not only authorized but required by the laws of the United States: given the finding, the acts of the agent could hardly help but be upheld as the acts of the United States Government. Here we find exactly the contrary — that performing the act of manufacturing ammunition in such a way as to cause pollution, in violation of the laws of Pennsylvania, is expressly prohibited by the laws of the United States.

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competent for their work and that duty it must be presumed has been performed."

But Justice Holmes also said in the same opinion, 254 U.S. at 56:

"Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States v. Hart*, Pet. C.C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth v. Closson*, 229 Massachusetts 329. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence."

In this case, it is not the basic activity that is sought to be controlled — it is the mode of carrying it out. Pennsylvania is not seeking to control the manufacture of ammunition; Pennsylvania is only seeking to control an incidental consequence of that manufacture, *viz.* the disposal of wastes incidental to the manufacture of ammunition in such a way as to pollute the waters of the Commonwealth. If Federal law required that ammunition be manufactured in such a way as to pollute the waters of whatever state in which the manufacturing plant was located, then we should have to conclude that sovereign immunity would bar this action. *Ohio v. Thomas*, 173 U.S. 276 (1899), *Mayo v. United States*, 319 U.S. 441 (1943). But federal law requires the contrary: federal law expressly required compliance (rather than non-compliance, as in *Mayo v. Thomas*) with State water pollution control laws and procedures. The strictures of Justice Holmes' opinion in *Johnson* therefore, do not apply. No qualifications are being added to "those the Government has pronounced sufficient"; on the contrary, the Government has explicitly deferred to the State's *environmental* restrictions (qualifications) on the manner of operating the plant. Both the behavioral requirements (not to pollute) and the procedural requirements (e.g. obtain a permit, allow the agents of the Commonwealth to make inspections) touch these agents of the United States Government only incidentally, by a general rule on conduct;

they concern the way in which their duties to the United States are to be performed (*viz.* in a manner so as not to injure the citizens of Pennsylvania, and the United States). Nothing in the *Johnson* case prohibits this action, therefore.

We conclude that our jurisdiction over the Defendants in this case is not barred by the doctrine of sovereign immunity.

We note that at least one Federal court agrees with this conclusion. In *California v. Davidson*, 3 E.R.C. 1157 N.D. Cal., (1971), (Interlocutory Ruling, not published in F. Supp) the State of California sought injunctive and monetary relief against the Commanding General of Fort Ord Military Reservation, on the grounds that Fort Ord was polluting Monterey Bay in violation of State water quality standards. The Court held, on much the same grounds that we have adduced, that the doctrine of sovereign immunity was no bar to the action.

## II. AMOUNT OF CIVIL PENALTIES

It remains to consider what should be the amount of the penalty imposed. The Clean Streams Law, 35 P.S. §691.605, requires us to consider:

"In determining the amount of the civil penalty the Board shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors . . ."

In State *Real Estate Commission v. Bewley*, 1 Pa. Commonwealth 85, 272 A.2d 531, 536 (1971), cited in *United States Steel Corp. v. Department of Environmental Resources*, 7 Pa. Commonwealth 429, 300 A.2d 508 (1973), the Commonwealth Court required a detailed justification of the amounts of penalties.

"...An administrative agency which possesses both the power and authority to enforce the law and to impose penalties for violations found by it to exist, has special duties. In those cases where it is given discretion as to the penalty to be imposed, the agency should disclose in its adjudication the basis upon which it exercised its discretion. Otherwise, neither the person against whom the penalty was imposed nor a reviewing court can possibly determine whether the administrative agency abused its discretion in terms of the penalty."

In this case, the absence of any appearance by the Defendants makes that more difficult, in some respects — we were not, for example, enlightened by any cross-examination of the witnesses called by the Commonwealth on the question of damages. On the question of attitude, of willfulness, the very non-appearance of the Defendant makes our task easier.

When this action was brought, the only response of the Defendants was to claim sovereign immunity.<sup>4</sup> They did not seem to care that the pollution complained of harms citizens of the United States. They did not take any corrective action. Their attitude seemed to be that, since they were immune from suit, they could disobey the law, and injure the health of their neighbors and fellow citizens, at will. We can only conclude that the pollutorial acts complained of were not only willful but were so willful as to amount to a malicious and deliberate disregard not only for the State and Federal water quality laws already cited, but also for the health and welfare of the citizens of the United States affected by these discharges.

When added to the fact that many of the pollutants are quite harmful, and that the amount of pollution is quite large, it is the Board's conclusion that the amount of the civil penalties imposed upon the Defendants Daniel E. Duggan and Chamberlain Manufacturing Corporation, the Defendants primarily responsible for the operation of this facility, should be the maximum permitted by law. The amount which may be assessed against Defendant Robert F. Froehlke if we find that we have jurisdiction over his person, should be somewhat less than that amount, limited in accordance with his more limited responsibility. He is responsible, but only secondarily so, as the person who could have ordered the pollution stopped and did not.

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4. In a two page Memorandum filed with the Board on the question of jurisdiction there is hardly any discussion — only a short string of cases cited. One of those cases, *Loneragan v. United States*, 303 U.S. 33 (1938) is totally irrelevant, dealing with a change in unrelated procedural rules in mid-litigation, plus interpretation of the procedural rules themselves. Assistant United States Attorney General Walker purportedly representing these Defendants, may have meant to cite *Munro v. United States*, 303 U.S. 36 (1938), the next case in volume 303 U.S. Reports after *Loneragan*. *Munro*, like *United States v. Sherwood*, 312 U.S. 584 (1941), *supra*, is a Tucker Act case, and the remedy would have had to have been exercised against the United States itself. Like *Sherwood*, *supra*, it is easily distinguishable on those grounds.

With respect to whether the discharge of wastes containing oil in violation of The Clean Streams Law and the Regulations of the Department is or is not continuous, the Board notes that all the tests of the industrial waste-water flowing into Roaring Brook showed violations of the 30 ppm effluent standard of the Department.<sup>5</sup> In addition, testimony showed that every time the effluent was viewed it had a milky white appearance attributed to the presence of soluble oils and showed black oily globules, and that the stream bottom was coated with oil. (Tr. 38, 40, 67-70, 72, 74, 79, 94) Testimony also showed that nothing at the plant changed up to October 1972, that would have made the discharge less and that, as of the time of the hearing, substantial problems remained relative to which no action was contemplated. (Tr. 27, 28, 81-82)

We note that the standard of proof, in a civil penalty case, is proof by a preponderance of the evidence. One might analogize civil penalty actions either with criminal actions or with tort actions that call for punitive damages. Civil penalty actions do not brand a Defendant as a criminal, however and, although willfulness is a factor we are required to consider in setting the amount of damages, 35 P.S. §691.605, so is willfulness a major factor in most tort punitive damage situations. Prosser, *Torts* 7-14 (4th Ed. 1971). Harm to the waters of the Commonwealth, which we are also required to consider, 35 P.S. §691.605, suggests a compensatory damage aspect of civil penalty actions much more analogous to tort damages than criminal penalties. Another major factor we must consider is the cost of clean-up.

On balance, we are convinced that the Legislature, by creating the action for civil penalties, intended among other things to create a remedy

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5. Except two, both test samples taken by George E. Phillips, described in the transcript pp. 57-60, DER Exhibits C-4, C-5. There seemed to be some question about the test procedures on these tests, and they are very far out of line with all of the other tests. Mr. Phillips' test results for all contaminants differ from the results of tests performed by, for example, Jerome J. Lehman, described in transcript p. 69 by approximately two orders of magnitude -- a factor of 100! This suggests the possibility of some confusion in the units in which the tests results were expressed, (one possibility with the writer's own experience as a chemistry student, and as an associate of various science teachers, leads him to believe may even be a probability). The Board concludes that either (a) Mr. Phillips' tests were of Roaring Brook, and not of the outfall (just where the samples were taken is a bit unclear from the testimony itself), or (b) there was some defect in the test procedure, or (c) there was some confusion in the unit in which the test results were expressed.

that would provide some economic dissuasion to polluters, some compensation to the public, and also a remedy that did not require proof beyond a reasonable doubt. In this sense, civil penalty actions are analogous to abatement orders. See *North American Coal Corp. v. Commonwealth*, 2 Pa. Commonwealth 441, 279 A.2d 388 (1970). The fact that a jury trial is not provided for strengthens our conviction in this regard.

Even if we were to hold that the Department was required to prove its case beyond a reasonable doubt, however, we do not see how we could conclude that, somehow, the nature of the discharge was less or different, on all the days other than those on which chemical analyses were made. If the testimony shows that by doing particular things, effluent containing more than 30 ppm oil is produced, and testimony also shows clearly that the particular things that produce that quality effluent are what these Defendants always do, then we are compelled to conclude, by any standard of proof, that similar, bad quality effluent is continuously discharged. We so conclude.

The same conclusion is less clear with respect to the discharge of effluent containing heavy metal compounds, largely because it is not so clear from what operation within the plant these heavy metals discharges are coming. It is clear from the concentration on the stream bottom (see e.g., Tr. 82-83, 90-93), that there is more than an occasional discharge of wastes containing heavy metals compounds. Some apparently comes from the descaling operation, which was identified by at least one witness, Robert J. Blaszcak, an engineer with the United States Environmental Protection Agency, as being a major problem, and one that is not yet corrected. (Tr. 27) Some may also come from the floor drains in the large shop, also a continuing problem. (Tr. 27, 81-82) These factors combined lead us to conclude that this, also, has been a continuous discharge.

Four additional legal issues with respect to the assessment of civil penalties must be resolved:

1. Can the Board assess civil penalties for any period of time subsequent to September 5, 1973, the date when the complaint was filed? We conclude that it can. Civil penalties are analogous to recovery for torts.

Where a tort is a continuing wrong, or gives rise to damages that occur over a period of time, a court may assess permanent damages, or may assess damages up through the time when the judgment becomes effective, or may make some other provision for the payment of damages for the totality of the harm.

This Board, in two cases, has provided for periodic payment of civil penalties during a period extending into the future — the idea being that one object of civil penalty assessment is to bring about a correction of the problem, and that is likely to come about more quickly if there is a continuing series of payments that need no longer be made when the problem is corrected. *In the Matter of Price's Poultry*, Docket No. 72-289 (October 10, 1972); *In the Matter of John W. Schmidt*, Docket No. 72-187 (September 13, 1972).

We do not adopt the latter course in this case. It is true that the problem is a serious one, and the sooner correction can be brought about, the better. However, the probability of appeal, and the legal difficulties associated with this case, prompt us to close the case with respect to violations that occurred up to the time of the most recent inspection,<sup>6</sup> and to take up subsequent violations when and if the Department chooses to bring them before us. In addition, we do not know to what extent problems may have been corrected in October of 1972, (Tr. 44-46) and would prefer to hear evidence on that point prior to assessing penalties for any subsequent to October 4, 1972.

2. Can civil penalties be assessed for any period of time prior to July 31, 1970, when Section 605 of The Clean Streams Law, 35 P.S. §681.605, permitting the assessment of civil penalties, became effective? (This was suggested at the hearing. Tr. 95-98). We conclude that they cannot. To apply a remedy such as this one to actions that took place prior to its enactment would seem to us to be subjecting persons who performed those acts to a substantially greater risk than they could have contemplated at the time they performed the act. The fact that we

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6. In the case of oil pollution, the most recent test was October 4, 1972, and indicated a concentration in the discharge of 435 ppm. (Commonwealth Exh. 29). In the case of heavy metals pollution, the most recent test was December 13, 1972, and indicated very high concentrations of lead, copper and zinc in the substrate of Roaring Brook downstream from the discharge compared with concentration upstream. Compared with earlier such comparative samples, the relative concentration should have decreased if discharges had ceased for any time from this plant. We take the October 4, 1972, test as a cutoff date in both cases, however.

may think the acts of the Defendants were bad should not affect our view of the fairness — or, we should say, unfairness — of subjecting them to a large financial liability that was not provided for by law at the time the Defendants did the acts that gave rise to the liability. See also §56 of the Statutory Construction Act, Act of May 28, 1937, P.L. 1019, 46 P.S. §556, which provides for a presumption against giving a law retroactive effect. We do not see any sufficient reason for overcoming that presumption in this case.

3. Can civil penalties be assessed separately for each of several different violations that occurred simultaneously at the same plant — *viz.*, in this case, (a) violating effluent regulations relating to oil, (b) violating effluent regulations relating to heavy metals, (c) discharging industrial wastes without a permit, (d) discharging industrial wastes without treatment, (e) discharging industrial wastes, in violation of the Department's regulations, without notifying the Department?

That the same general activity may result in multiple violations is well known in the criminal law. To take an example from The Vehicle Code, one person may be found to be driving (a) over the speed limit, (b) on the wrong side of the street, (c) while intoxicated, (d) without a license. See e.g. *People v. Sharczewski*, 287 N.Y. 826, 41 N.E. 2d 99 (1942); *Sweiles v. District of Columbia*, 219 A.2d 100 (App. D.C. 1966).

We are confronted with an analogous situation here. It does not seem, in this instance, to matter whether we analogize to tort or criminal law, although most of the relevant case law we have found involves criminal law principles relating to whether or not prosecution for separate offenses arising out of the same acts constitutes double jeopardy. As long as the definition of the violations are independent, and not simply different ways of referring to the same thing, it would seem that cumulative penalties are perfectly proper. Cf. *Commonwealth ex rel Ciapoli v. Heston*, 292 Pa. 501, 141 A. 287 (1928); *United States ex rel. Bracey v. Hill*, 77 F. 2d 1970 (C.A.5. 1935); *United States v. Keresty*, 323 F. Supp. 230 (M.D. Pa. 1971)

Here, getting a permit would not insure that the other violations were not committed. It would make it easier for the Department to insure that stream water quality was maintained and would therefore help to protect the public and its interest in clean water. Relative to making it easier for the Department to administer The Clean Streams Law we point

with particularity to the effect such increased ease of administration might have on the general lack of care and cooperativeness on the part of the Defendants, such as the refusal, on October 31, 1972, to permit a representative of the Department to make dye tests to determine where certain components of the discharge into Roaring Creek might be coming from (Tr. 81-82) and the general carelessness with respect to the floor drains (Tr. 81-82) as well as the cavalier and harmful manner of disposing of phosphate sludge (Finding of Fact No. 27), and alkali cleaner tanks (Finding of Fact No. 29). Reporting violations would, similarly, help the Department to know that it should be doing something to minimize damage to the stream. These two requirements while they have similar purposes<sup>7</sup>, do not have identically the same purpose: they are not simply different ways of expressing the same thing.

Violating the restrictions on the discharge of oil, similarly, is different, as are violations of the restrictions on the discharge of wastes containing heavy metals compounds. Treatment methods designed to correct one will not necessarily deal with the others. There may be synergistic effects between the oil and the heavy metals compounds, but they are different pollutants, with different effects, and different treatment methods. Discharging industrial wastes without adequate treatment on the other hand, is simply another way of saying that effluent standards are being violated.

We conclude that, in this case, there are four separate violations, detailed under our Conclusions of Law, below.

4. Is it proper to charge each of several different Defendants, each of whom (or which, in the case of Chamberlain Manufacturing Corporation) can be said to be responsible independently, for the various violations of The Clean Streams Law and Regulations promulgated thereunder in the sense that any one of the Defendants could, at any time, have caused that law to be complied with? In the case of a tort, one

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7. A good faith attempt at compliance with either requirement, ten years ago, would probably have resulted in solving all of the water pollution problems at this plant five or six years ago. Certainly the phosphate sludge, alkali cleaner, and Borzin problem mentioned in the text (Finding of Fact Nos. 27, 28, 29), even assuming they are now solved (see Tr. 44-46) would have been solved much earlier.

would conclude that there was only one injury, and the civil penalty provision of the statute would serve to define a limitation on damages which would then be assessed against all of the Defendants, jointly and severally. *Ferne v. Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949); *McCarthy v. DeArmit*, 99 Pa. 63 (118); *Mac Holme v. Cochenour*, 105 Pa. Super. 563, 567, 167 A. 647, 648 (1933); Uniform Contribution Among Joint Tortfeasors Act, Act of July 19, 1959, P.L. 1130, 12 P.S. §2082-2089. In Pennsylvania this principle applies even to punitive damages, *McCarthy v. DeArmit*, *supra*, although this is not the case in many other states, see e.g. *Mauk v. Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903); *Kim v. Chimm*, 56 Cal. App. 2d 857, 133 P.2d 677 (1943); *Freeman v. Sproles*, 204 Va. 353, 131 S.E. 2d 410 (1963). Criminal penalties, on the other hand, would ordinarily not be awarded jointly and severally, even in the case of joint crimes such as conspiracy. We believe that, considering willfulness as one factor that we must consider in assessing civil penalties, we would not be in error if we assessed different — even cumulative — amounts against different Defendants, even where, as here, there was only one harm given a proper case. In that respect, we analogize civil penalties more closely to criminal penalties than to exemplary damages in torts.

Here, we have considered both the compensatory and punitive damage aspects of civil penalties in setting damages. Either, separately and independently, would justify awarding the maximum provided by law. At the same time, we do not have any direct evidence that would justify distinguishing between the various Defendants relative to the degree of willfulness. Froehlke, being physically more distant, may have had less knowledge; but since we do not have jurisdiction over his person, that is irrelevant. While in some cases it may be proper to award damages separately against separate Defendants, and while, even in this case, we might, if we had more evidence on the question, distinguish between the relative willfulness, degree of responsibility, and ability to pay of Chamberlain and Duggan, we do not think that there is a basis for awarding damages individually and separately in this case.

Accordingly, we will award civil penalties against Defendants Chamberlain Manufacturing Corporation and Daniel E. Duggan jointly and severally. With respect to Defendant Robert F. Froehlke, see Conclusion of Law No. 4, below.

The particular amounts assessed against each Defendant are

specified (and in some instances justified) under the numbered Conclusions of Law, below. It is realized that the amounts are large. When measured against the willfulness of the violation, however, and the harm done to the waters and people of the Commonwealth, the amounts assessed are not high.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the subject matter of this action.

2. The jurisdiction of the Environmental Hearing Board over the subject matter of this action and/or over these Defendants is not barred by the doctrine of sovereign immunity. This is not an action against the United States.

3. The Environmental Hearing Board has jurisdiction over the persons of all three Defendants. Defendants Daniel E. Duggan and the Chamberlain Manufacturing Corporation are respectively domiciled and do business in Pennsylvania and were properly served according to law.

4. The Environmental Hearing Board concludes that it has no jurisdiction over Defendant Robert F. Froehlke. *Vaughn v. Love*, 324 Pa. 276, 188 A. 299, 107 A.L.R. 1336 (1936). Defendant Robert F. Froehlke resides in Washington, D.C., but is responsible for the performance of acts in Pennsylvania that harm the citizens of Pennsylvania. However, he was served by mail and so far as this Board can determine at this point, Defendant Robert F. Froehlke may never have been within the territorial limits of the Commonwealth of Pennsylvania. See *Vaughn v. Love, supra*; *Scott v. Noble*, 72 Pa. 115 (1872); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Perhaps in circumstances similar to this the State might arrange for the required appointment of someone to receive service within the State, as it has done for foreign corporations and automobile drivers, see e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927). There is no evidence that any such "long arm" statute applies in this case, however.

5. The quantity and character of the pollutorial acts in this case, combined with the extreme willfulness of the Defendants in polluting the waters of the Commonwealth, justify and indeed compel the imposition of the maximum civil penalties provided by law.

6. The maximum civil penalties provided by law are \$10,000.00

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for each separate polluttional act, plus \$500.00 for each day during which that violation is continued.

7. Each of the Defendants has violated The Clean Streams Law, and applicable Regulations of the Department of Environmental Resources thereunder in the following particulars, each of which constitutes a separate violation, meriting a separate penalty, in the amount indicated in Conclusion of Law No. 9.

(a) On or before July 31, 1971, discharging industrial waste containing oil in excess of 30 milligrams per liter (ppm) into the waters of the Commonwealth in violation of The Clean Streams Law, 35 P.S. §691.307, and the Regulations of the Department §§95.3 and 97.63 and doing so continuously to and including the date of the most recent inspection admitted in evidence before this Board, October 4, 1972.

(b) On or before July 31, 1971, discharging into the waters of the Commonwealth industrial waste containing heavy metals, including lead, copper, zinc, and cadmium compounds, in amounts harmful to aquatic life, in violation of §§95.3, 101.3, and 97.14 of the Rules and Regulations of the Department, and in violation of The Clean Streams Law, 35 P.S. §691.307, and doing so continuously to and including the date of the most recent inspection admitted in evidence before this Board October 4, 1972.

(c) On or before July 31, 1970, discharging industrial waste into the waters of the Commonwealth without a permit, in violation of §§301, 307 and 401 of The Clean Streams Law, 35 P.S. §§691.301, 691.307, and 691.401, and in violation of §§95.3, 97.14 and 401.3 of the Rules and Regulations of the Department.

(d) On July 31, 1970, and on each day from then until at least October 4, 1972, discharging industrial waste into the waters of the Commonwealth in violation of the effluent standards established for such discharges, harmful to aquatic life, and endangering the lives and health of citizens of Pennsylvania and of the United States without notifying the Department of Environmental Resources so that action might be taken to minimize harm to the environment and to the health of the people of the Commonwealth and of the United States, in violation of §101.2 of the Rules and Regulations of the Department.

(8) The amount of civil penalties justly assessable against the Defendant Daniel E. Duggan and the Defendant Chamberlain Manufacturing

Corporation, jointly and severally, on account of the above violation, are as follows:

(a) For the violations specified in paragraph 8(a) above, \$10,000.00, plus \$500.00 per day for the period from August 1, 1970, through the last test for oil discharge which was made for this plant, a period of 796 days, or a total of \$398,000.00.

(b) For the violation specified in paragraph 8(b) above, \$10,000.00, plus \$500.00 for each day of violation from August 1, 1970, through October 4, 1972, when the last inspection relating to heavy metal discharges from this plant was made, a period of 796 days, or a total of \$398,000.

(c) For continuous violations specified in paragraph 8(c) above, \$10,000.00, plus \$500.00 for each day of violation from August 1, 1970, through December 18, 1972, the date of the hearing, at which time it was stated by the plant manager for Defendant Chamberlain Manufacturing Corporation that no permit had been obtained (Tr. 42, 52), a period of 871 days, or a total of \$435,500.00. It may be that on the issue of willfulness, since the witness said he had received an opinion of counsel (we assume he must have meant corporate counsel) that "the Federal Government does not need a permit", that should mitigate our feeling that the violation was willful and deliberate. We fail to see that Chamberlain could have reasonably believed that it was the Federal Government. Furthermore, we are not sure that such an opinion of counsel affects the question of willfulness on Chamberlain's part. Ignorance of the law does not excuse violation of the law, and incorrect advice of counsel does not excuse the violation either.

(d) For the violations specified in paragraph 8(d) above, \$10,000.00, plus \$500.00 for each day for the period from August 1, 1970, through December 18, 1970, the date of the hearing, at which time the plant manager said the Department had never been notified of any discharge (Tr. 51-52), a period of 871 days, or a total of \$435,500.00. There is some question whether, in this case, the violations should be logically considered a series of separate violations meriting a \$10,000.00 penalty for each failure to report. While that might be true under some circumstances, in this case it appears to be in reality a continuing violation and is, therefore, so treated.

142. *Robert F. Froehlke*

**ORDER**

AND NOW, this 31st day of JULY, 1973, in accordance with section 605 of The Clean Streams Law, 35 P.S. §691.605, civil penalties are assessed, jointly and severally against Defendant Chamberlain Manufacturing Corporation and against Defendant Daniel E. Duggan, in the amount of one million, six hundred sixty-seven thousand dollars (\$1,667,000.00).

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Lackawanna County is hereby ordered to enter these penalties as liens against any private property of the aforesaid Defendants Chamberlain Manufacturing Corporation and Daniel E. Duggan, with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

As against Defendant Robert F. Froehlke, the Complaint is dismissed for want of jurisdiction over his person.

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*Vito Fabiano*

VITO FABIANO

: Docket No. 73-051

**A D J U D I C A T I O N**

By **ROBERT BROUGHTON**, Chairman, August 1, 1973

This matter arises from an application for an on-lot sewage permit with respect to a lot in Fisher Road, Worchester Township, Montgomery County, otherwise known as R. D. #2, Lansdale, Pennsylvania. A hearing in this matter was held before the Honorable Gerald H. Goldberg, Member of the Environmental Hearing Board, at Norristown, Pennsylvania, on Wednesday, April 11, 1973. A view was taken by the writer on Wednesday, July 18, 1973, at the site.

Upon the basis of testimony and evidence of record, we make the following:

**FINDINGS OF FACT**

(1) Appellant is owner of a tract of land situated on Fisher Road, Worchester Township, Montgomery County, Pennsylvania. (R, 8)

(2) The Appellant purchased the lot in question approximately three years ago, and made an application for an on-lot sewage disposal system in December of 1972. (R, 9)

(3) The subject property was purchased under an Agreement of Sale which was concluded by the parties prior to the submission of an application for a permit for an on-lot sewage treatment system by the Appellant. (R, 9)

(4) The percolation tests were conducted on the tract by Edward Schlaner, a civil engineer employed by H. Metz, Inc., of Lansdale. In Mr. Metz's judgment, the results of the percolation tests were adequate to meet the standards of the Department of Environmental Resources for a single family on site sewage disposal system (44 minutes per inch). In the course of preparation of the application, Mr. Metz dug a six foot deep test pit and determined, in his opinion, that there was no evidence of a high water table within six feet of the surface, nor was there bedrock within six feet of the surface of the land. (R, 13-15)

(5) Although Mr. Metz had soil courses and geology courses during the course of his civil engineering training, he is not a soils scientist. (R, 17)

(6) Mr. Metz testified that, in the course of his examination of the test pit, he did not observe mottling or other evidence of a seasonal high water table in the soil in question. (R, 21, 22)

(7) The application in question was denied by the Department of Environmental Resources upon the basis of an alleged seasonal ground high water table. (Stipulation R, 86-87; 32)

(8) The test pit in question was visited on January 5, 1973, by Mr. John Zwalinski, Soil Scientist of the Department of Environmental Resources, and by Mr. Glen K. Stinson, Sanitarian of the Department of Environmental Resources, and was observed on another occasion by Mr. Michael Simon, Sanitarian of the Department of Environmental Resources. Each of these witnesses testified that he observed mottling within 20 to 40 inches of the soil surface. (R, 24, 25, 41, 42, 50-29, 64, 71-72)

144. *Vito Fabiano*

(9) Dr. Dale Harroun, a Soil Mechanics Engineer, President of a Soil and Foundation Consultant Firm, and Professor of Soil Mechanics at the University of Pennsylvania with some 25 years of professional experience in the field of engineering soils and soil consultation, testified that on Sunday, April 8, 1973, he made a fresh test pit on the Fabiano tract and, after observation thereof, in his opinion there was no mottling in any area of the test pit which he dug. Further he examined the test pit previously dug by Mr. Schlanser and examined by Mr. Zwalinski and his fellow members of the Department of Environmental Resources, and found no mottling in that trench. (R, 78-81)

#### ULTIMATE FINDINGS OF FACT

(1) The percolation test results incorporated in the application comply with the requirements of the Department of Environmental Resources for single family dwellings. (R, 14)

(2) More than four feet of soil exists between the bottom of the proposed drain pipe and the seasonal high water table. (R, 14, 15, 80, 81)

(3) The evidence with respect to mottling in the soil, at a depth of less than four feet under the ground surface, which in the context of this case must be taken as evidence of a seasonal high water table at such depths, disqualifies the premises for an on site sewage disposal system under the terms of the regulations of the Department, Section 73.11.

#### DISCUSSION

Reduced to its simplest terms, the narrow issue for the Board to decide in this matter is whether there is or is not a seasonal groundwater table problem on the site in question. By stipulation all other considerations are irrelevant.

The testimony on this point can be easily summarized. The expert witnesses called by the Appellant independently dug deep trenches on the site during fall and early Spring when a seasonal high water table would appear, (by coincidence, both during wet periods) and neither of them found any evidence of a seasonal high water table to depths varying from six to nine feet. Both these expert witnesses stated that no water either rose

up, or ran into the trenches, a fact that the Commonwealth's own witnesses Mr. Zwalinski and Mr. Simon agreed should be observed if such a water table were to be found, (R,35, 68, 70), provided the test was conducted in the winter and spring months. The Commonwealth's witnesses, on the other hand, testified that they observed evidence of "mottling" of the soil and that this, together with general soil data studies, indicated a seasonal high water table. Upon cross-examination by the Appellant and upon examination by the Board, the observations of the Commonwealth's witnesses were to the effect that they noted various splotches of color in the soil based upon the interaction of various mineral elements with water. Mr. Zwalinski described the mottling as a "pinkish gray", which had a Munsell Color Chart or a Shue Value Chroma of 5YR6/2. Witnesses for the Appellant, on the other hand, viewing the very same soil, indicated that they observed no such splotches or other indications of a seasonal high water table.

None of the witnesses observed standing water in the test pits. However, the Regulation does not require the presence of standing water or free water in order to demonstrate the presence of a seasonal high water table.

Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder colors in some spots, and grayer colors in others — a variation in "chroma", in particular — it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level for prolonged periods of time, say eighteen inches, as in the vicinity of the test holes examined by the Department's soil scientist, John Zwalinski, then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer — of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops, many of these nodules will be exposed to air, and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray.

We say "almost" invariably because it is conceivable that, in a particular case, a gray mottle might be due to incompletely broken up gray parent material, especially in an area where an iron-rich parent shale had overlain an iron-deficient parent shale. This sort of condition is not (we gather) common, and where the mottling exists in soil that is derived from an almost uniformly deep red triassic shale, as the soil on this tract was, the possibility of an alternative explanation for the mottling can be dismissed altogether.

Depending as it does upon personal observation, we have encountered numerous cases in which highly qualified expert witnesses have disagreed as to whether mottling was observed in the same pit at the same time. Frequently, the Department, in cross-examining witnesses for the Appellant in such cases, argues that an ordinary layman or even a professional engineer cannot be expected to recognize mottling or to testify with authority with respect thereto, without extensive special training in soil science. Dr. Harroun, the witness for Appellant who testified in the instant matter, arguably has such special training, together with many years of experience.

Given this disagreement, the Board saw no way to resolve it other than to take a view, with both experts expressing their view of what was or was not mottling. This was done on July 18, 1973, in a hole approximately 5-1/2 feet deep, dug for the purpose of having a view, at about the center of the area proposed for the leach beds. There was faint, but definite mottling at approximately 30 inches, and very distinct mottling showing at 44 to 48 inches.

Under such circumstances, we believe the law clearly requires that we find for the Department of Environmental Resources. It is well settled that the expert opinions of administrative bodies such as the Department of Environmental Resources will not be upset if they are based upon substantial evidence. In this case the Department's finding was based on substantial evidence.

We are in sympathy with the plight of the prospective home owner in the instant case. However, we have no jurisdiction to offer him equitable relief. The Department has taken the position that it must rely upon the opinion of its soil scientist, and that it has no choice other than to deny a permit for an on site sewage system in the instant case. Furthermore the Board has directly observed the mottling to which the Department's

expert witness testified; and we accept the conclusion that such mottling, in this case, is evidence of a high seasonal water table. Neither the Environmental Hearing Board nor the Department of Environmental Resources has the discretion to enforce or not to enforce the statute or regulations or to balance equities. We do observe, however, that it appears to the Board that an alternative system would function adequately in accordance with the Regulations.

Accordingly, we make the following

#### CONCLUSIONS OF LAW

(1) The Board has jurisdiction of the parties and subject matter, and said matters are properly before the Board for decision.

(2) Under all of the evidence, it must be concluded that the Department of Environmental Resources properly denied the application in the instant case based upon substantial evidence to the effect that the site has a seasonal high water table higher than that permitted by the Rules and Regulations of the Department of Environmental Resources for the issuance of an on-lot septic tank sewage system.

#### ORDER

AND NOW, this 1st day of AUGUST, 1973, it is hereby ordered that the Appeal is dismissed, and the case remanded to the Department to consider an alternative treatment system to be proposed by the Applicant.

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148. *Warren Sand & Gravel Co., Inc.*

WARREN SAND & GRAVEL CO., INC. : Docket No. 72-194

OIL CITY SAND & GRAVEL CO., INC. : Docket No. 72-195

DAVISON SAND & GRAVEL COMPANY : Docket No. 72-207

#### A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, August 8, 1973

#### HISTORY OF THE CASE

The above captioned matters have been consolidated by agreement of the parties hereto, and, except as otherwise noted herein, all statements appearing herein apply equally to all three of the Appellants.

On October 4, 1971, Warren Sand and Gravel Co., Inc. (hereinafter "Warren") and Oil City Sand and Gravel Company (hereinafter "Oil City") applied for a permit to remove sand and gravel from the bed of the Allegheny River, under the provisions of Section 1808 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-8. A similar application was made by Davison Sand and Gravel Company (hereinafter "Davison") on November 11, 1971. On Tuesday, February 29, 1972, and Wednesday, March 1, 1972, the Department of Environmental Resources conducted a hearing at Franklin, Pennsylvania, before Jack Sheffler, a Hearing Examiner for the Department of Environmental Resources (hereinafter "Department") Wesley Gilbertson, Deputy Secretary of Environmental Resources, and Vaden R. Butler, Director of Dams and Encroachments, Department of Environmental Resources. The purpose of the hearing was "to receive testimony relevant to the applications in this matter to dredge sand and gravel for commercial purposes in the Allegheny River, Venango County, Pennsylvania" (DER Tr. 4). (For clarity, page references to the February-March 1972, hearing will be designated "DER Tr.". Page references to the hearing held October 2 and 3, 1972, before the Honorable Gerald H. Goldberg, then a Member of this Board, will be designated "EHB Tr.") The Hearing Examiner indicated that the Department would "consider testimony relevant to the issue of whether the proposed (permits) will comply with the Pennsylvania Water Reclamation Act, The Clean Streams Law and the Surface Mining Conservation and Reclamation Act" and further, that "the Department will

further consider testimony relevant to the potential environmental impact of the proposed operation under Section 27, Title I of the Pennsylvania Constitution." (DER Tr. 4-5) (Certain portions of the testimony presented at that hearing, it was agreed could be considered by this Board as introduced before this Board. (See EHB Tr. 3-5) The Hearing Examiner noted that the hearing has been publicized in the Pennsylvania Bulletin and in newspapers of general circulation in the area of the proposed projects, and the Appellants herein, who were present at the hearing and represented by counsel, entered written appearances with the Department of Environmental Resources. Testimony was taken under oath, the parties were given a right to cross-examination and to rebuttal, as well as to representation by counsel. The Hearing Examiner indicated that "the nature of this proceeding is a fact-finding hearing; it is not an adjudicative hearing under the Administrative Agency Law." (DER Tr. 6) He advised the participants that, after consideration of the several applications, and the relevant testimony, the Department "shall thereupon take such action as is authorized by law, which shall be contained in a written notice directed to the applicant, and which contain a written statement of available appeal procedures." (DER Tr. 7) Judging from the transcript of those hearings taken as a whole, and from a number of comments during the course of those hearings, many participants, including some or all of the Appellants herein, believed that the issue to be decided at those hearings was whether the permits applied for would or would not be granted at all. (DER Tr. *passim*)

On April 10, 1972, the Department of Environmental Resources issued executed permits for the dredging operations of Warren and Oil City, and on April 12, 1972, for Davison. The permits, identical except with respect to the identity of the parties and the location of the proposed dredging operations, consisted of the basic permit plus several pages of typewritten terms and conditions, specifying in considerable detail the manner in which dredging operations were to be conducted by the applicants. (Appeals On May 1, 1972, Warren and Oil City filed timely Appeals with the Environmental Hearing Board and on May 15, 1972, Davison filed a timely Notice of Appeal following a fifteen (15) day extension of the appeal period granted by the then Chairman of the Board. Appealed from were three (3) of the terms and conditions, namely:

150. *Warren Sand & Gravel Co., Inc.*

(I) Dredging shall not take place any closer than fifty (50) feet from the shore line or from islands.

(II) Dredging shall not be permitted in the period between 6:00 p.m. Friday and 7:00 a.m. Monday, nor between 6:00 p.m. on the day preceding a national holiday and 7:00 a.m. on the day following the holiday.

(III) Dredging shall not take place in any natural and untouched areas. (Permits issued to applicants, Notice of Appeal Briefs of both parties)

A hearing was held upon the Appeals before the Honorable Gerald H. Goldberg, then a Member of the Environmental Hearing Board, on Monday and Tuesday, October 2 and 3, 1972, at Franklin, Pennsylvania. A further hearing was held before Mr. Goldberg on Wednesday, October 18, 1972, at Harrisburg, Pennsylvania.

#### STIPULATIONS

During the course of Pre-Hearing Conferences conducted by Mr. Goldberg, the parties entered into certain Stipulations which were made a part of the record. It was agreed that certain of the testimony taken before the Department of Environmental Resources at its hearing on February 29 and March 1, 1972, at Franklin, Pennsylvania (DER Tr.) would be made a part of the Record before the Board with the same force and affect as though the witnesses appeared on the stand, were sworn and testified thereto, subject to the right of further examination by both parties (EHB Tr. 3, 4).

It was further stipulated that the restrictions added to the permits which are the subject of the appeals were not based upon turbidity, and that turbidity is not an issue in these cases, and has no relevance to the conditions contained in the said permits. (EHB Tr. 6) The parties further stipulated:

"1. That the condition of the permit with respect to washing of the aggregate in the river, as stipulated at the hearing held before you (Mr. Goldberg) on August 24, 1972, would not apply to Davison Sand and Gravel Company by reason of the peculiar nature of their operation.

"2. With respect to the issue of excavating along the shore line, it was agreed that the Commonwealth would eliminate any conditions having

to do with terracing and that Appellants would consequently raise only the issue of the distance at which the dredged area shall intersect the stream bottom horizontally from the channel shore or island shore lines.

"3. The Appellants' experts will prepare a summary of their testimony and conclusions. Also that Dr. Bardarik or his associate John C. Alden be available for cross-examination. Mr. Grimaud has advised that Dr. Goddard shall also be available for cross-examination.

"In addition to the matters heretofore specifically mentioned, the only issues remaining have to do with the factual and legal justification for the limitations placed upon the hours of operation and the areas in which dredging may be conducted and the economic impact upon the Appellants, their customers, including the Commonwealth, their employees and the business area in which they operated resulting from such limitations."

With respect to the later statement, Mr. Grimaud, counsel for the Department of Environmental Resources, entered a general objection to the consideration of matters having to do with economics by the Board in the disposition of the subject Appeals.

#### FINDINGS OF FACT

In addition to the matters stipulated to by the parties as above noted, the Board makes the following Findings of Fact, some of which were agreed to by the parties (see Appellants' Request for Findings of Fact and Conclusions of Law; Brief for the Commonwealth of Pennsylvania):

1. Because of the cut in tonnage production, the Pennsylvania Fish Commission will receive this year from Oil City Sand and Gravel Company and Warren Sand and Gravel Company an estimated \$20,000.00 to \$25,000.00 less in royalty payments as compared with last year's \$48,670.00 based on the ten (10¢) cents per ton royalty which the industry is required by statute to pay. (EHB Tr. 26)

2. There are extensive deposits of sand and gravel aggregate in the Upper Allegheny River. (DER Tr. 30, 115)

3. The sand and gravel aggregates found in the Upper Allegheny River are of very high quality and meet the standards of the Department of Transportation (PennDOT), Commonwealth of Pennsylvania, for wearing courses on roads. PennDOT is the largest consumer of aggregate in Pennsylvania. (DER Tr. 15, 185, 190, 204, 224, 247, 314)

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4. PennDOT requires the use of an aggregate (denominated "Type A") with good skid resistant qualities for wearing surfaces on roads in order to reduce accidents, and with a high degree of hardness for traffic and construction loads. Vanport Limestone, found in Western Pennsylvania, tends to polish and become slippery under traffic conditions and is, therefore prohibited for road surfaces. Vanport Limestone would be satisfactory for other purposes; deposits of Vanport Limestone have not been developed. (DER Tr. 15, 16, 169, 185, 191, 241-2; EHB Tr. 140, 210-211)

5. The Upper Allegheny, from the limit of navigation (Mile 72) to the Kinzua Dam Mile 200) has large deposits of Type A gravel. (Exh. E-1, Report of General Analytics, Inc.; DER Tr. 137-142; EHB Tr. 309-310). Other deposits undoubtedly exist, but have not been discovered and/or developed; most of those that have been investigated to October, 1972, do not meet PennDOT's requirements for Type A gravel for road surfaces. (Exh. E-1, DER Tr. 16, 18-19, 21-24, 140; EHB Tr. 56, 57)

6. Construction and maintenance of highways accounts for forty to fifty (40% to 50%) percent of national production of both crushed stone and sand and gravel; it accounts for seventy to eighty (70% to 80%) percent of Warren's production (DER Tr. 20, 44).

7. Generally, truck hauls of Appellants' aggregates do not exceed thirty (30) miles. At that distance in the Western Pennsylvania area, transportation comprises about 40 to 50 percent of the . . . cost for sand and gravel. To double that length of haul (to 60 miles) will increase the customer's costs by another 40 to 50 percent or more. (DER Tr. 41, 30; EHB Tr. 48, 49)

"Since 1968, governmental agencies, sportsmen and conservationists have focused their attentions to instream dredging on the Allegheny River. Fears and opinions were expressed by these groups that dredging was detrimental to fishing, recreation and the ecology of the stream." T<sub>1</sub>9.

Subsequent to 1968, all Appellant dredging companies were sold by their long-time owners. T<sub>2</sub>130, 155-156.

In September 1972, William Gibb, through Warren, purchased General Concrete Products Corporation, a company dredging in the Upper Allegheny River and subject to the same restrictive permit conditions as are the other five permittees operating on subject portion of River. T<sub>2</sub>45,

and official notice.

Business in the Upper Allegheny Valley is enhanced during the summer months of each year due to the tourist industry, an industry which is largely dependent upon the Upper Allegheny River. T<sub>2</sub> 276; T<sub>1</sub> 160-166; Bramer Study.

Dredging by Appellants adversely affects property uses of riparian land owners and tends to decrease the value of their real estate. T<sub>1</sub> 288, T<sub>2</sub> 273-274.

8. The present economics of the sand and gravel business dictate that recoverable deposits must be located in areas where adjacent transportation systems permit low cost movement. At current (October 1972) trucking prices, assuming a cost at the Warren plant of about \$2.25 per ton, trucking the material about thirty-three (33) miles will equal that amount, and double the price. (EHB Tr. 48-49) DER Tr. 11, 12; EHB Tr. 235)

9. Although there has been no comprehensive study of aggregate resources in Northwestern Pennsylvania, (R, 152), there are no known substantial land deposits of aggregate in Butler, Crawford, Erie, Warren, Forest, Armstrong and Venango Counties which will meet the requirements of Type A aggregate for road surfaces as required by the Specifications of the Department of Transportation. (EHB Tr. 56, 57; DER Tr. 16, 140)

10. There are extensive land deposits of aggregates in northwestern Pennsylvania, in particular Vanport Limestone, which will meet Pennsylvania Department of Transportation standards with regard to subbase and construction, in counties referred to in finding 9, *supra.*; however, such aggregates are not satisfactory for highway road surfaces. (DER Tr. 13, 191, 242, 247, 248-249, 255, 257; EHB Tr. 150, 152-153)

11. Assuring an adequate supply of raw construction materials in the face of a growing population and expanding urban area is of increasing importance and concern. Even with the steady increase in population, the per capita production of sand and gravel has increased from about 2.5 tons per person in 1950 to about five (5) tons per person in 1969. (DER Tr. 236-238)

12. No study has ever been undertaken with the objective of

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computing the total estimated volume of sand and gravel in the Upper Allegheny River Counties. (R, 152)

13. The sand and gravel aggregate of the river is a non-renewable natural resource.

14. The practical effect of restricting dredging only to areas previously dredged would, in the immediate future, severely restrict the production of sand and gravel by Appellants and, unless existing equipment is replaced with new equipment capable of extracting material at much greater depths than is presently possible with existing equipment, all operations will be required to terminate in the pool below Oil City. (DER Tr. 41; EHB Tr. 23) With respect, however, to Davison, it is estimated that it may continue to dredge in its present location for another twenty-five to thirty (25 to 30) years with the use of equipment of comparable dredging capacity as that presently employed. (DER Tr. 218)

15. Of the 125 mile length of the Allegheny River between Mile Post 72 and Mile Post 200, approximately 6.5 miles or about five (5%) percent have been dredged in the past fifty (50) years. When measured from just below the mouth of French Creek at Franklin and Warren, the same 6.5 miles constitutes approximately ten (10%) percent. (EHB Tr. 115, 116, 118, 122, 218, 309-10, 314)

16. Warren has reached the bottom of its deposit at present, and currently has no more gravel in the existing pool to dredge. (EHB Tr. 24, 36; EHB Tr. (October 18, 1972) 8-17) Hence application of the condition limiting dredging to previously dredged areas means, for Warren, no more dredging.

17. An average of 34 dredging days were lost in 1972 due to the permit condition disallowing dredgings on weekends and holidays, resulting in loss of wages by dredger's employees and reduced production of aggregate. (EHB Tr. 23)

18. Since the dredging season is from about the end of March to December (EHB Tr. 23-32, EHB. Tr., October 18, 1972, 19) a loss of 34 days of operation due to the limitations on time of operation suggests to the Board that the Appellants did not operate on Sunday, before. (See also EHB Tr. 23, where witness William W. Gibb, president of Warren and Oil City, complained of not being able to run a Friday evening and Saturday shift.)

19. The annual advance of dredging in the past several years has

been 200 to 250 feet longitudinally. (EHB Tr. 114, 118)

20. The conditions appealed from were first promulgated by the Department as a part of the permits issued to the Appellants herein, and the first notice which Appellants had of such conditions was upon receipt of the said permits. Although the Department published a notice of its intention to conduct departmental hearings upon the said applications on February 29 and March 1, 1972, in the *Pennsylvania Bulletin* and in newspapers of general circulation in the area, such notice did not contain specific or general reference to the conditions here questioned. Nor were the terms of such conditions published anywhere prior to or following the incorporation thereof into the permits issued to the Appellants. (Official Notice, Departmental Records, Section 21.33(c) Environmental Hearing Board Rules of Practice and Procedure).

21. Most of the Upper Allegheny River remains in its natural condition and this highly valued type of area is one of the areas in Pennsylvania which has been chosen by Congress for study for inclusion under the Federal Wild and Scenic Rivers Act, along with Pine Creek, the Youghiogheny River, the Clarion River, and the Delaware River. (R, 262-263; 16 U.S.C. §1276(a)(1), (5), (6), (12), and (27).)

22. In the area of the Upper Allegheny River, within fifty (50) miles thereof, there exists nineteen (19) major lakes and reservoirs (not including Lake Erie) with recreation designated as one of their uses. Total water area available from these dams, lakes and ponds is approximately 44,000 acres, or about four to five times the entire surface area of the Upper Allegheny River. (R, 187-188)

23. The dredging process creates a "high wall" at the upstream end of the pool, and the water coming into the pool at that point causes very turbid water flowing through a narrow channel (R, 226) which, in turn, creates dangerous conditions for canoeing. (R, 280-283)

24. During the summer months, business in the Upper Allegheny Valley is enhanced due to the tourist industry, which is dependent in part upon the fishery and in part upon the use of the stream for boating. (R, 276) In this regard, dredging is viewed both as detrimental and helpful to the recreational use of the river, depending upon the nature of the recreation involved (see findings *supra*).

25. The dredging industry now provides employment in the Upper Allegheny River Valley, (a) directly in the dredging operations

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themselves; (b) indirectly, through trucking, asphalt and concrete plants and the like, and (c) through the "multiplier" effect (services such as groceries, gas stations, teachers, doctors, lawyers and the like, dependent on the primary employment of dredging and manufacturing related to dredging). (DER Tr. 108, 173-5, 177, 179, 180-188, 207-209; EHB Tr. 23-26; Official Notice)

26. Tourism is or can be a valuable economic support for the people of the Upper Allegheny River Valley. (EHB Tr. 268-296, Bramer Study, Official Notice)

27. The natural distance between riffles (or from the center of one riffle to the center of the next) in the Upper Allegheny River, as unaffected by any dredging, would be about 5,000 to 7,000 feet, based on approximate measurements taken from App. Exh. 3, especially photographs numbered 2 and 4. While these photographs are of a limited area, and may not be completely representative, they do indicate that the dredging operations can and sometimes do completely eliminate riffles.

28. The Upper Allegheny River now supports an abundant fish population above and below dredging operations. (EHB Tr. 91, 92, 142, 251) The testimony of one witness, John Anderson, an aquatic biologist with the United States Department of the Interior, Bureau of Sport Fishery and Wildlife, bears quoting, as summarizing most of the other testimony on this question:

"I consider the Upper Allegheny a good fishery. It is not as good in some respects as some people chose to remember. It is not as bad in many respects as some people say it is. It is a good fishery now."

29. The Upper Allegheny River is the best river on the upper Ohio Basin, in terms of overall quality. In Pennsylvania it is comparable with the Juniata and the North Branch of the Susquehanna, but not quite as good as the Delaware in terms of water quality. (DER Tr. 186-7)

30. Fish which would like and live in a dredged pool would find an undredged pool just as favorable a habitat. (EHB Tr. 93)

31. The converse is not necessarily true: fish that live in a natural pool — at least as such pools exist in the Upper Allegheny, - - will not necessarily live in a dredged pool. (EHB Tr. 258-9, 215-235)

32. Aquatic Biologist Ronald Lee testified at the DER hearings in February — March, 1972, that as a preliminary conclusion, below the

active dredging areas, the number of species of aquatic life was lowered. (DER Tr. 151)

33. Lee testified in October that the percent of forage fish (minnows, shiners, and darters, primarily) relative to other fish in the dredge pools, relative to other, natural areas of the river, was much reduced. In the active dredge pools the percent of forage fish was found to be ten (10%) percent; in the Oil City, inactive pool, around twenty (20%) percent; in the natural areas, around fifty-one (51%) percent. (EHB Tr. 219, 216)

34. Lee also testified that his studies had shown a far higher percentage of "rough fish" — carp, suckers, etc., — in the dredge pools than in the natural areas (EHB Tr. 216-219, 230-231) Aquatic Biologist Miller explained this as being because the "rough fish" feed more readily on burrowing benthic (bottom) organisms such as are likely to be found in the sediment at the bottom of a deep pool. (EHB Tr. 260-261)

35. One would normally expect a larger proportion of forage fish in riffles than in pools (Deduction drawn from EHB Tr. 216-219, 258-261). It does not appear, however, that the extent of the diminution in the percentage of forage fish in the dredged pools at Oil City and Tionesta found by Aquatic Biologist Lee could be explained by this fact. At least two of the natural areas Lee investigated were also pools (EHB Tr. 221), and possibly, all three. It does not appear that the extreme variation could be explained by this factor alone, especially when only one possible sampling point could be involved in an average. [Based on simple mathematical calculations, the percentage of forage fish in the possible riffle sample would have to be somewhat greater than one hundred (100%) percent for this factor to account for the extreme variation between dredged and natural areas found by Lee.

36. It takes more than good quality water to make a healthy and ecologically sound river. For example, needed is a proper balance of pools to riffles, nonuniform depths of pools, adequate fish spawning grounds, areas of weed growth, and adequate food supply. (T<sub>1</sub> 171, T<sub>2</sub> 84-85.)

37. An aquatic food chain may be thought of as a succession of points starting from a plant base such as algae or high vascular aquatic plants. The second trophic level in the chain is benthic macroinvertebrates. The third trophic level is the forage fishes and the fourth is the game fish. (T<sub>2</sub> 191, 85-86)

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38. Algae forms the base of all the other trophic levels in the food chain in that it converts the basic nutrients found in the aquatic environment into simple sugars. In the Upper Allegheny River, most of the algae is found in very shallow water and riffle areas where there is adequate substrate for attachment, adequate sunlight and adequate nutrients. Algae are not normally found in any significant quantity in deep pools. (T<sub>2</sub> 191-192)

39. Benthic macroinvertebrates, the second trophic level in the aquatic food chain, are bottom dwelling organisms which utilize algae as their principal food. In the Upper Allegheny River, the major productivity of these benthics is found in the shallow water riffle areas. It is in these areas that these benthics may find suitable non-shifting substrate for attachment and suitable current, which brings food other than algae and generates dissolved oxygen in the water. (T<sub>2</sub> 192-193.)

40. The third trophic level, forage fishes (e.g. minnows, darters and shiners), in the Upper Allegheny River use riffle benthic macroinvertebrates as their primary food source. Other sources of food may be algae, diatoms, higher aquatic plants, terrestrial insects. (T<sub>2</sub> 193, 216)

41. Forage fish serve as the primary food source for the game fish. (T<sub>2</sub> 194)

42. All trophic levels are dependent upon all trophic levels beneath them. For example, if the algae are eliminated or severely reduced in the trophic structure, each succeeding level would be eliminated or severely reduced. (T<sub>2</sub> 196)

43. Areas of shallow water with a current sufficient to cause turbulence are needed for spawning areas for fish in the Upper Allegheny River. The water turbulence serves to increase dissolved oxygen to the high level required by fish eggs. Turbulence also serves to remove debris or silt which would otherwise tend to accumulate on top of the eggs and smother them. (T<sub>2</sub> 90, 194-195)

44. Natural pools are multilevel, with rounded bottoms and both high (shallow) spots and low (deep) spots within the pool itself — which generally average six to ten (6 to 10) feet deep. (EHB Tr. 158-159)

45. Several species of darters are rare, specifically the slender head darter, the Tippy canoe darter, the gill darter, the spotted darter and the blue breasted darter. None of these can live in shallow areas along

the shore, but instead need active riffly areas, with relatively strong currents, turbulence, and forced aeration of the water, to survive. (EHB Tr. 239-240) When the riffles are destroyed, these forage fish will no longer exist. (EHB Tr. 238-239)

46. Riffles are necessary, with their more rapid current, turbulence, and oxygenation of the water, to support the ecosystem of the Upper Allegheny. (EHB Tr. 190-205, 215-267)

47. A pool to riffle ratio of anywhere from 50:50 to 2 to 1 is considered good from the standpoint of aquatic biology. (EHB Tr. 255-259) The Upper Allegheny has a pool to riffle ratio of approximately 2 to 1. (EHB Tr. 217)

48. Some game fish live in dredged pools (EHB Tr. 83; Exh. 2 App) Game fish will normally inhabit pools — dredged or natural — to rest from the greater current in the riffles and, especially at the heart of the pools, to feed on organisms that wash off the riffles. (EHB Tr. 261)

49. Some findings of large numbers of fish found in dredged pools, however, actually reported fish in shallow areas of the pools, and in weed banks along the sides of such pools. (EHB Tr. 98-99; App. Exh. 2, pp. 46-7)

50. Leaving shallow areas tapered so they were not totally dry during the yearly low water level period, in and adjacent to the dredged pools, would mitigate but not eliminate some of the problems of survival of benthic organisms and forage fish that need shallow and riffle areas to live. (App. Exh. 2, pp. 46-7; EHB Tr. 240, 264-5)

51. In general, it may be deduced from the testimony of Aquatic Biologists Lee, Anderson, and Miller (EHB Tr. 215-267) that dredging a pool is less harmful to the aquatic ecosystem of the Upper Allegheny than is dredging of a riffle.

52. Shallow areas on either side of the river will assist in giving certain species of fish spawning grounds and feeding areas, but will not take the place of riffle areas. (EHB Tr. 240, 224-225, 252-253)

53. That there is no way to come to any conclusions regarding the overall effect before and after the construction of the Kinzua Dam for years and years. The effects, which include a 1.5° temperature drop, will take a long time to evolve and a longer time to discover. (EHB Tr. 245-7)

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54. Theoretical and empirical studies indicate that dredging, which creates large deep pools in lieu of shallow areas, may diminish the value of a fishery and may have a detrimental effect on the ecological balance of a stream. (R, 84-86, 191-193, 194, 196, 203, 216-219, 252, 253, 259, 260). There is empirical evidence to the effect that such damage to the fishery may be permanent, and that the area may not be able to recover therefrom and return to its natural condition (R, 216-217, 238, 267).

55. The Upper Allegheny River and its characteristics have been of interest to biologists and professors from various colleges and universities, and other students of aquatic life (R, 214, 155, 242). There are several species of fish in the Upper Allegheny which are rare and endangered species of fish, and some of these experts are of the opinion that dredging may be a contributing cause to the dwindling number of those fish. (R, 238-240, 256, 267).

56. A twelve-month study of the aquatic life of the Upper Allegheny River will be completed in September, 1973. Collation and interpretation of the data will be completed shortly after that. (EHB Tr. 243)

57. The Pennsylvania Fish Commission constructed a boat launching ramp and parking area at the old inactive dredged pool at Wyllis and Front Streets in Oil City, as shown on photo number 5 (exh. 3, #5) which launching ramp would not have been built had the dredged pool not existed. (EHB Tr. 119, 120)

58. Water skiing and motor boating on a portion of the river near Franklin, and Oil City, Pennsylvania could not have been conducted without the commercial dredging which took place in that vicinity. (R, 120-121)

59. Dredging of rivers and harbors has long been a method used to aid both flood control and navigation. (DER Tr. 120, 129)

60. There is conflicting evidence with respect to the question of whether the safety of the public has been affected by dredging operations. There is no direct evidence to the effect that dredging operations have caused perilous or unsafe conditions except with respect to canoeists who attempt to navigate the high walls and dredging pools of the River. With respect to larger boats, dredging has provided easier use of the river. (R, 226, 280-283, 295-296)

61. Turbidity is not an issue in these proceedings. (EHB Tr. 6; Stipulation)

62. The noise made by dredging operations is objectionable in evenings, and during periods in which persons normally use the River for recreational purposes. (R, 274, 280-283, 295-296, Judicial Notice) There was, however, no evidence that the noise made by the dredging operation is excessive, of any particular degree of loudness, or that it constitutes a nuisance; there was no testimony with respect to any intrinsic quality of the noise itself (Inspection of entire Record).

63. No testimony was offered by the Commonwealth specifically justifying the requirement of the permit which provided for leaving fifty (50) feet undisturbed on both sides of the river. (See Discussion *infra*.)

64. No testimony was offered by the Commonwealth specifically justifying the requirement of the permit which prohibits any dredging whatever on weekends. (See Discussion, *infra*.)

#### DISCUSSION

Appellants object to the three conditions on two principal grounds: (1) that the Department does not have authority to attach conditions to the permits, and (2) if it does, it has authority to promulgate only conditions that are reasonable.

The first issue can be disposed of easily. The statute provides, Administrative Code of 1929, as amended, *supra*, 71 P.S. §510-8:

(3) To enter into agreements to sell, lease or otherwise dispose of any iron, coal, limestone, fire-clay, oil, gas and other minerals, except sand and gravel and minerals deposited as silt in pools created by dams, that may be found in or beneath the beds of navigable streams or bodies of water within the Commonwealth and non-navigable streams or bodies of water where the beds thereof are owned by the Commonwealth, on such terms and conditions as the board deems to be in the best interest of the Commonwealth: . . .

We note, parenthetically, that we take the words "the Commonwealth", in this Statute to mean not the Commonwealth in its proprietary capacity, but the people of the Commonwealth. The authority to impose conditions

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upon a sale or lease would be inherent in the power to lease, even apart from the explicit statutory authority. By analogy we note that Zoning Boards of Adjustment may impose conditions upon the grant of a variance, and that this authority, held to be inherent in the zoning board's power, is based upon far flimsier statutory language than is the Department's power. See *Everson v. Zoning Board of Adjustment*, 395 Pa. 168, 171, 149 A.2d 63, (1959); *Jacobs v. Philadelphia Zoning Board of Adjustment*, 1 Pa. Commonwealth 197, 273, A.2d 746 (1971); *Butler v. Derr Flooring Co.*, 4 Pa. Commonwealth 341, 285 A.2d 538 (1972). And see *Bortz Coal Co. v. Commonwealth*, 2 Pa. Commonwealth 441, 279 A.2d 388 (1971).

We conclude that where, as here, the administering agency is given explicit authority to lease "subject to such terms and conditions as it deems in the best interests of the Commonwealth" that it does have the power to impose conditions on the lease. We are not convinced by the arguments relating to the applicability of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, 45 P.S. §1101 *et seq.* We do not think that Law prohibits the attaching of reasonable conditions to the leases, as authorized by the leasing statute.

It remains to determine what the limits of that power are, if any.

We do think that there are limits. Even the appellants conceded that the Department has the authority to impose "reasonable" conditions. (EHB Tr. 17) We agree that the Department does not have the power to impose unreasonable conditions. We must define "reasonable" however.

Reasonable conditions will be defined, we think, by their having some rational relation to the purpose of the statute authorizing leasing of mineral resources under navigable streams, and to the general purpose of the statute reenacting that power - - namely the statute that created the Department, the Act of December 3, 1970, P.L. 834, 71 P.S. §510.1 *et seq.* We also think that the reenactment of the statute authorizing the leasing of mineral resources under navigable waters on December 3, 1970, must be taken to have been in contemplation of Article I, §27 of the Constitution of Pennsylvania, the "Environmental Declaration of Rights," which had been passed by two successive legislatures and then adopted by the electorate in May of 1970. That amendment was held by the Commonwealth Court in *Gettysburg Battlefield Tower, Inc. v. Commonwealth*, 8 Pa. Commonwealth 231, 302 A.2d 886 (1973), to be

self executing, and we are bound by that decision. Furthermore, the part of the Amendment that applies to this case is the public trust provision, as to which the comments made by Judge Mencer in his dissent — as to the lack of standards with regard to what constitutes "clean air" or "pure water" — do not apply. There is ample common law precedent, extending over several centuries, regarding the definition of the duties of a trustee. See our opinion and ruling on these questions in *Fox v. Department of Environmental Resources*, Docket No. 73-078 (filed June 18, 1973). There is also some hint that the Article I, §27, as it enunciated the public trust doctrine, may have been simply declaratory of the common law as it existed prior to the enactment of Article I, §27. *Rundle v. Delaware and Raritan Canal Co.*, 14 Howard 80, 54 U.S. 79 (1852).

There is no question that the bed of the Allegheny River is a publicly owned natural resource. *Skrunk v. Schuylkill Navigation Co.*, 14 Sarg. & Rawl. 71 (1826)

It follows that the Commonwealth must deal with that resource as trustee. It does not follow that the sale or lease of gravel from the bed is not legal. A trustee has a duty to make the trust corpus productive, See 2-Scott on Trusts §181 (3rd ed, 1967), and the Constitutional injunction to "conserve" surely includes some use. The trustee is, however, obligated under the trust doctrine to consider the effect of any use on the values sought to be preserved by Article I, §27.

We therefore hold that, under the phrase "such terms and conditions as (the department) deems in the best interest of the Commonwealth" includes at least conditions relating to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." With respect to other factors the Department did consider, under The Clean Streams Law, Act of June 2, 1937, P.L. 1987, as amended, 35 P.S. §§691.1 *et seq.*, the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§1396.1 *et seq.*, and the Water Obstruction Act of 1913, Act of June 25, 1913, P.L. 555, as amended, 32 P.S. §681 *et seq.*, while these statutes might form a separate legal basis for some factors, they are mostly subsumed under the language of Article I, §27 of the Constitution.

We hold that under Article I, §27, and under the general phrase

"such terms and conditions as (the department) deems in the best interests of the Commonwealth," conditions that relate to (a) water quality, (b) conservation of the resource itself, (c) allocation of the use of the resource (both the gravel deposits and the use of the river for recreation, boating, fishing, and other legitimate purposes), (d) preservation of the economic and intrinsic value of the river as a fishery, (e) the preservation of "the natural . . . values of the environment of the Upper Allegheny River Valley; and (f) the public health and safety, generally, may legally be imposed by the Department. A condition that is imposed must have some rational connection with some legitimate purpose, and the connection must be supported by substantial evidence. Administrative Agency Law, Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.53. Although the Department may not have been obligated to produce substantial evidence to support its decision prior to acting, §21 of the Act of December 3, 1970, P.L. 834, 71 P.S. §510-21, we must find substantial evidence before we uphold the Department's action, Administrative Agency Law, *supra*, 71 P.S. §1710.53.

Viewed in this light, we find that there is no substantial evidence to support two of the conditions.

I. The condition requiring that the dredging companies not dredge within 50 feet of the shore of the river or of any island was unsupported by any evidence whatever. It might be supported by safety considerations — the river is used by wading fisherman and swimmers. But there was no showing — no testimony even offered tending to show — that the difference between 25 feet of shallow water near shorelines (the distance required under the old, pre-1972 permits) and 50 feet would be at all significant in this respect. The permits do require warning signs, and there was no showing that these are inadequate for safety.

Perhaps it could be argued that the aquatic biology evidence presented relative to the undesirability of extending the area being dredged, generally, is relevant to this condition as well. That evidence related much more to the harm done by dredging lengthwise to the river than to any here by dredging closer to shore. In fact, there was some suggestion that reshaping the shore areas so that there was at least a foot of depth at summer low water would be beneficial, rather than harmful. (Finding of Fact No. 50, *supra*. See also EHB Tr. 215-267, discussions of this question by Witnesses Lee, Anderson, and Miller, esp. 224-5, 240, 252-4; App. Exh. 2, p. 46-7).

One guesses that the rationale for this condition may have been related to a concern with the determining of river banks and islands. If so, there was no evidence whatever that it related to this concern.

9 Rattling Creek

II. The prohibition against dredging on weekends and holidays appears to have been designed to allocate the use of the river as between dredgers and recreational users — boaters, fishermen, campers and people with weekend cottages. While this is a reasonable and legitimate purpose, it is not, here, supported by evidence. At most a few people object to the noise made by the dredgers (e.g. Joseph M. McClain, EHB Tr. 274, based on dredging noise in the East Brady area prior to World War II), but there was some indication that they may have objected as much to the idea of dredging as to the noise.

We can undoubtedly take Judicial Notice of the fact that people are more likely to be using the Upper Allegheny for recreation on weekends and holidays; but we cannot take Judicial Notice that that use is so great that other activities on the River must cease at these times. There was no traffic count, no evidence that the dredging rigs constitute a public or private nuisance, no evidence of a decibel level, and no evidence that recreational use is so intensive that recreational use and dredging cannot coexist at the same time. There was testimony of a safety hazard created by the way in which the water flowed over the headwall above the pool made by Warren (EHB Tr. 294-6), but that appeared to be due to the way in which the dredging was being carried out, rather than due to the fact it was being carried out at the time.

In the Sunday Blue Law Cases, the United States Supreme Court held that a state may prescribe a day of rest, and may even prescribe which day that day of rest must be. See *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 81 S.Ct 1155, 62 L. Ed 2d 551 (1961). Here, that does not appear to be what the Commonwealth was doing. And in fact, it is our reading of the record that at least some of the operators do not work on Sunday, now. (See Finding of Fact No. 18) We have some doubt whether the Department would have the power to require no work on Sundays indirectly enforcing §699.4 of the Penal Code, Act of June 24, 1939, P.L. 872, as amended, 18 P.S. §4699.4, or the new Crimes Code, Act of December 6, 1972, P.L. \_\_\_\_\_, No. 334, but since this appears not to have been any part of the purpose of the Department,

and since it also appears that Appellants would not object if such a condition were imposed, we do not pass on the issue.

We conclude that the condition prohibiting work on weekends and holidays is not supported by substantial evidence.

III. The condition prohibiting dredging in any natural or untouched areas, in effect requiring the appellants to stay within the confines of the pools they had already dredged, might have been based on one or more of several factors: (a) allocation of the basic resource - - the river and its bottom — different classes of users; (b) water quality; (c) the "natural . . . values of the environment" of the Upper Allegheny River valley; (d) conservation of the resource itself — including both the gravel and the river; (e) safety (f) economics.

Aquatic biology studies were presented that convince the Board that the decision of the Department to impose this condition was reasonable, and supported by substantial evidence. Certainly, in long run terms, based on consideration of the allocation of the resource "in the best interest of the Commonwealth", it is reasonable for the Department to decide that not all of the Upper Allegheny River should be dredged. Short of that very long term consideration (it would probably take around 4 to 500 years to dredge all 128 miles of the River), it does appear, even in the shorter run, that dredging is likely to have an adverse effect upon the fishery value of the River. (Testimony of aquatic biologists Lee, Anderson, and Miller, EHB Tr. 215-268) Based on the allocation of the resource in terms of its value as a fishery, the Department was reasonable in making the decision that the area to be dredged must be limited, at some time. While we do not accept the Bramer Study submitted by the Department, completely, in terms of the absolute values arrived at, it is clear that the Upper Allegheny River does have considerable value as a fishery and as a recreational resource in its natural state, and that that value, if it does not now, is likely at some time, if not at present, to be greater than the value of the gravel that can be dredged from the River.

We uphold the Department's decision to limit the area to be dredged, therefore; based on substantial evidence supporting a rational connection between that limitation of area and the purposes of (a) conservation; (b) allocation of the resource as between recreational users,

including fishermen, "weekend cottagers," campers, and boaters on the one hand, and dredgers on the other; (c) the preservation of some of the natural values of the environment of the Upper Allegheny River Valley.<sup>1</sup>

The Appellants argued in their brief that they had been dredging for a long enough time to have acquired a vested right to continue dredging, and that the area limitation condition imposed by the Department in effect put them out of business, thus effecting a taking of property without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States. We do not accept that argument. The resource is owned by the Commonwealth of Pennsylvania, as trustee for all the people, including generations yet to come, Article I, §27, Constitution of Pennsylvania. Regulation and control of access to that resource is not a taking within the meaning of the Fifth Amendment to the Constitution of the United States. See also *Goldblatt v. Hempstead*, 369 U.S. 590 (1961), where a regulation of the Town of Hempstead, New York, of a land based gravel quarry which had the effect of putting the quarry operator out of business immediately, was upheld by the United States Supreme Court — even though, in that case the gravel was privately owned. This is not to say that the Appellants need not be fairly dealt with — obviously they should be. But there is no taking of property involved, in a constitutional sense.

The Appellants presented evidence tending to show that there were game fish in the dredged pools, and that the riffles above and below the dredged pools supported approximately the same benthic organisms (App. Exh. 2) and, generally, that the dredging that has occurred to date may not have been significantly harmful to the ecosystem and/or the recreational value of the Upper Allegheny. In terms of boating, it may be true that certain portions of the Upper Allegheny, as at Oil City and Franklin, have been made available to motor boating because of the existence of dredged pools; whereas the possible use of motor boats on the River, apart from those dredged pools, would have been quite minimal. In terms of the allocation of the resource, however, it must be pointed out that there are many lakes in the area, most of which are better for

1. We are not convinced, for reasons already stated of any public safety basis supporting the decision. But this is not needed.

motor boating (and water skiing, etc.) than are the dredged pools on the Allegheny e.g., (EHB Tr. 283). It is reasonable for the Department to try to preserve the River, as a river, for those recreational pursuits that need a river, such as canoeing and river fishing, and to expect motor boaters to go to lakes.

As for the effect of the dredging on the aquatic ecosystem of the river, the Appellants' experts, Dr. Daniel G. Bardarik and Mr. Jon C. Alden, made a study in which they concluded that the diversity of organisms in dredged and undredged pools is really not very different. That does not say that the ecosystem is the same, however. Certainly the studies by Ronald Lee, an aquatic biologist for the Fish Commission, showed quite different distributions of organisms in the dredged and natural pools (EHB Tr. 215-219). Furthermore, part of the diversity index prepared for at least one of the dredged pools tested by Bardarik and Alden, the Tionesta pool, were taken along the western shore in an undredged weedbed area. (App. Exh. 2, pp. 46-47.) Trawl hauls in the pool itself would have produced very different statistics, very different diversity indexes. (*Id.*) While there are game fish found in dredged pools, the ecosystem of the dredged pools does appear to be significantly different from the ecosystem of all undredged areas of the river that have so far been tested.

It may be true that, given the area of the River so far disturbed by dredging, the effects on undredged areas is minimal. (See e.g. App. Exh. 2, comparisons of riffles above and below dredging operations; EHB Tr. 89) That does not necessarily mean that there is no effect whatever (see EHB Tr. 215-219, 227), nor does it mean that dredging can be continued indefinitely without an adverse effect. As Aldo Leopold said in *A Sand County Almanac* 257-8 (1971), "Ecology knows of no density relationship that holds for indefinitely wide limits." The Department's testimony was that the riffles are necessary, and that if too many of the riffles are destroyed, if the pool-to-riffle ratio gets significantly larger, then the entire ecological structure of the river will change. Substituting an "artificial riffle" at the head of a dredged pool does not make up for the loss of a natural riffle (EHB Tr. 227). Undoubtedly there will then be some fish, but they will be different kinds of fish.

How many riffles have to be destroyed, how many deep pools (as distinguished from the natural shallow pools) have to be created, before the overall balance of the river changes over to a different ecological

structure we cannot say. It has, if we accept the conclusion of the Bardarik and Alden study (App. Exh. 2), not happened yet. But the balance will, predictably, be tipped at some time, with some quantum of dredging.

We hold that the Commonwealth is reasonable in deciding to limit the area to be dredged, prior to the time that balance is tipped.

The disposition of this case is not quite so simple as the above would appear to make it, however. As we studied the transcript and the entire record, including Exhibits, motions, and other docket entries, it became obvious that there were really two issues involved in the decision whether or not to impose the area-limitation condition. One issue is the decision whether (or *that*, as it turned out) it should, at some time be imposed. The second issue is when it should be imposed.

Our holding, above, relates only to the reasonableness of the Department's decision that the area to be dredged should be limited at some time. With respect to the issue of when that limitation should be imposed, there is very little to suggest the Department is either right or wrong.

The evidence does indicate that additional dredging is likely to be harmful, so perhaps a decision to limit the area to be dredged immediately cannot be called unreasonable. On the other hand, there is evidence that there is or will be an undesirable economic impact, on the dredging companies, their employees, their customers (especially PennDOT), and on the communities in which the employees of the dredging companies live, and that that economic impact is related very much to whether the condition is imposed immediately or is postponed during some transition period.

The Department argued strenuously that economic impact is irrelevant to the decision of the Board, and implicitly to the decision of the Department.

We disagree. When the statutory authority is for the Department to impose "such terms and conditions as (it) deems in the best interest of the Commonwealth", we do not see how economic impact can be excluded, *as one factor to consider*. See also *Bortz Coal Co., v. Commonwealth*, 2 Pa. Commonwealth 441, 460-461, 279 A.2d 388, 399 (1971). Relative to the long run decision, economic factors appear to have been considered, and they certainly support that decision. Relative to the short run decision. — when should the area limitation condition be

imposed — we see no evidence that economic factors were considered; and indeed, perhaps they were not, since the Department asserts they are irrelevant.

Were we to reverse entirely on this ground, it would imply we were able to perform the balancing tests that the Department should have performed. It would imply, for example, that we were able to decide just how much deterioration of the fishery ought to be balanced out against how much adverse economic impact of an immediate area limitation.

We cannot do that. And if we did do it, on the basis of the record before us, our decision would not be supported by substantial evidence. There was simply not enough evidence to give us any quantitative yardstick of the risk to which the River will be put by further dredging, sufficient to compare that risk to the economic problems connected with an immediate application of the area-limitation condition. We know, for example, that dredging a natural pool is less harmful than dredging a natural riffle, but we do not know how much less; nor do we know whether any of the Appellants is just downstream from a natural pool or just downstream from a natural riffle. We know that there are going to be transition problems, as the dredgers and/or their customers shift over from a river source of aggregate to a land source — or to a mixed land and river source. We do not know the magnitude of those problems, the nature of the impact on highway construction programs and on other building projects. In short we do not have a basis for making the decision.

We do, however, hold that it is error for the Department not to have included economic impact — on the public, primarily, not simply the private impact on the Appellants — as one factor in its decision making process with respect to the timing of the imposition of the area limitation condition. Since that factor was not considered, and must be, we remand to the Department to reconsider the timing of the imposition of the area limitation condition in light of that factor, along with those factors the Department has already considered.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this case and over the parties.
2. The Department of Environmental Resources has valid statutory authority to impose reasonable terms and conditions upon the

sale or lease of sand and gravel in the bed of the Allegheny River.

3. Despite the fact that the permit conditions appealed from were attached to an annual permit, the Board takes notice, from the totality of the record, that dredging in the Upper Allegheny River is a continuing activity and that, therefore, the issues in this case are not mooted by the fact that the permits to which the disputed conditions were attached may technically have expired.

4. The condition prohibiting dredging within fifty (50) feet of the shore of the River or of any island is an arbitrary and unreasonable condition, in that no basis for it is supported by substantial evidence.

5. The condition prohibiting dredging on weekends and holidays is not a reasonable condition, in that no basis for it is supported by substantial evidence.

6. The condition prohibiting dredging in any natural and untouched areas is a reasonable condition, in that it is supported by substantial evidence.

7. The timing of the imposition of the condition prohibiting dredging in any natural and untouched areas as that timing engenders economic impact must be considered by the Department, and was not. We hold that this was error.

#### ORDER

AND NOW, this 8th day of AUGUST, 1973, the Board remands the case to the Department and Orders that, upon application by any of Appellants for a permit, the permit issued shall not contain a condition prohibiting dredging within any distance greater than twenty-five (25) feet of the shore of the River or of any island, and shall not contain a condition prohibiting dredging on weekends and holidays. Such permits may contain a condition prohibiting dredging in any natural and untouched areas, but before such condition is imposed, the Department shall consider the economic impact of the timing of the imposition of such condition as balanced with other relevant factors discussed in this Adjudication. Such decision shall be made within thirty days of this Order. While the Department is making the decision, the Appellants shall not dredge any natural and untouched areas, unless specially permitted by the Department (and if it can be done with any reasonable confidence that permanent harm

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to the recreational and/or fishery value of the River is minimal compared with the economic impact, the Board strongly-recommends that such special permission be granted.) That decision, like other action of the Department, is appealable to this Board.

It is further Ordered that, when the twelve-month study referred to in Finding of Fact No. 56 is completed, the Department shall take a second look at the necessity for restricting dredging to existing dredged pools, both with respect to the ultimate basis for such a restriction and with respect to the timing of the imposition of that restriction. The results of the twelve-month study and of that "second look" shall be submitted to this Board.

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*Charles W. Cannon, Jr.*

CHARLES W. CANNON, JR.

: Docket No. 72-396

A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, August 15, 1973

This is an Appeal from a refusal on the part of the Department of Environmental Resources to approve an application by Charles W. Cannon, Jr., the Appellant herein, for an on-lot sewage system, Application #213101.

The Appellant is not represented by counsel, and has consciously and knowingly waived such representation.

A hearing in the matter was held at Norristown, Pennsylvania before Gerald H. Goldberg, Esquire, a Member of the Hearing Board.

At the hearing of this matter, the Appellant presented testimony by Mr. John Dzedzy, a Registered Professional Engineer, who prepared the application in question. Mr. Dzedzy testified that he had ten (10) test trenches dug on the tract in question, twenty-four inches wide and five to eight feet deep. His testimony was that in some of the trenches he found evidence of mottling, but that in four of the test holes he found no evidence of mottling, and further indicated that the depth in the four holes in question to bedrock was eight feet. Mr. Dzedzy's testimony was to the effect that there was no evidence of seasonal high-water table in

those test holes, and that they are dry. (R, 8)

Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder colors in some spots, and grayer colors in others — a variation in "chroma," in particular — it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level for prolonged periods of time, say eighteen inches, as in the vicinity of the test holes examined by the Department's soil scientist, John Zwalinski, then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer — of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops, many of these nodules will be exposed to air, and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray.

We say "almost" invariably because it is conceivable that, in a particular case, a grayer mottle might be due to incompletely broken up grayer parent material, especially in an area where an iron-rich parent shale had overlain on iron-deficient parent shale. This sort of condition is not (we gather) common, and where the mottling exists in conjunction with an impermeable stratum just below it such as, in this case a fragipan or tightly consolidated layer, the possibility can be dismissed altogether.

The tract in question is 4.6 acres. It is part of a small housing development or subdivision and, in fact, the only lot left which has not been developed. All of the other lots in the subdivision have wells and on-lot sewage treatment systems (R, 9).

Mr. Dzedzy further testified that there is no evidence of pollution or malfunctioning systems on any of the other lots in the subdivision.

Upon cross-examination, Mr. Dzedzy admitted that he had no specialized training in soil genesis, soil chemistry, soil physics or soil characterization, but stated that he felt that he was qualified to determine whether a test pit is satisfactory for an on-lot system because he has run soil tests for over ten years in the area, during every month of the

174. *Charles W. Cannon, Jr.*

year (R, 12, 13).

The Appellant, testifying in his own behalf, reiterated the contention that none of the other lots in the development have any water problems, or any malfunction problems with respect to their sewage treatment systems.

The Commonwealth offered testimony by John Zwalinski, a Soils Scientist with the Department of Environmental Resources. Mr. Zwalinski, in testifying to his qualifications, indicated that he has a Bachelor of Science Degree in Agronomy from the Pennsylvania State University, and is a member of two professional societies. In addition, Mr. Zwalinski has had several months of field experience with the United States Department of Agriculture Soil Conservation Service in Lebanon, Pennsylvania, and he is presently responsible for a five county area designated by the Department of Environmental Resources as Region 1, consisting of the counties of Bucks, Montgomery, Chester, Delaware, and Philadelphia. Mr. Zwalinski's testimony was that he examined four existing back hoe pit excavations on the lot in question. He observed mottling in the first pit which he examined at a depth of sixteen inches, and the depth to fragipan (which he deemed to be equivalent to bedrock) was twenty to thirty-six inches. In the next pit which he examined, he found mottling at eighteen inches from the soil surface and fragipan at a depth of twenty to thirty-six inches. In the third pit, he found mottling at eighteen inches from the surface, and fragipan at twenty to thirty-six inches from the surface. In the final pit examined by Mr. Zwalinski, the same conditions prevailed at the same depths. His conclusion, based upon these examinations, was that the soil occupying the site has a seasonal high-water table at a depth of eighteen inches from the soil surface and a fragipan which extends from a depth of twenty to thirty-six inches and is sixteen inches in thickness. From this, Mr. Zwalinski concluded that the site may not be recommended for an on-lot sewage system.

Mr. Zwalinski indicated that the holes which he examined were the only holes which were found on the premises at the time of his examination. He did not dig any fresh holes. Three of the pits which he examined were only thirty-six inches deep. The only deep pit examined by Mr. Zwalinski was seventy-eight inches deep. Mr. Zwalinski made no other tests in the area, nor did he interview any of the neighboring lot owners with respect to their on-lot systems. There was no evidence by

which the holes examined by Mr. Zwalinski may be correlated to those dug and examined by Mr. Dzedzy.

Mr. Russell Place, the Township Health Officer, testified that he rejected the application on the advice of the Department of Environmental Resources, acting as the agent for the Department. Mr. Place indicated that he is not a soil scientist and knows nothing about soil conditions (R, 62). Mr. Place indicated that he had seen water in some holes dug on the property some fourteen or fifteen months previous to the submission of the application, and that he was not inclined to give a great deal of credence to Mr. Dzedzy's report, because of his previous observation of water on the property.

Under normal circumstances, the Board is constrained to accept the opinion of expert staff personnel of the Department of Environmental Resources with respect to matters within the scope of their area of expertise. In the instant case, the qualifications of Mr. Zwalinski, the soil scientist employed by the Commonwealth, were not challenged by the Appellant. Mr. Zwalinski has a Bachelor of Science Degree in Agronomy, with a Major in Soils, and he has experience under the supervision of veteran soil scientists; he must be presumed to have more knowledge of soil characteristics than that of the Engineer who prepared the application for the Appellant. Mr. Dzedzy, a Registered Professional Engineer, stated that he has had extensive practical experience in the performance of percolation tests, but admitted that he has no special training in soil mechanics, soil characteristics, or other scientific aspects of soil analysis.

However, in the instant case our problem is that, in the tests taken by Mr. Dzedzy, the undisputed facts are that a total of ten newly-dug deep back hoe pits were examined, at widely scattered locations on the tract. Mr. Dzedzy admits that in six of those pits he found evidence of mottling. The tract in question, however, is more than four acres in size. Mr. Dzedzy's uncontradicted testimony was that, in four of the pits he found no evidence of mottling.

Mr. Zwalinski's testimony was that he examined a total of four old pits, three of them being some thirty-six inches deep. Mr. Zwalinski testified that he found soil mottling in each of these pits. However, the problem posed to the Board in this matter is whether or not this testimony effectively contravenes the undisputed testimony of Engineer Dzedzy. It is quite possible that, despite Mr. Zwalinski's findings, in four of the ten

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locations examined by Mr. Dzedzy, the soil conditions were satisfactory. Mr. Dzedzy candidly admits that in some parts of the tract the conditions are not satisfactory. His testimony in this respect indicates that he, too, can recognize mottling in soil.

It is true that the applicant has the burden of proving to the Department, and to this Board, that the application meets the standards required for on-lot sewage systems. Where the application does so, prima facie, however, the Department cannot reject the application capriciously, or otherwise than by an inspection and/or evidence that shows that the application fails to meet those requirements. Here, the Department's inspection was not shown to contradict evidence presented by the Applicant-Appellant.

It is our opinion that, while Mr. Zwalinski's findings may cast some doubt upon the question, the report prepared by Engineer Dzedzy appears to compel us to conclude that there are some areas upon this four acre tract in which the soil conditions are satisfactory for an on site sewage treatment system. To conclude that the entire site is unsatisfactory for such a system, based upon an examination of our existing holes, three of them only three feet deep, and without evidence that they correspond to the pits found satisfactory by Appellant's engineer is, in the opinion of the Board, a rather unconvincing and perfunctory dismissal of the application.

Mr. Cannon has purchased a lot in a development which is occupied by numerous other homeowners, all of whom have on-lot sewage treatment systems and all of whom have on-lot wells. His uncontradicted testimony is to the effect that none of these people have experienced malfunctions, and that all of them are drinking water from the wells without apparent ill effect. Under such circumstances, it does not seem reasonable to deny his application solely upon the basis of what appears to be a somewhat inconclusive and incomplete test procedure.

Accordingly, based upon the evidence of record and the exhibits submitted, we make the following:

#### FINDINGS OF FACT

1. The Appellant, Charles W. Cannon, Jr., is the owner of a 4.6 acre lot located at Old Orchard Road, Worcester Township, Montgomery County, Pennsylvania.

2. On or about October 23, 1972, the Appellant applied for a permit to construct an on site sewage facility under the provisions of the Sewage Facilities Act.

3. A Registered Professional Engineer with extensive experience in the performance of percolation tests prepared the application and, in the process of doing so, dug 10 twenty-four inch wide test trenches, ranging in depth from five to eight feet. In four of the ten trenches, he found soils which showed no evidence of seasonal high-water table. The soils in the said test pits were eight feet to bedrock. There was no evidence of mottling in the four pits. The Engineer admitted that in the other six pits, there was evidence of mottling, indicating an unsatisfactory seasonal high-water table.

4. On or about October 23, 1972, inspections by a soil scientist for the Department of Environmental Resources indicated that there was evidence of a seasonal high-water table as near as thirty inches to the surface of the ground, based upon his examination of four existing holes in the area. These holes were thirty-six inches in depth with the exception of one deeper pit. The holes in question were not correlated to those approved by Engineer Dzedzy. From this, and based upon information given in the Montgomery County Soil Survey of 1967, the application was rejected.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction of the parties and of the subject matter.

2. The application filed by the Appellant is in compliance with the provisions of the law, and prima facie sets forth satisfactory evidence to the effect that there are sites upon the Appellant's property which are satisfactory for an on-lot sewage treatment system.

3. The test performed by the Department Soil Scientist was insufficient to contravene the results reported by Mr. Dzedzy and, in the absence of further evidence with respect to the specific locations of the sites found satisfactory by Mr. Dzedzy, it must be concluded that the rejection of the application in question was improper.

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**ORDER**

AND NOW, to wit, this 15th day of AUGUST, 1973, the Appeal of Charles W. Cannon, Jr., is sustained. The Department of Environmental Resources is hereby directed to issue the appropriate permit, upon the condition that the specific site where the Appellant plans to install his septic tank shall be determined by the Department, prior to said installation, to be in one of the areas where mottling was not present.

**CONCURRING OPINION**

By **PAUL E. WATERS, Member**

I would remand the case to the Department. It may be that the distinction between sustaining the appeal on condition subsequent and remanding the case to permit the Appellant an opportunity to show that there is a satisfactory location on his four acres for a sewage disposal system, ultimately is meaningless and for that reason I have signed the Adjudication.

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*Brookhaven-Aston-Middletown*

Brookhaven-Aston-Middletown : Docket No. 73-026  
Conservation Association  
Township of Aston, Intervenor :

**A D J U D I C A T I O N**

By **PAUL E. WATERS, Member, August 27, 1973**

This matter comes before the Board as an appeal from the issuance by the Department of Environmental Resources, hereinafter D.E.R., to Pyramid Land Development Company hereinafter "Pyramid", of an "Interim Permit" under the Surface Mining Conservation and Reclamation Act of 1971.

Brookhaven-Aston-Middletown Conservation Association hereinafter called Appellant, appealed from the permit grant on the grounds that the permitted activities are, or may be, environmentally harmful and, in any event, that D.E.R. improperly issued such a permit based on the limited and general information supplied by Pyramid.

The Township of Aston where the project is located was permitted to intervene in the proceedings, and a petition for supersedeas filed by appellant was denied on May 24, 1973.

#### FINDINGS OF FACT

1. Pyramid Land Development Company is owned entirely by Stephen P. Yorden and Raymond E. Yorden and is a fictitious name for a business which includes the removing and hauling of rock from a 30 acre site in Aston Township, Delaware County, Pennsylvania.

2. The property is zoned "limited industrial" and includes another twenty acres owned by the same parties in the name of Ekridge Construction Company.

3. On May 18, 1972, the Environmental Quality Board approved and adopted a Proposal for Phasing-in the implementation of the permit requirements of the Surface Mining and Reclamation Act of 1971.

4. On November 3, 1972, Pyramid applied for an interim permit Surface Mining Operator's License and supplied all information requested by D.E.R. on forms supplied by D.E.R.

5. On November 2, 1972, Hartford Accident and Indemnity Company issued a surety bond for \$5,000 to Pyramid to secure the faithful performance of the requirements of the rules and regulations of D.E.R. and the conditions of the permit to be issued.

6. On January 3, 1973, D.E.R. issued an interim permit to Pyramid, No. 253.

7. D.E.R. did not require and Pyramid did not furnish a detailed and accurate estimate of the cost of reclamation of the project area.

8. The project area has steep slopes and is one of natural and scenic beauty enjoyed by residents of Aston Township, and is heavily forested with beech, hemlock and laurel and is inhabited by a large variety of small wildlife, deer and birds, and drains into the Chester Creek.

9. The project area is approximately rectangular in shape, the long axis running in an eastward and westward direction, bounded on the north by Chester Creek, on the south by Pennell Manor, a residential area, on the east by Knowlton Road and on the west by a small wooded tract abutting on Mt. Alverno Road.

10. Prior to issuing Interim Permit No. 253, D.E.R. did not

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obtain or require and Pyramid did not submit a complete and detailed plan for reclamation of the land affected including:

- (a) the manner in which topsoil and subsoil would be conserved and restored;
- (b) a complete planting program or alternate procedures to permanently restore vegetation to the land affected and to prevent the threat of soil erosion;
- (c) a detailed timetable for accomplishment of each major step in the reclamation plan;
- (d) Pyramid's estimate of the cost of each such step and the total cost of the reclamation program.

11. If runoff from the project area, erosion and sedimentation is not effectively prevented and controlled, the risk of flooding of the Chester Creek will be increased.

12. The Chester Creek is susceptible to serious flooding and has experienced serious floods in the past.

13. Pyramid's present operations consist of stripping the existing ground cover, cutting of trees and earth removal.

14. If effective measures are not undertaken to prevent erosion and sedimentation, substantial runoff may result depending upon the characteristics of the underlying mineral strata.

15. The Chester Creek, including the reach of the stream forming the northern boundary of the project area, is classified by the Pennsylvania Fish Commission as an approved trout stream.

16. The biological survey of the Chester Creek in the section of the project area conducted by the Pennsylvania Fish Commission found a variety of fish and aquatic life, inhabiting the stream.

17. Runoff, accelerated erosion and sediment discharged into the Chester Creek would degrade the water quality and have a deleterious impact upon fish and aquatic life.

18. If effective measures are not taken to prevent the discharge of substances into the Chester Creek which are harmful, detrimental or injurious to recreation uses, to wild animals, birds, fish or other aquatic life including alteration of the physical, chemical or biological properties thereof, such discharges which cause, contribute to or create a danger of such environmental impacts will occur as a result of Pyramid's operation.

19. One of the conditions of the issuance of the interim permit

which is for only eight months is that a full and complete application be submitted three months prior to the expiration of that permit.

20. The interim permit issued in this case by D.E.R. is due to expire September 3, 1973, and a final permit would have to be issued in order for Pyramid to continue operations.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and subject matter of this appeal.

2. Section 4 (a) of the Surface Mining Conservation and Reclamation Act, November 30, 1971, P. L. 147, 52 P. S. 1396.1, requires certain detailed information be provided before a permit is granted — "unless modified or waived by the Department for Cause". . .

3. On December 16, 1971, D.E.R. adopted Sub-chapter C, "Interim Requirements for Surface Mining" of Chapter 77 of the Rules and Regulations. Section 77.84 (b) of the Regulations requires operators of non-coal surface mines to obtain permits from D.E.R. prior to July 1, 1972.

4. On May 18, 1972, the Environmental Quality Board adopted an interim permit program utilizing a short-form application procedure for existing non-coal surface mining operators.

5. This temporary procedure, admittedly a modification of the detailed procedure required by the Surface Mining Conservation and Reclamation Act, was more of an administrative policy decision born of necessity than a general permanent regulatory change requiring publication in the Pennsylvania Bulletin.

6. Article I Section 27 of the Pennsylvania Constitution is self-executing.

7. The waters of the Chester Creek and the fish and aquatic life thereof are public natural resources within the purview of Article I, Section 27 of the Pennsylvania Constitution.

8. D.E.R. had and has an obligation to protect the environmental values consisting of the waters of the Chester Creek, wildlife, birds and fish and to preserve when possible, the scenic and aesthetic values in and about the project area.

9. D.E.R. properly issued an interim permit to Pyramid under

the policy and regulations of the Department.

#### DISCUSSION

Article I, Section 27 of the Pennsylvania Constitution is self-executing but indeed it is not self-enforcing. These proceedings point up the need for vigilance by concerned citizens to insure that the delicate natural balance which mankind must depend upon to sustain life as we know it, is not destroyed in the name of progress. It is, after all, the use we make of natural resources of our land which can often make the difference between the enjoyment of life and mere survival.

Associations, such as the Appellant in this case, can now take an ever expanding role in the never-ending task of environmental preservation.

Turning to the facts of this case, we find one overriding and indeed controlling issue. Did D.E.R. have the authority to issue an interim permit to Pyramid? It is my opinion that it did. If it is argued that it would have been much better for D.E.R. to have sufficient trained staff to gather, review and check the complete and detailed technical information required by Section 4 (a) (1) and 4 (a) (2) of the Surface Mining Act before issuing a permit — of course I would agree. We are not, however, called upon to decide whether there might not be a better method of dealing with the problem of phasing in a new program.

Presumably the legislature when it passed the Act in question, anticipated problems such as those faced by D.E.R. in implementing the Act and provided for "modifications" in the procedure. Again I would concede that a better way to give notice of a governmental policy change is by publication. This of course is not always practical and here the temporary nature of the policy, and the fact that all of the required information must be supplied within an eight-month period leads me to believe that D.E.R. did not act unreasonably or illegally in failing to publish its new permit policy under the Commonwealth Documents Law.

The question of how the evidence of the policy was received by the Board, deserves some comment. The Board ruled that a change in regulations could not be shown except by the published copies of said regulations. Having now determined that what was at issue was a statutorily authorized, interim policy change, we have allowed the proof offered at the hearing and as submitted by an official of the Environmental Quality

Board for judicial notice.

The Appellant raised the question of the Bond amount, and the failure of Pyramid to submit estimates to justify the \$5,000 figure. In a case of this kind, where work proceeds before enough information is developed as to the content of potential harmful effects on the environment, we feel that the bond should serve as an equalizing force in proper control methods. In this case, based on the testimony of the delicate nature of Chester Creek, the kind of soil in the area, the flooding potential and the contour of the land, the wildlife and scenic beauty involved, \$5,000 appears to be woefully inadequate.

If a larger bond had been requested at the supersedeas hearing that would have been given serious consideration as an appropriate measure to deal with the difficult problem of this interim permit period.

Inasmuch as the final permit decision has been made or will be made shortly, it does not seem appropriate to now remand the case for the imposition of a higher bond.

We have no authority to pass upon and we decline to speculate upon, the bond to be required for issuance of a final permit under the Act, except to say that the same rights of appeal attach to that permit as they did to the interim permit.

Finally, a word on the evidence as to environmental harm. Inasmuch as we decide that the interim permit was properly issued, it follows that the burden of proof, if the same is to be revoked, is upon Appellant. Although there was evidence of possible environmental harm, and potential increased dangers of flooding etc. the burden of proof was clearly not met by Appellant on this issue.

Indeed, the Appellant proceeded on the theory that Pyramid had the obligation to prove that its operations were safe to the environment, and had not adequately done so. Pyramid of course does have this responsibility, but it runs to D.E.R. in order to obtain a permit in the first instance. In order for Pyramid to obtain a permit, it is not Appellant, but D.E.R., that must be satisfied. At any time, Appellant is free to show either to D.E.R. or, under our procedures, this Board, that Pyramid is conducting an environmentally harmful operation. It should be clear, however, that the burden in the latter instance would rest squarely upon

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Appellant.

In summary, we do not believe, that Article I, Section 27 of the Constitution intended to shift the burden of proof to a permittee where D.E.R., which must be presumed to uphold the law, has granted that permit.

#### ORDER

AND NOW, this 27th day of August, 1973, the interim permit issued to Pyramid Land Development Company is hereby sustained and the appeal is dismissed.

#### CONCURRING OPINION

By **ROBERT BROUGHTON**, Chairman

I am not certain that I am satisfied that the requirements of Article I, Section 27 of the Constitution of Pennsylvania, which implicitly requires the Department of Environmental Resources to consider the impact of a particular decision of this kind on the value set forth in Article I, Section 27, were met in the instant case. In view of the interim and temporary "Phase-In" nature of the policy determinations of the Department of Environmental Resources, however, and in view of the imminence of a more thorough consideration of these values, I join in the decision.

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*Gysegem Enterprises, Inc.*

**Gysegem Enterprises, Inc.**

: Docket No. 72-254

#### A D J U D I C A T I O N

By **GERALD H. GOLDBERG**, Member, August 31, 1973

#### HISTORY OF THE CASE

1. On or about April 13, 1971, the Appellant, Gysegem Enterprises, Inc., (hereinafter "Gysegem"), of 314 Fifth Street, Charleroi, Pennsylvania, 15022, submitted an application for a permit approving discharge of industrial waste and mine drainage from strip mines pursuant

to The Clean Streams Law for a bituminous coal open pit mining operation known as the "Matovich Strip Mine", in Mount Pleasant Township, Washington County.

2. The Department of Environmental Resources, on May 12, 1971, denied the aforesaid application numbers 3271BSM18 and 590-3, upon the basis of a recommendation of a three man fact-finding committee consisting of Mr. Jack C. Sheffler, a Hearing Examiner for the Department, Mr. William C. Forrey, Assistant Director of the Bureau of State Parks of the Department, and Walter N. Heine, Associate Deputy Secretary for Mines and Land Protection. The committee conducted a Departmental hearing at which testimony was taken, as a result of which "findings of fact" were made. The committee concluded that it was "satisfied that the proposed mining operation carried out in the manner described in the application may meet the requirements of The Clean Streams Law." However, the committee further concluded that the granting of the applications in question "may adversely affect the public enjoyment of the natural, scenic, historic, and aesthetic values of the environment. . .", and that the environmental needs of the residents of Washington County and of those who use the Lutheran Church Bible Camp would be better served by denying the applications. The committee also concluded that the proposed operation "would create fire, explosion, and safety hazards by proposed use of explosives and heavy equipment near shallow high pressure gas lines which cross the proposed mining area at six locations" and that "The presence of heavy earth moving equipment and the mines high wall near areas used for recreation also presents a danger to the public". (Exhibit, Appeal)

3. Appellant filed a timely appeal on May 22, 1972, by which Gysegem challenged the accuracy and relevancy of the "findings of fact" of the Departmental committee, charged that the Departmental hearing was conducted in "an area and air of public circus with contrived groups bringing in school children who had been told what to say and an atmosphere of general hostility", and further contended that the law had been improperly interpreted and applied by the Department.

4. On May 22, 1972, the Environmental Hearing Board issued Pre-Hearing Order No. 1, requiring the Appellant to file, on or before June 19, 1972, a Pre-Hearing Memorandum. The Memorandum in question was filed on June 19, 1972, within the period specified by the Board. On

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July 21, 1972, Gerald C. Grimaud, Special Assistant Attorney General for the Environmental Pollution Strike Force, filed a Motion to Quash, alleging, *inter alia*, that the Appellant had failed to file the required Pre-Hearing Memorandum.

5. On July 27, 1972, the County of Washington, and the Washington County Commissioners, filed a Petition to Intervene. On July 28, 1972, Washington County, by its Assistant County Solicitor, filed an "Answer of Washington County to Appeal of Gysegem Enterprises, Inc."

6. A Pre-Hearing Conference was held before the Environmental Hearing Board en banc on Tuesday, September 19, 1972, involving, in addition to the instant, certain motions filed in the matter of *Bologna Mining Company*, at Board Docket No. 71-101. At that time, the Board upon the basis of a stipulation of counsel, allowed the intervention of Washington County in the Gysegem matter, (P-H R, 26) and the Motion to Quash filed by the Commonwealth was denied (P-H R, 27-28).

7. A hearing on the merits was held before Gerald H. Goldberg, Member of the Board, on Wednesday, November 29, 1972, in Pittsburgh, Pennsylvania. At the conclusion of that hearing, it was agreed by the parties that certain additional depositions would be taken, which depositions were taken on Wednesday, December 13, 1972, at Washington, Pennsylvania.

#### SUMMARY OF TESTIMONY

Mr. Henry Motycki, Secretary-Treasurer of Gysegem, testified that the corporation filed an application for approval of the discharge of industrial waste and mine drainage from strip mines pursuant to The Clean Streams Law.<sup>1</sup> Mr. Motycki testified that the tract in question is located in Mount Pleasant Township, approximately three miles from Hickory, in Washington County; that it is owned by Goldenrod Coal Company, to be operated under a coal lease by Gysegem (R, 11); that the application was prepared by Mr. Frank Gosnell, a Registered Professional Engineer, who was generally in charge of outlining the mining procedures which would

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1. The allegation was made during the hearing that Gysegem was not in fact a Pennsylvania corporation. A subsequent search of the records of the Department of State indicated, however, that Gysegem was and is a Pennsylvania corporation, and that a representation to the contrary was made in error.

have to be followed to meet the standards set by the Board and by the Commonwealth (R, 13, 14). During the course of his studies, Mr. Gosnell prepared a document headed "Mining Procedure", which outlined the problems which would be involved with the operation in its entirety, including borings, diversion structures, drainage, etc. (Petitioner's Exhibit No. 4) The document was signed by Mr. Motycki, with the statement that he, as Secretary-Treasurer of Gysegem "agree(s) with the above procedure and guarantee(s) that this will be followed exactly as shown and every measure possible will be made to avoid any damage to Cross Creek." Mr. Motycki further testified that an evaluation of the coal was made by Fleming Testing Laboratory of Uniontown, Pennsylvania, as a result of which he concluded that approximately 550,000 tons of coal could be profitably mined on the tract, and that the coal in question was of high quality (Petitioner's Exhibits Nos. 5, 6, R, 24 & 25). Mr. Motycki further testified that the stripping operation, in relationship to a proposed park known as Cross Creek Park, lies approximately a mile and a half from the nearest boundary of the park (R, 26, 27) and that appropriate measures had been taken to prevent damage or injury to gas lines crossing the tract (R, 27, 28). Further, Mr. Motycki testified that there are no high powered electrical lines on the property to be mined, and that if such mines were discovered to exist, the necessary precautions would be taken to meet with the utility and comply with its regulations (R, 31). Mr. Motycki further testified that no blasting operations of any kind would be performed on the premises (R, 31, 32). With respect to the church camp near the area, Mr. Motycki's testimony was to the effect that the church property contained only an old farm house and a couple of buildings, which buildings are approximately a mile and a half from the area to be stripped (R, 32, 33). His testimony was that from the site of the buildings on the church camp, one could not view the stripping operation, or see the property upon which the operation was to be conducted (R, 33) testified that a fence would be erected along the boundary line of the two properties, together with no trespassing signs, and that his engineer, Mr. Gosnell, had advised him that the operations would have no affect upon the water which the people in the church camp used. Finally, Mr. Motycki testified that his company would religiously follow the procedures outlined by Mr. Gosnell,

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and that, based upon his knowledge of the proposed mining procedures, no damage to the environment could be anticipated.

Upon cross-examination, Mr. Motycki testified that even from the border line fence of the camp, one could still not see the stripping operation, because that operation is at the bottom of the hill, and there is a forest between the two areas (R, 42, 43). With respect to the groundwater, Mr. Motycki admitted that his conclusions were based upon reports from Mr. Gosnell, and that with respect to his personal observation, he could speak only with respect to surface water. In further cross-examination, Mr. Motycki iterated his position that no blasting would be necessary on the premises. (R, 64-66).

Mr. Leon Gysegem, President of Gysegem Enterprises, further explained the mining procedure by indicating that areas of ten acres would be mined at any one time (R, 81, 82). He explained that in establishing diversion ditches and ponds, prior consultation with the mine inspector is necessary, and he proposed that such consultation would be conducted upon a frequent basis (R, 81-84). Mr. Gysegem also indicated that with respect to the bible camp, the geologic evidence, based upon his experience and upon core drillings which he had taken, indicates that the water runs from the bible camp down hill to the strip site (R, 86). Upon cross-examination, he admitted that this was not expert opinion, but that he was speaking only as a layman.

In rebuttal, Washington County called Dr. Javaid Munir Alvi, who is the President of a Consulting Engineering Firm called Geo-Mechanics, Inc. Dr. Alvi has a degree in mining engineering from the University of West Pakistan, a B.S. degree in petroleum engineering from the Montana School of Mines and Engineering, a B.S. degree in geological engineering from the Montana School of Mines and Engineering, a Doctorate from the University of Pittsburgh in Earth Sciences, specializing in Soil Mechanics, and is a member in the International Society of Rock Mechanics (R, 101, 102). Dr. Alvi's experience primarily related to those aspects of soil mechanics dealing with the design of highways, earth dams, foundations for various kinds of buildings, and some groundwater studies in connection with acid mine drainage, sanitary landfills and industrial waste disposal (R, 101-104). Dr. Alvi, upon cross-examination, admitted that he had never made any examination of any stripable or proposed stripping operation to determine whether or not a permit should or could properly be issued (R,

109). Basing his conclusion upon a study of pertinent documents in the matter, together with his observation of the testimony of witnesses during the hearing, Dr. Alvi concluded that the conduct of any kind of strip mining in the area would increase pollution in the water, both surface and subsurface, and would increase the sedimentation of the runoff water or the streams (R, 118, 119). These conclusions were stated by Dr. Alvi as having general applicability to any strip mining operation (R, 121, 122). Dr. Alvi indicated that sedimentation and erosion would continue for a period of twenty, thirty or forty years after the completion of the mining operation (R, 127). He stated that, in his opinion, some of the rock formations may require blasting (R, 131). Dr. Alvi further indicated that, in his judgment, the diversion ponds and sedimentation ponds proposed by the Appellant would not be sufficient to take care of the entire watershed area (R, 137) and, further, that there is nothing in any of the plans submitted which indicate that the problem of sedimentation will be permanently resolved by the use of ponds or otherwise (R, 137, 138). Upon further examination by counsel for the Commonwealth, Dr. Alvi stated that there was a risk "at the very least" of pollution no matter what the Appellants do (R, 142). He expanded this statement, upon cross-examination by counsel for Gysegem, to a conclusion to the effect that "whenever there is strip mining at any time at any place" there is a *certainty* of pollution (emphasis supplied; R, 143). Dr. Alvi admitted that he made no test borings on the site (R, 148), that he made only one visit to the general area at which time he merely walked over it (R, 149, 150) and that, from his observation, it appeared that there was no possibility of polluting the water of the bible camp (R, 154). Upon examination by the Board, Dr. Alvi admitted that he could not speak from personal knowledge or with certainty with respect to the underlying rock formations of the tract (R, 157) and, further, that nothing in the mining procedures proposed by the Appellant is inconsistent with practices of which he is aware (R, 157, 158). Dr. Alvi concluded that even if all of the practices proposed by the Appellant were to be carried out in strict accordance with the law and in accordance with the approved procedures, methods and techniques, there would nonetheless be a possibility of pollution. Finally, upon inquiry of the Board with respect to the decision whether there is a significant risk of pollution in excess of the requirements of the water quality criteria of the Department of Environmental Resources,

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assuming that the operation is conducted in accordance with the application, Dr. Alvi's reply appeared to be that there was "no immediate possibility of pollution".

Mr. Mike George, Director of Parks and Recreation for Washington County, testified that Cross Creek County Park, a proposed park of approximately 2,800 acres financed through local tax revenues of Washington County, Project 70 Funds, and the USDA under Public Law 566, Small Watershed Protection Program, is proposed for the area (R, 162, 163). The major purpose of the plan is for flood control, and it involves the installation of an all purpose 2,800 acre reservoir, which will be used as a water supply for the independent municipal authority of Avella. Upon cross-examination, Mr. George admitted that no construction had begun, and only about \$25,000 has been spent for initial planning, and that approximately \$275,000 has been spent for land acquisition (R, 166-168). The location of the proposed park would be approximately five miles from the Community of Avella and Independence Township, and "a few miles further" from the proposed stripping site (R, 168, 169). The stripping operation would be "up the tributary" from the proposed park, and not on Cross Creek itself (R, 171). Upon further examination by Mr. Grimaud, Mr. George testified that approximately seventeen (17) families have moved from the site of the proposed park, and that there is a definite need for the proposed park. Upon examination by the Board, Mr. George stated that no water treatment plant or facility would be constructed in connection with the proposed water supply for the town of Avella, and that he was not familiar with the water quality of Cross Creek (R, 174, 175, 176).

Mr. Thoreson, Camp Director for the Ohio Valley Lutheran Bible Camp Association, testified that the camp in question is approximately 291 acres, and contains three small existing buildings. The land, according to Mr. Thoreson, is used for "outpost wilderness type camping", (R, 185) and for hiking and recreation. The camp adjoins the Goldenrod tract for a boundary distance of 453.75 feet (R, 188). Mr. Thoreson indicated, however, that the camp has an option upon an additional piece of property which also adjoins the Goldenrod tract. Mr. Thoreson is of the opinion that a stripping operation would adversely affect the use of the camp, because (a) there would be a safety hazard to children who might trespass from the campground onto the stripping operation, and from possible blasting and rupture of gas lines (R, 192, 193) (b) noise pollution and

possible water pollution would also be objectionable to the users of the camp (R, 194). Mr. Thoreson testified that there is only one well on the campground which is the primary source of water, and if the well were damaged, the camp would be seriously hampered (R, 193, 196). Further, Mr. Thoreson testified that the main entrance of the camp is directly off the township road and persons entering the camp would be able to see the stripping operation, which would be objectionable to persons entering and leaving the camp (R, 196, 197). According to Mr. Thoreson the existence of a coal stripping operation near the camp "would not look nice. It would not fit in with our basic philosophy of preserving our land as nearly as possible we can to the natural environment . . ."

Upon cross-examination, Mr. Thoreson indicated that the total number of campers who used the area at the present time is approximately 200 per summer (R, 201), which averages about four campers per church. Mr. Thoreson testified, however, that the area is used as a week-end retreat throughout the year, and that approximately 300 to 500 persons use the area over a full year's time.

Upon further cross-examination of Mr. Leon Gysegem, he testified that, in the event pollution was found to occur while he was in the process of extracting coal, he would stop until the pollution was corrected (R, 227).

Upon deposition, Mr. Frank B. Gosnell, of Uniontown, Pennsylvania, testified that he is a Registered Professional Engineer who has been registered with the Commonwealth of Pennsylvania since 1942. Mr. Gosnell specialized in strip mines and deep mines, and is thoroughly familiar with the law relating to surface or strip mining (D, 4, 5). Mr. Gosnell testified that he designed a complete operation procedure for the Gysegem project, reduced this procedure to writing, placed his signature and his engineer's registry number thereon, and required the procedure to be accepted and signed by the client (D, 5-7). In Mr. Gosnell's opinion, if the procedure is followed as it is required to be, no pollution will result (D, 7). Further Mr. Gosnell testified that, if this procedure is followed, there will be no damage to underground wells or other natural or man-made features in the area (D, 7, 8). Mr. Gosnell further testified that no blasting whatsoever would be required during the mining operation (D, 9). He concluded that the operation would not interfere with the water supply

at the bible camp, and further that the use of heavy equipment in the area would create no hazards with respect to gas lines (D, 9, 10). Mr. Gosnell further described the specific mining operations, and concluded that as a result of the barriers and crop lines which would remain following the completion of the mining operation, and of the proposed procedure to leave ditches and catch basins in place until rehabilitation of the area has been completed and the soil protected against erosion by the development of shrubbery and other ground cover, there would be "no chance of pollution at all" (D, 13, 14, 15).

In further testimony, Mr. Gosnell indicated that the operation would be required to comply with State and Federal Regulations with respect to air pollution and noise pollution (D, 15, 16), and that, with the safeguards provided by the detailed operation plan, together with the supervision of the operation which would be conducted during the course of mining procedures, there would be no pollution of the proposed park, or its reservoirs. Upon cross-examination, Mr. Gosnell admitted that certain details of the plans would have to be worked out during the course of operation (D, 21, 22); this was characterized as a normal procedure, and Mr. Gosnell indicated that he would work closely with Mr. Cherry, the Mine Inspector (D, 23). Upon cross-examination, Mr. Gosnell reviewed the operation plan in detail, and further conceded that, with respect to certain detailed specifications thereof, it would be necessary to make final adjustments upon a day-to-day basis.

Upon examination of Dr. Alvi, in rebuttal, Dr. Alvi indicated that, as previously testified, any strip mining in the area would produce a possibility of water pollution and sedimentation (D, 45-49). Dr. Alvi offered certain estimates of the amount of sedimentation which he claimed could be produced during the course of this operation, but the calculations in question were not based upon personal observation, nor were they based upon data collected by Dr. Alvi. In summary, Dr. Alvi completely disagrees with Mr. Gosnell's testimony to the effect that there would be no pollution if the plan were meticulously followed, for the reason that there would be "infiltrated water" which would "go into hill" (D, 57). Dr. Alvi indicated that in his opinion, this "infiltrated water" would follow a southwesterly direction in the form of seepage springs along the hillside into the stream, and emerge somewhere near reservoir area of Cross Creek Dam (D, 58, 59). In his opinion, such infiltration would pollute that water

(D, 59). Upon cross-examination, Dr. Alvi admitted that the construction of the reservoir itself would cause sedimentation and pollution problems, and further conceded that his experience with respect to strip mining is extremely limited.

#### DISCUSSION

In the appeal filed by Appellant, the contention is made that a number of the findings of fact made by the three man departmental review committee which conducted a departmental hearing with respect to the application in question were without factual foundation. Pertinent findings to which the Appellant specifically objected were:

"5. The proposed strip mine is within the drainage area of the proposed lake along an unnamed stream which drains into Cross Creek.

\* \* \*

"7. The applicant intends to perform blasting operations in the area to be mined.

\* \* \*

"17. Strip mining could disturb the water supply of the church camp.

"18. The proposed surface mining activities present potential safety hazards to the campers, particularly children, from operation of heavy equipment and the anticipated steep highwall.

"19. Blasting and heavy equipment operation could interfere with shallow high pressure gas lines, thereby creating gas leakage, explosion and fire hazards."

The Appellant further objected to the conclusion that the "proposed operation would create fire, explosion, and safety hazards by proposed use of explosives and heavy equipment near shallow and high pressure gas lines which cross the proposed mining area at six locations." And that "the presence of heavy earth moving equipment in the mine's highwall near areas used for recreation also presents a danger to the public." Further, the Appellant disagrees with the conclusion of the Department to the effect that even though the proposed mining operation carried out

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in the manner described in the application may meet the requirements of The Clean Streams Law, the Department has a right to nonetheless deny an application "whenever any use of a mineral resource is proposed and that use *may* adversely affect the public enjoyment of the natural, scenic, historic, and aesthetic values of the environment. . ." (Emphasis Supplied).

In its Petition to Intervene, Washington County claims, with respect to its citizens, that the Commissioners have the responsibility to see that they are not deprived of their constitutional rights, and the allegation is made that the streams of the county are in danger of being polluted by the proposed operation, that potential dangers to environmental patterns and water patterns exist, that "great volumes of materials will be deposited in the streams, and erosion and pollution of presently clear water will occur", and that the "natural resources and public State amendment" to the Pennsylvania Constitution require that the rights of citizens be protected.

In reviewing the extensive testimony in this matter, we must begin with the observation that an applicant for a permit does have the burden of proving that its operation, for which it seeks a permit, will not damage the environment in a way prohibited by statute, by regulations duly promulgated pursuant to statute, or by Article I, Section 27, of the Constitution of Pennsylvania. At the same time, when the Department denies a permit, it is hornbook law that the findings of fact upon which it bases that denial must be based upon substantial evidence. In this case, it appears to the Board that many of the reservations expressed by the Department of Environmental Resources and by Washington County are speculative, or based upon mere supposition. Mr. Frank B. Gosnell, a Mining Engineer of fifty-two years experience (D, 4), who is a specialist in strip mining operations (D, 5) designed the mining procedure to be followed by the Appellant (D, 7). These procedures follow the Regulations established by the responsible agencies of the Commonwealth (D, 7).

In Mr. Gosnell's opinion, based upon his extensive education and experience in the field, if the procedures which he designed are carefully followed, there will be no stream pollution and no damage to underground wells (D, 7, 8). He testified that 550,000 tons of valuable coal could be mined in this operation, and that this could be accomplished without blasting (D, 8, 9). He further testified that any water supply of the bible camp, if there is any, would not be affected by this operation (D, 10).

Mr. Gosnell further testified that a proposed lake in the proposed park would not be polluted by the operation. He rules out the possibility of polluting Cross Creek (D, 11, 15). He pointed out that his work drawings as submitted to and accepted by the Appellant, imposed more stringent controls than the law requires (D, 17). He found no danger to the high pressure gas lines (D, 19).

None of this testimony was substantially challenged upon cross-examination.

In corroboration of Mr. Gosnell's testimony, Mr. Henry Motycki, Secretary-Treasurer of the Appellant, and Mr. Gysegem, President, verified the fact that they fully intended and still intend to follow the recommendation which Mr. Gosnell has made in meticulous detail.

It was, of course, acknowledged by Mr. Gysegem, as well as by Mr. Gosnell, that it would be necessary, on a day to day basis, to supplement the mining operation plan with the cooperation of the State Mine Inspector. We do not find this to be an unusual situation; it is, of course, virtually impossible to account for every condition which may arise during a surface mining operation. However, upon cross-examination by Mr. Grimaud, Mr. Gysegem stated that should any difficulty involving pollution occur during the course of the operation, he would immediately cease operations until the condition was corrected. The Board is impressed with the danger of such a pollutorial incident, however and impressed that, should it occur, it would be likely to be both severe and continuing. Merely ceasing operations would not necessarily cure it. It would be the responsibility of Gysegem to cure it, and that cure could be expensive. It seems to the Board that this may well be a case where a special bond, such as was ordered by us *In the Matter of Schmidt & Nyce, Inc.*, Docket No. 71-027 (1972), or by §325 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P.S. §691.315, should be required, in addition to the usual bonds required to insure restoration of strip mines. The Intervenor herein, the County of Washington, rests its case almost entirely upon the testimony of Dr. Javaid Alvi, a graduate Mining Engineer with a degree from West Pakistan University and a doctorate from the University of Pittsburgh in Earth Sciences. Dr. Alvi has four years of experience;

however, his experience with strip mining is limited to one job in Collier Township under the prior law (R, 107). At page 109 of the Record, Dr. Alvi admits that he has never made any examination of a proposed strip mining operation to determine whether or not a mining permit could be properly issued. He visited the site in question on one occasion (R, 150). His general opinion with respect to strip mining was to the effect that "any kind of strip mining which is to be done will create two kinds of problems; it will increase the pollution in the water . . . will increase the sedimentation of the runoff water in the streams" (R, 119). These conclusions, expressive merely of the general experience to the effect that, unless properly regulated and supervised, strip mining is a procedure which may cause damage to the environment, is of little or no evidentiary value in this case.

Dr. Alvi, however, is apparently so persuaded of the danger of strip mining that, at page 72 of the transcript, he stated that no matter what the Appellant does the risk of pollution exists (R, 72).

Upon cross-examination, Dr. Alvi conceded that the risk of pollution in this instance is neither greater nor less than that in any other strip mining operation (R, 143). He made no test borings himself (R, 148); he admits that the bible camp is on a steep wooded hill, well above the area where the strip mining operation is contemplated (R, 149-151); he admits that the stream on the property is only "two or three feet wide" (R, 153) in December; he further stated that he could not "testify with any specificity," as to the nature of the underlying rock formations in the area (R, 156). Further, Dr. Alvi admitted that there is nothing in the mining procedure proposed by the Appellant which is inconsistent with present practices (R, 157, 158).

The other witnesses for the county were Mike George, Director of Parks and Recreation, whose testimony related to the proposed park. He indicated that no construction had commenced nor had a date for construction been established. The funds spent thus far for the land acquisition have come mainly from funds provided under Flood Control Acts (R, 166). He concedes that the proposed stripping operation is a mile and a half from the proposed park, and is not on Cross Creek itself,

but on a tributary of it (R, 171).

The Director of the bible camp testified that the camp is virtually undeveloped, it has approximately three buildings "120 years old" (R, 184). Only the south central part of the property touches the Appellants' site (R, 187). On cross-examination, he admitted that there is no public sewage system in the area; that they use outhouses (R, 199, 200, 102); and that the total number of campers for the summer last year was approximately 200.

The Department of Environmental Resources, through its three man fact-finding committee, consists of Mr. Jack C. Sheffler, an experienced Departmental Hearing Examiner, Mr. William C. Forrey, Assistant Director of the Bureau of State Parks, and Mr. Walter Heine, a Professional Engineer, who was Associate Deputy Secretary for Mines and Land Protection, concedes that "the proposed mining operation carried out in the manner described in the application may meet the requirement of 'The Clean Streams Law.'" This concession by the Department, together with the evidence of record, appears to dispose of the issue whether the conduct of the operation in question poses a substantial risk to the environment. Without reference to the "Conservation Bill of Rights" Amendment to the Pennsylvania Constitution, The Clean Streams Law very specifically provides that no permits shall be granted where there is a substantial risk to the environment.

The specific risks mentioned by the three man review board — "fire, explosion, and safety hazards by proposed use of explosives and heavy equipment near shallow high pressure gas lines which cross the proposed mining area" and "the presence of heavy earth moving equipment and the mine's highway near areas used for recreation" clearly do not constitute such a risk, in the opinion of the Department's own fact-finding team. Further, we independently conclude that no such substantial risk exists. The record is clear that no blasting of any kind will be used during the operation. There is a clear and well-detailed agreement with the gas company with respect to the gas lines in question, and Mr. Gosnell's operation plan as well as supplementary plans which are a part of the application clearly outline the manner in which earthen barriers will be maintained around the gas lines. With respect to the question of water pollution, we must conclude that there is no substantial evidence of record by which it may be concluded that the operations in question pose any

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substantial risk of long term water pollution problems of the kind usually associated with deep mines, see e.g. *Harmar Coal Corp. v. Commonwealth*, \_\_\_\_\_ Pa. \_\_\_\_\_, \_\_\_\_\_ A.2d \_\_\_\_\_, (CIVIL. No. 89-90, March 16, 1973). We are convinced there is some serious risk of short term "accidental" discharges. Other than this, neither the Commonwealth nor Washington County presented any evidence or testimony which compels us to cast serious doubt upon the application itself or upon the testimony of Engineer Gosnell.

It is, of course, possible to raise the specter of all sorts of possible and contingent hazards in strip mining operations. Accidents can happen; unforeseen events can occur; problems may arise from day to day which must be dealt with, if the operation is to be conducted in a safe manner. But these are risks which the General Assembly, in establishing the provisions of The Clean Streams Law, saw fit to take with respect to any strip mining operation. It lay within the providence of the General Assembly to forbid strip mining in the Commonwealth of Pennsylvania. This the General Assembly chose not to do. Instead, a detailed system of regulation is provided by the law. Its purpose is to permit the extraction of valuable minerals while, at the same time, protecting the environment as fully as possible within the scope of human limitations. In preparing the operation plan for the site in question, Mr. Gosnell has gone considerably further than the already strict requirement of the Pennsylvania law. Further, the Appellant has agreed, upon the record, to refrain from the use of explosives, to maintain a fence along the border of the bible camp and, should any pollution incident occur, to voluntarily shutdown its operation until such time as the pollution incident is fully corrected. Because any pollution incident that might occur (however improbable) is likely to be of a continuing nature, and entail considerable expense to correct, we think it would be appropriate for the company to post a substantial bond to insure that correction does take place, in addition to the usual Bonds required for operating strip mines.

The "Environmental Bill of Rights" Amendment, Article I, Section 27 of the Pennsylvania Constitution, provides that the Commonwealth is a trustee of the publicly owned natural resources of Pennsylvania and that, in its capacity as trustee, it is required to conserve those resources for the benefit of all the citizens of this Commonwealth. Does this mean that, as the Department concludes in its "Discussion"

"Whenever any use of a mineral resource is proposed and that *may* adversely affect the public enjoyment of the natural, scenic, historic, and aesthetic values of the environment, it is within the Commonwealth's authority to conserve and maintain these public natural resources by denying development of the mineral resource?" As an abstract statement this is true, see *Commonwealth v. National Gettysburg Battlefield Tower*, 8 Pa. Commonwealth. 231, 302 A.2d 86 (1972); *Fox v. Department of Environmental Resources*, EHB Docket No. 73-078 (Opinion issued June 18, 1973). The application of this principle to any particular set of facts, however, requires a balancing of the risk or threat to the values protected by Article I, Section 27 of the Constitution, against other interests of the public, including the public interest in the utilization of mineral resources, and the public interest in allowing private property to be used where there is no substantial threat to the public from such use, depends upon whether the likelihood of harm to the constitutionally protected values is or is not substantial.

First of all, we do not feel that there is substantial evidence on the record to the effect that the proposed coal stripping operation in the instant matter will do such damage to the water quality of Cross Creek as to adversely affect the health, welfare, and general interest of the people of the Commonwealth. On the contrary, the weight of the testimony is to the effect that no damage whatever to the water quality of Cross Creek is likely to occur. There is always, of course, a possibility that any strip mining operation may damage the environment in some manner. We do not, however, feel that the public interest in the protection of the natural, scenic, historical and aesthetic values of the environment will be in this case significantly threatened by this particular proposed strip mining operation.

The mining operation in question will, if promptly commenced, be completed within a period of three years. The bible camp to which reference has been made herein is totally undeveloped and, although the Director of the camp submitted a grandiose and detailed map to the Board, showing all sorts of proposed future developments, he was unable to indicate when, if ever, any of this development work would take place. As to the proposed reservoir in the proposed park, not only has construction not commenced, but the testimony was no one can predict when construction may commence.

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Upon the basis of the record, and upon the consideration here before stated, the Board makes the following:

#### FINDINGS OF FACT

1. Appellant Gysegem Enterprises, Inc., is a registered Pennsylvania corporation, having valid and subsisting mine operator's license.

2. Application numbers 3271BSM18 and 590-3 are in compliance with the requirements of "The Clean Streams Act" and of the Rules and Regulations of the Department of Environmental Resources.

3. There is no substantial evidence of record by which it may be concluded that the operation in question poses a substantial threat of water pollution to Cross Creek, to any of its tributaries, or to the proposed reservoir.

4. There is no substantial evidence of record by which it may be concluded that the proposed strip mining operation poses a substantial threat to the water supply of the bible camp.

5. There is no substantial evidence of record which indicates that the proposed ruling operation poses a substantial threat of air or noise pollution in excess of that permitted by law.

6. Upon the basis of the record, we find that the strip mining operation will not normally be visible from the premises of the bible camp and, although a portion of the operation may be visible from the access road approaching the said camp, we do not conclude that this constitutes such a substantial affront to the aesthetic values of the environment as to permit the invocation of the "Environmental Bill of Rights" Amendment to the Pennsylvania Constitution in order to outweigh the public and private interest in mining the coal.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction of the parties and of the subject matter herein.

2. The application in question is in compliance with the law.

3. The provisions of the "Environmental Bill of Rights" Amendment to the Pennsylvania Constitution are inapplicable to the existing applications.

4. The applications in question were improperly denied by the Department.

**ORDER**

AND NOW, to wit, this 31st day of August, 1973, the Department of Environmental Resources is hereby ordered to issue appropriate permits upon application numbers 3271BSM18 and 590-3, as presented by Gysegem Enterprises, Inc., with the following additional terms and conditions attached thereto:

1. The Applicant will erect and maintain a substantial chain link fence upon the boundary line of its property which adjoins the property of the Ohio Valley Lutheran Bible Camp Association. In addition, the Appellant will post the fence with "no trespassing" signs at twenty (20) foot intervals.

2. The permits will specifically provide that no blasting will be permitted during the course of the operation.

3. The permits shall provide that, upon the concurrence of any pollution incident (as pollution is defined in The Clean Streams Law and the Regulations of the Department) the operation shall forthwith terminate until such time as the pollution incident has been corrected, and shall provide that Gysegem Enterprises, Inc., shall be responsible for such correction.

4. The permits shall be conditioned upon the posting of a Bond in the amount of \$250,000 by Gysegem Enterprises, Inc., in addition to the Bonds normally required by law for the operation of a strip mine, to insure that if any pollution incident occurs as a result of the mining contemplated by the application here in question, that pollution will be corrected.

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202. *Community of Gray*

COMMUNITY OF GRAY : Docket No. 72-301  
Somerset County :

#### A D J U D I C A T I O N

By MICHAEL H. MALIN, Chairman, September 10, 1973

This matter is before the Environmental Hearing Board on an Appeal, filed by certain residents of an area in Jenner Township, Somerset County, known as the Community of Gray (Gray), from two Orders issued by the Department of Environmental Resources (Department) to Jenner Township.

In the first of these Orders, hereinafter referred to as "Order No. 1" dated June 9, 1972, the Department, after making a finding that untreated and inadequately treated sewage was being discharged from Jenner Township into Quemahoning Creek, the North Branch of Quemahoning Creek and their tributaries in the Villages of Gray and Acosta, ordered Jenner Township to construct and operate two sewage conveyance and treatment facilities, permits for which had previously been issued to Jenner Area Joint Sewer Authority.

In the second of these Orders, hereinafter referred to as "Order No. 2", also dated June 9, 1972, the Department made a finding that abatement of polluttional discharges of sewage in Lincoln Township, Somerset County, in a manner consistent with Sections 201, 202, and 203 of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.201, 35 P.S. 691.202 and 35 P.S. 691.203, requires that Lincoln Township, Jenner Township and Jenner Area Joint Sewer Authority plan, design, finance, construct and operate joint sewage conveyance and treatment facilities. The Department ordered Jenner Township to develop and negotiate with Lincoln Township and Jenner Area Joint Sewer Authority agreements designed to produce these needed conveyance and treatment facilities.

In its Appeal from these Orders, Gray contends that the Department has failed to prove that there are discharges of untreated or inadequately treated sewage to the waters of the Commonwealth from Gray. Gray also bases its Appeal on the fact that its residents cannot afford to pay for construction of sewage conveyance and treatment facilities in their area.

Hearings on this Appeal were held before Louis R. Salamon, Esquire, Hearing Examiner, on November 13, 1972, and on January 29, 1973.

It must be noted that Attorney James B. Yelovich, who represented Gray at the Hearing held on January 29, 1973, stated (N.T. 111) that his clients were interested only in voiding that portion of Order No. 1 which required the construction of sewage conveyance and treatment facilities in Gray.

The parties waived filing of briefs.

The Board makes the following

#### FINDINGS OF FACT

1. Gray is an area in Jenner Township, Somerset County which is situate along the watershed of Quemahoning Creek.
2. There are no public sewage collection and sewage treatment facilities in Gray.
3. There are 87 lots in Gray upon which there are occupied structures or dwellings.
4. Septic tanks have been installed to service the occupants of the structures or dwellings in 78 of these 87 lots.
5. Raw or inadequately treated sewage is flowing from pipes situate at various points in Gray into at least 11 open ditches. This sewage flows in these ditches and is discharged to the waters of the Commonwealth, to-wit, the North Branch of Quemahoning Creek.
6. This sewage is malodorous, is black or gray in color, and contains solids and tissue paper.
7. This discharge of raw or inadequately treated sewage from Gray to the waters of the Commonwealth creates a danger to the public health in that, among other things, disease causing organisms are present in raw or inadequately treated sewage.
8. This discharge of raw or inadequately treated sewage from Gray to the waters of the Commonwealth, to-wit, the North Branch of Quemahoning Creek, has adversely affected these waters by virtue of the fact that the oxygen in these waters, necessary for the survival of aquatic life, is being depleted by the dissolved organic matter contained in the sewage.

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9.     This discharge of raw or inadequately treated sewage has resulted in pollution of the North Branch of Quemahoning Creek.

10.    On May 19, 1972, the Division of Water Quality Management of the Department issued Water Quality Management Permit No. 5672404 to Jenner Area Joint Sewer Authority, which approved the construction of sewage conveyance and sewage treatment facilities to serve the area in Jenner Township known as Gray.

11.    Construction and operation of these approved facilities are necessary to eliminate the health hazards and to abate the pollution of the North Branch of Quemahoning Creek which has been created by the discharge of raw or inadequately treated sewage thereto.

12.    The plan to construct sewage conveyance and sewage treatment facilities to serve the area in Jenner Township known as Gray, is in conformity with the interim sewage plan prepared by the Somerset County Planning Commission.

13.    The sewage conveyance and sewage treatment facilities construction project for Gray is eligible for federal funding.

14.    The areas of Lincoln Township which are the concern of the Department in Order No. 2 are the communities of Harrison and Sipesville.

15.    Since Gray, Acosta, Harrison and Sipesville are located in the Quemahoning Watershed, it is necessary under Section 5 of The Clean Streams Law, *supra*, 35 P.S. 691.5, and under Department Regulation 91.31, for the municipalities in which these communities are located, to-wit Jenner Township and Lincoln Township, together with Jenner Area Joint Authority, to develop and to implement comprehensive plans and projects for collection and treatment of the sewage generated in these communities.

16.    The availability of federal funding for sewage conveyance and sewage treatment facilities in Jenner Township and in Lincoln Township is contingent upon the development and implementation of a comprehensive plan of sewage conveyance and treatment for areas in the Quemahoning Watershed.

17.    It is doubtful that there will be 100 per cent funding for construction of these projects. As such, a landowner in Gray will be required to pay a charge based upon the number of feet of frontage of his lot, a connection fee and a monthly rental fee.

18. Neither Jenner Township nor Lincoln Township nor Jenner Area Joint Sewer Authority has appealed from the two Orders issued by the Department which are the subject of this Appeal.

#### DISCUSSION

The Department has very clearly demonstrated that untreated or inadequately treated sewage is continually being discharged from numerous points in Gray to the North Branch of Quemahoning Creek.

William Ciccarelli, who appeared at the hearings in this matter on behalf of Gray, concurred in this determination (N.T. 97, Nov. 13, 1972) (N.T. 57-59, Jan. 29, 1973)

As Gray is situate in Jenner Township, Jenner Township is in violation of Sections 201 and 202 of The Clean Streams Law, *supra* 35 P.S. 691.201 and 35 P. S. 691.202, as the result of the existence of such discharges.

Although 78 of the 87 lots in Gray which are improved by an occupied structure or dwelling are equipped with septic tanks, it is rather obvious that the pollution problems have not been solved by these systems.

Abatement of the problem of discharges of raw sewage to the waters of the Commonwealth, and compliance with The Clean Streams Law can be achieved only if sewage conveyance and sewage treatment facilities are constructed to serve the residents of Gray.

This was recognized by Jenner Area Joint Sewer Authority when it applied to the Department for a permit to construct such facilities in Gray, which permit the Department issued.

The Department was and is cognizant of the fact that there are tremendous capital costs involved in constructing sewage facilities. The Department was and is aware that a prerequisite for federal funding for this project or for any other sewage facility construction project in areas of Jenner Township and Lincoln Township included in the Quemahoning Watershed, is to direct these municipalities, together with the Jenner Area Joint Sewer Authority, to develop a comprehensive plan for sewage conveyance and treatment.

Furthermore, the Department has the duty, under Section 5 of The Clean Streams Law, *supra*, to consider water quality management and pollution control in the watershed as a whole and the feasibility of combined

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or joint treatment facilities. This duty also arises by virtue of Department Regulation 91.31 which provides that the Department shall not approve a sewage facilities project requiring its approval unless such project is included in or conforms with a comprehensive program of water quality management and pollution control.

For these reasons, and pursuant to the authority granted to the Department by the provisions of Section 203 of The Clean Streams Law *supra*, 35 P.S. 691.203, the Department issued the two Orders to Jenner Township from which Gray has appealed.

It is clear that the primary objection of the citizens of Gray to the construction of sewage facilities in their community is that they cannot afford the front foot assessment, the connection fee and the monthly rental fee which they will be charged.

Although we sympathize with these citizens in the prospective financial plight with which they are faced, we must hold that the violations of The Clean Streams Law, *supra*, to-wit, the discharge of untreated or inadequately treated sewage to the waters of the Commonwealth from Gray, must be abated in spite of the financial hardship which abatement activities to cure such violations might entail. See *Commonwealth ex rel Allesandroni v. Borough of Coudersport*, 35 Dauphin 82 (1966); *Commonwealth ex rel Allesandroni v. Borough of Confluence, et al.*, 87 Dauphin 214 (1967); *affd.* 427 Pa. 540, 234 A. 2d. 852 (1967); *In re Borough of Zelienople*, E. H. B. Docket No. 72-199 (February 5, 1973); *In re Sellersville Borough*, E. H. B. Docket No. 72-173 (July 31, 1973)

We trust that the officials of Jenner Township and Jenner Area Joint Sewer Authority and their engineers and consultants will devise a plan which will take into consideration the financial plight of these citizens as well as abate the violations of The Clean Streams Law which are so clearly present here.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter of this appeal.

2. Jenner Township, in which Gray is situate, is in violation of Sections 201 and 202 of The Clean Streams Law, the act of June 22, 1937, P.L. 1987, as amended 35 P.S. 691.201 and 35 P.S. 691.202, by

reason of the continuing discharges of untreated or inadequately treated sewage to the waters of the Commonwealth.

3. Violations of The Clean Streams Law, *supra* must be abated in spite of the financial hardship which abatement activities to cure such violations might entail.

4. The Department of Environmental Resources properly issued the orders of June 9, 1972, under the authority of Section 203 of The Clean Streams Law, *supra*.

**ORDER**

AND NOW, this 10th day of September, 1973, the orders issued by the Department of Environmental Resources on June 9, 1972 are hereby upheld and the Appeal of the Community of Gray is dismissed.

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*Mr. & Mrs. Willard E. Davis*

MR. & MRS. WILLARD E. DAVIS : Docket No. 72-328

A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, September 26, 1973

This is an appeal from a refusal on the part of the Department of Environmental Resources (Department) to approve an application by Mr. & Mrs. Willard E. Davis, Appellants herein, for a permit to construct and operate an on-lot sewage system, Application No. 144466.

A hearing was held before Allan H. Starr, Esquire, hearing examiner, on October 13, 1972, at Norristown, Pennsylvania.

At the hearing, the principal contention turned on whether there was or was not a high seasonal water table on the subject premises in the area where the proposed sewage system would be located. This question turned on three issues of fact: (1) Whether mottling of a certain kind found in soil at a specified depth below the surface, indicated a seasonal high water table at that depth? (2) If so, whether any of the holes investigated by the Department in which mottling was found, were in the area where the sewage system applied for would be located? (3) If none

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of the holes were in that area, is evidence of mottling at a certain depth in some holes, taken as evidence of a seasonal water table at that depth at those locations, sufficient evidence of a high seasonal water table at other locations on the same lot?

With respect to the first question, we find in the affirmative, as we have found in other cases. See e.g., *Department of Environmental Resources v. Cannon*, EHB Docket No. 72-396 (Opinion filed August 15, 1973); *Department of Environmental Resources v. Fabiano*, EHB Docket No. 73-051, (Opinion filed August 1, 1973). Here, as in the *Fabiano* case, we are dealing with a Readington soil, derived from a predominantly reddish Triassic shale. One would not expect grey mottling in this soil to be derived from grey pavement material, unless there are grey basalt dikes in the areas not noted in the record. We conclude that in the holes investigated by the Department, the seasonal water table was at the depths indicated by the mottling that was present, viz., 30 to 48 inches.

However, the evidence is clear (and was clear to the hearing examiner) that none of the holes investigated by the Department was in the area where the Appellant's engineer proposed to put their sewage system. Hence, there is no direct evidence that there is a high seasonal water table, in violation of §73.11 of the Department, in that area.

The third question therefore becomes the crucial one. The Department's expert, Mr. John Zwalinski, testified that in his opinion the seasonal high water table would not vary in depth throughout the lot in question (Tr. 67-69, 82). This opinion was apparently based at least in part, on his judgment that, given the topography of the region, the entire area would exhibit the same soil and water table characteristics. (See Tr. 67-69).

The Appellant's engineer on the other hand, testified that he examined the soil in the area where the leach beds were to be placed, and that, although there was mottling, indicating a high seasonal water table, in other areas of the lot, there was no mottling there. That was why he located the leach beds there, he said. (Tr. 28, 34-38).

As between the theoretically based testimony of the Department and the direct observations of the Appellant's engineer, we must select the latter. However certain the Department's expert is that the soil and water table characteristics of a given lot are uniform, it is nevertheless conceivable to the Board that they may not be uniform.

When there is direct and uncontradicted testimony that in fact they are not uniform, we see no reason why such testimony may be disregarded if the witness is credible. (And, the witness appeared to the hearing examiner in this case to be credible.)

The Board makes the following additional

#### FINDINGS OF FACT

1. Mr. and Mrs. Willard E. Davis, Appellants herein, are the owners of a 46,800.43 square foot lot fronting on Pennsylvania Route 113, in Skippack Township, Montgomery County, Pennsylvania.
2. The subject lot is part of a subdivision plan which was approved by Skippack Township in 1965.
3. On or about July 10, 1972, Appellants applied for a permit to build a septic tank sewage disposal system on the subject lot, said application being No. 144466.
4. The Department administers the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, 35 P.S. §§750.1 *et seq.*, directly, in Skippack Township.
5. By letter dated July 13, 1972, the Department denied Appellants' an application No. 144466 for a septic tank sewage disposal system on the subject lot.
6. The Department's denial was based on its conclusion that a high seasonal water table exists on said lot, in violation of Section 73.11 of the Regulations of the Department.
7. The Department's conclusion that such a high seasonal water table exists was based on observations of grey and rust colored mottling in the soil in six (6) holes dug in the subject lot, at depths of approximately two (2) to four (4) feet.
8. The soil in said holes was of a type known as Readington.
9. Grey and rust colored mottling in said soil does indicate a seasonal water table at the depths at which such mottling occurs.
10. None of the holes in said lot investigated by the Department, were located where the Appellants' proposed sewage system would be located.
11. Holes dug where the proposed sewage system would be located showed no mottling to depths greater than six (6) feet.

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12. Therefore, there is no indication of a high seasonal water table, in violation of Section 73.11 of the Department's Regulations.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and of the subject matter.

2. The burden of proof with respect to facts necessary and sufficient to justify the granting of a permit is on the applicant for that permit.

3. The applicant in this case has satisfied that burden of proof, and in the absence of contrary evidence is entitled to the permit applied for.

#### ORDER

AND NOW, this 26th day of September, 1973, the appeal of Mr. & Mrs. Willard E. Davis is sustained. The Department of Environmental Resources is hereby directed to issue the appropriate permit, upon the condition that the specific site where the Appellants install their sewage system shall be the area where it has been found that mottling was not present.

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*James H. Brower*

JAMES H. BROWER, a/k/a : Docket No. 73-028  
NORTH HILLS MOBILE HOME PARK,  
a/k/a BROWER'S MOBILE HOME PARK, :  
Defendant

#### A D J U D I C A T I O N

By THE BOARD, November 2, 1973

AND NOW, this 2nd day of November, 1973, it appearing to the Board that the Commonwealth of Pennsylvania, Department of Environmental Resources (Department) having filed a Complaint for Civil Penalty against James H. Brower, also known as North Hills Mobile Home

Park (Brower) and that at the hearing held on April 10, 1973, the parties reached a settlement agreement, the terms of which are reflected in the record of said hearing; and that Brower, having failed to communicate with the Department upon the final language of a consent adjudication;

NOW THEREFORE, upon motion of the Department, and it appearing to the Board that this adjudication is just and proper, it is hereby ordered and adjudicated that:

1. As settlement for past violations, Brower shall pay to the Pennsylvania Clean Water Fund the sum of five hundred (\$500.00) dollars. This sum shall be due and payable upon expiration of the appeal period following advertisement of the terms of this settlement if no appeal therefrom is filed by any third party. If an appeal following the said advertisement is filed, the said five hundred (\$500.00) dollar payment shall not be due until the consent adjudication is upheld by the Hearing Board, and the ultimate payment by Brower shall be in accordance with the adjudication ultimately arrived at and made final.

2. From and after the date of the hearing hereon, April 10, 1973, Brower shall pay to the Pennsylvania Clean Water Fund the sum of five (\$5.00) dollars per trailer per month. In computing this figure, all occupied trailers whose sewage discharges into the Brower sewage disposal system shall be included. A trailer shall be considered occupied for a particular month if, during that month it was occupied for at least fifteen (15) days. Payment of this sum and the sums described in paragraphs three (3) and five (5) hereof shall be received at the Department's Lewistown Office, 29 Chestnut Street, Lewistown, Pennsylvania, 17044, within five (5) days following the tenth (10th) day of every month. The said payment shall continue until such time as Brower connects to municipal sewerage system or otherwise develops and makes operational an approved sewage disposal system, or until July 1, 1974, whichever occurs first. It is understood that at no time during the life of this Agreement shall Brower be permitted to connect more than twenty-two (22) mobile homes to his present system.

3. From and after July 1, 1974, if Brower is not connected to either a municipal sewage system or other approved or permitted means of sewage disposal, then the payment described in paragraph one (1) hereof, shall be increased to ten (\$10.00) dollars per trailer per month.

4. From and after July 1, 1975, if Brower has not connected

to a municipal sewage system or otherwise connected to an approved sewage disposal facility, then the payment described in paragraph three (3) hereof, shall be increased to fifteen (\$15.00) dollars per trailer per month.

5. From and after July 1, 1976, if Brower has not connected to a municipal sewage system or otherwise connected to an approved sewage disposal facility, the payment described in paragraph four (4) hereof, shall be increased to the sum of twenty (\$20.00) dollars per trailer per month.

6. It is expressly understood that a condition of this Adjudication is that Brower shall connect to the Derry Township municipal system as soon as it becomes available in the area of his mobile home park and if he, his successors or assigns refuse or neglect to do so, then this Adjudication may, at the option of the Department, be considered null and void, and Brower shall be subject thereafter to prosecution and/or civil action for violation of the Rules and Regulations of the Department and the laws of the Commonwealth for any unpermitted discharge of sewage into waters of the Commonwealth.

7. It is further understood as a condition of this Adjudication that if at any time hereafter, Derry Township abandons its plans to provide municipal sewage collection and treatment for the area where the Brower Mobile Home Park is located, or if Derry indefinitely postpones plans for construction of such facilities, then Brower shall be required to immediately take such steps as are necessary to begin construction and ultimate operation of an approved sewage treatment facility for his Mobile Home Park, and all the trailers connected to his collection system. If Brower fails to take such action, the Department, may at its option, declare the Adjudication null and void, and Brower shall be subject thereafter to prosecution and/or civil action for violation of the Rules and Regulations of the Department and the laws of the Commonwealth for any unpermitted discharge of sewage into waters of the Commonwealth.

8. This Adjudication shall have the same force and effect as a Consent Adjudication in settlement of this Civil Penalty litigation, and the Commonwealth shall summarize its terms for publication in the Pennsylvania Bulletin as required by Title 25: Rules and Regulations of the Department, Chapter 21, Environmental Hearing Board, Section 21.38.

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*Robert L. Anthony*

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**ROBERT L. ANTHONY**  
Action for Community Survival, et al

: Docket No. 73-356-W

**A D J U D I C A T I O N**

By **PAUL E. WATERS**, Member, November 19, 1973

This case is being decided on the basis of a Motion to Dismiss filed by Springfield Associates, questioning the jurisdiction of this Board over the subject matter of this appeal.

We have concluded that we do not have jurisdiction. The "action of the Department" being appealed from is the Department's acceptance of certain acts and submissions of Springfield Associates as compliance with a consent order dated December 28, 1972. Essentially, the Appellants seek enforcement of that consent order, as interpreted by them.

This Board has no power to enforce orders of the Department. That is a matter for the Courts.

**ORDER**

AND NOW, this 19th day of November, 1973, after due consideration of the Motion to Dismiss the appeal taken in the above matter from a consent agreement of December 28, 1972, the Motion is hereby granted.

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*Township of Monroe*

**TOWNSHIP OF MONROE**

: Docket No. 73-177-W

**A D J U D I C A T I O N**

By **PAUL E. WATERS**, Member, November 26, 1973

This matter comes before the Board as an appeal from an order of the Department of Environmental Resources, hereinafter Department, issued to Monroe Township requiring it to negotiate and enter into an agreement with the Municipal Authority of the Borough of Mechanicsburg, hereinafter Authority, for the use of a certain capacity in a new treatment

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plant providing service to a portion of the Township which presently has no public sewer.

Monroe Township, hereinafter Appellant, had no prior notice that this order would be issued and inasmuch as there is not allegation that it is presently causing any water pollution problems, contends that the order is not only unreasonable, but economically impossible to comply with.

**FINDINGS OF FACT**

1. On May 16, 1973, the Department issued an order to Appellant requiring it to negotiate toward an agreement with the Authority for the utilization of such excess sewage treatment capacity as would be provided in the Authority's new treatment facilities for Appellant's future needs.

2. The Appellant is not presently causing any degradation of the waters of the Commonwealth.

3. The Appellant will have future needs for sewage treatment in the area known as Sewer District No. 1.

4. The primary and present need for upgraded sewage treatment is due to the Authority plant which is having an adverse effect on the Trindle Spring Run.

5. The Tri-County Plan under Act 537 which was prepared by the Tri-County Planning Commission and adopted by the Township as its official plan, and two related studies conducted by Monroe Township, recommend that the portion of Monroe Township designated as Sewer District No. 1. be sewered to the Authority plant.

6. The new Authority treatment plant is projected for completion in 1976. This is in accord with the projected future need of the Appellant for sewage treatment.

7. The Appellant has not submitted a subsequent implementation schedule showing a future need other than the 1976 date.

8. Under present Federal Regulations the area of Appellant township known as Sewer District No. 1. must be sewered to the Authority plant in order to obtain federal funds for the project.

9. One of the major objections to the joint sewer project raised by Appellant is the financial infeasibility based on the sewer rentals and costs which have not been finally determined.

### CONCLUSIONS OF LAW

1. The Department has jurisdiction of the parties and the subject matter.
2. The Department has authority under The Clean Streams Law and its Regulation 91.31 to issue an order to a municipality requiring it to negotiate and enter a reasonable agreement for a joint sewer system.
3. It is a prerequisite to any mandatory joint sewer agreement required by the Department that the terms thereof are "reasonable", and "fair" is encompassed within the term.

### DISCUSSION

The two issues in this case are concerned, first, with the authority of the Department and, secondly, with the procedure to be used in exercising it.

At the outset we affirm our prior decisions in holding that the Department does have the authority to order negotiations and reasonable agreements between municipalities for the construction of joint treatment facilities. The Clean Streams Law provides: "... Such orders may include, *but shall not be limited to*, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend or operate a sewer system or treatment facility, or to negotiate with other municipalities for combined or joint sewer system or treatment facilities..." (Section 203(b).)

We believe that, implicit in any mandatory negotiation requirement, is the understanding that any reasonable result of those negotiations will be agreed upon by the parties. Otherwise, the requirement has no meaning in the context of the case in point. In any event, we have held in *Department vs. City of Uniontown Docket No. 72-203* (filed June 18, 1973) that the Department may properly order a municipality to enter an agreement despite the fact that it is not presently in violation of The Clean Streams Law. Unless and until the Commonwealth Court rejects that view, we will continue to follow it. It is, of course, incumbent upon the Department to show that there is a present need for a joint facility and that this is in accord with the best overall long range planning for the present and future needs of the area. It is not new to our concept

of democracy, that sometimes a few are disadvantaged for the long range benefit of many.

The second issue is a bit more complex. Having said that the Appellant is bound to negotiate and enter any reasonable agreement with the Authority, what happens if the Appellant does not concede that the offered terms are reasonable? Obviously the question of the reasonableness of offered terms must be considered with a full background and understanding of the alternatives as well as all factors which influence rates, costs and the other terms. It appears that neither the Department or this Board is in the ideal position to determine the contents of an agreement after a breakdown of negotiations occurs. It also appears to us, however, that the administrative machinery and personnel of the Department are in a relatively better position to make such a determination than is this Board. We therefore hold that, when negotiations fail after the issuance of a departmental order, such as here, the Department must bring the parties together in a manner which it shall determine, and itself impose, any reasonable terms upon which the parties cannot agree. An appeal to this Board will, of course, be allowed from any such determination. In the same manner, an appeal can be then taken to Commonwealth Court from this Board's decision regarding the reasonableness of the disputed term or terms.

The parties have failed to agree after negotiations in this case and the burden must pass, in the manner above indicated, to the Department for initial resolution.

The case will be remanded to the Department for action consistent with this opinion.

**ORDER**

AND NOW, this 26th day of November, 1973, the Matter of Commonwealth D.E.R. v. Township of Monroe is hereby remanded to the Department for proceedings consistent with this adjudication.

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**BOROUGH OF CARLISLE** : **Docket No. 73-155-W**  
**CARLISLE BOROUGH AND** :  
**CLEAR Intervenor** :

**A D J U D I C A T I O N**

By PAUL E. WATERS, Member, November 8, 1973

This matter comes before the Board as an Appeal from an Order issued by the Department of Environmental Resources, (hereinafter Department), on April 27, 1973, to the Borough of Carlisle and Carlisle Sewer Authority to prohibit them from allowing any additional connections to the sanitary sewer system serving the area.

In April 1971, the Carlisle Borough Sewer System Authority and the Borough of Carlisle (hereinafter Appellants) received a directive from the Department of Environmental Resources to upgrade its sewage treatment facilities in accordance with the new standards applicable to the Susquehanna basin. In compliance with the directive, the Sewer Authority and the Borough agreed to plan and construct a regional treatment facility on the Conodoguinet Creek and to abandon its present treatment facility on the Le Tort stream. Due to unforeseen difficulties, the Sewer Authority was unable to keep the time table originally agreed upon. The Department consequently filed suit in Commonwealth Court to compel the Sewer Authority and the Borough of Carlisle to comply with the time table.

That law suit was terminated by Consent Decree issued by the Commonwealth Court on April 17, 1973, which permitted a revision of the time table. The order of the Commonwealth Court required that the new treatment facility be completed and in operation by October 1, 1976.

On May 1, 1973, a petition for supersedeas filed by the Borough of Carlisle and the Sewer Authority was granted on the condition that no more than eight (8) permits be issued per month which required a connection to the sewer system pending a final adjudication.

**FINDINGS OF FACT**

1. Carlisle Borough, a municipality located in Cumberland County, had created the Carlisle Borough Sewer System Authority to build and operate sewage treatment facilities for the Borough of Carlisle.

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2. The sewage treatment facilities operated by Carlisle Borough Sewer System are covered by Permit #8874-S, which was issued to Carlisle Borough Sewer System Authority by the Department of Environmental Resources (Department) in 1957.

3. On April 27, 1973, the Department without specific prior notice issued a combined order to Carlisle Borough Sewer System Authority and the Borough of Carlisle prohibiting them from discharging any additional sewage into the sanitary sewer systems which are tributary to the facilities covered by Permit #8874-S. There was no opportunity for a hearing prior to the ban going into effect.

4. Both Carlisle Borough and its Sewer System Authority appealed from the Department's order to the Environmental Hearing Board and said appeals were consolidated under the above caption.

5. The facilities covered by Permit #8874-S are subject to hydraulic overload in that the design flow of three (3) million gallons per day for said facilities, which was incorporated into said permit as an operating requirement has been exceeded at said facilities.

6. The facilities covered by Permit #8874-S are subject to organic overloading in that the treatment requirements set forth in Permit #8874-S, i.e., complete treatment, requires the removal of 85 percent BOD<sup>1</sup> during the period of time between May 1 and October 31, and 75% the balance of the year and that the operational records of said facilities indicate that a degree of treatment less than 85 percent and 75 percent has been achieved by said facilities within those time periods.

7. The increase in flow through the facilities covered by Permit #8874-S has also increased the level of Le Tort Spring Run downstream therefrom and has, therefore, increased the flood danger in this area.

8. The Department and Appellants entered into an agreement as of May 24, 1972, whereby Appellants would be permitted a hydraulic overload at said facilities covered by Permit #8874-S if they complied with certain conditions. Appellants failed to comply with said conditions in full.

9. The Department acted reasonably in considering the

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1. 1. Bio-chemical oxygen demand.

complaints of citizens and E.P.A. concerning pollution of Le Tort Spring Run.

10. Appellants have made a significant effort, at substantial expense, to reduce the amount of infiltration to its treatment plant.

11. The hydraulic overload when reduced by Appellants' present television inspection and repair program, will not remove the necessity for a new treatment plant, for which plans are moving ahead.

12. The costs of eliminating the infiltration completely or of upgrading the present facility to meet Department standards made these two solutions infeasible.

13. The Department did not consider the adverse economic impact of imposing a sewer ban on the Appellants, nor did it give full consideration to the present degraded condition of the lower part of the Le Tort Stream.

14. The Le Tort Stream above the treatment plant is a native brown trout fishing stream having a national reputation for fishing superiority.

15. Although the Le Tort Stream is presently polluted in the area of the treatment plant and below it, the pollution has sources in addition to the Carlisle Borough Sewer Authority plant.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.

2. The Department issued a sewer ban order to the Borough of Carlisle and its Sewer Authority on April 27, 1973, after determining that the sewage treatment plant was not operating within Permit #8874-S and the Rules and Regulations of the Department.

3. The Department is not estopped from issuing the Order of April 27, 1973, by reason of the Consent Order entered between the Department and Carlisle Borough and issued as an Order of Commonwealth Court on April 17, 1973.

4. The sewer ban order was issued to the Appellant without specific prior notice and opportunity for hearing in violation of the 14th amendment due process requirement of the U.S. Constitution.

5. Any constitutional imperfections in the notice procedure was cured when the Environmental Hearing Board granted the supersedeas requested by Appellants to remain in effect until a final decision could be reached on the merits.

6. The decision on the constitutional due process question in this case is not retroactive, and will be construed as prospective only.

7. A sewage treatment plant must comply with each and every provision of the Department's Rules and Regulations and must comply with each provision or condition of its permit. The requirement for the plant percentage removal of BOD cannot be abrogated by a calculation showing compliance with some other related or unrelated requirement.

8. The Department has some discretion in determining the length of time to allow a party to come into compliance with its Rules and Regulations governing sewage treatment plants.

9. In exercising this discretion, the Department should consider at least the following:

- a. The present condition of the receiving stream.
- b. The present plans and commitments for a new or upgraded treatment facility.
- c. The economic impact of the sewer ban order.

10. It was unreasonable for the Department not to consider, or not to properly consider the previously indicated factors in exercising its discretion to impose a sewer ban upon Appellants.

11. The evidence as a whole failed to prove that if limited additional connections are allowed to Appellant's sewer system they will have a discernible (or more than a *de minimis*) effect over the next three years on the Le Tort Stream.

#### DISCUSSION

This case will perhaps settle three very difficult and important legal questions which continually recur in this new era of the sewer ban.

First of all, the question of the necessity for compliance with due process requirements prior to the issuance of a sewer ban, must be squarely faced.

This question has arisen in almost every case of this kind appealed to us, but never has it been so pointedly thrust upon us as by the facts of this case. Simply stated the parent Commonwealth was dealing with one of its own creations, a small municipality in an effort to resolve a growing and potentially hazardous pollution problem in the Carlisle area. The facts indicate that these efforts ended in a Consent Decree entered by the Commonwealth Court on April 17, 1973. This agreement, which provided for the construction of a new regional treatment plant, Appellants thought, would terminate the Department's efforts to reclaim the Le Tort Stream pursuant to The Clean Streams Law, (35 P.S. 20.).

Ten days after what Appellants mistakenly thought was a final settlement, they were served on April 27 with the order which is the subject of these proceedings. Although it is clear that Appellants knew the Department had the authority to impose a ban on sewer connections and even if we agree that they should have known it would do so, the record is clear that they did not have prior notice that a ban would be imposed at a specified future time. We find no estoppel on these facts because the Department never represented that it would *not* impose a ban.

The matter cannot be decided on the *res judicata* argument offered by Appellants because the question of a sewer ban is nowhere mentioned in the Commonwealth Court Order of April 17, 1973. That still leaves the question of procedural due process.

The Department relies upon the statutory language which impowers it to "...issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act... Such orders may prohibit sewer system extensions, *additional connections*, or any other actions which would result in an increase in the sewage that would be discharged into the existing sewer system or treatment facility." Clean Streams Law Section 203 (b)

In addition, we should discuss the Administrative Code Section 510-21 which provides that the Department may initially take any action without regard to the Administrative Agency Law so long as it does not become final as to any person before he has an opportunity to appeal such action to the Environmental Hearing Board.

Turning first to the language of The Clean Streams Law, it should

be immediately apparent that the due process requirement, being of constitutional magnitude, clearly cannot be overridden by a statute, no matter how explicit are its provisions. If we read the law as prohibiting or even making optional the giving of prior notice to a municipality of an intended sewer ban, it would in my opinion then be unconstitutional. The Clean Streams Law, however, does not prohibit such notice. The statutory construction act provides that an act should be interpreted, if possible, in a constitutional manner. Here, we believe, that the legislature did not intend to abrogate the long standing mandate of the 14th amendment to the U.S. Constitution. Indeed, as previously stated, before this could happen, the statute itself would fall.

The Administrative Code provision previously cited would, of course, come within this same reasoning if construed not to require notice. I believe, however, the code by its own language covers the situation here in question. The law states "...no such action — shall be final..." In this case a sewer ban is a final action, and accordingly it comes within the language of the code.<sup>2</sup> This supports our view that a final sewer ban order, is subject to constitutional notice and hearing requirements.<sup>3</sup>

In summary, we are not simply trying to determine whether the Department has the authority to issue a sewer ban. Clearly, it does. The heart of the controversy is whether the order can constitutionally be issued without prior notice and an opportunity for hearing. We hold that it cannot be so issued.

The next logical question raised by this decision is, how much notice? Basically, this is an administrative decision. It is our view, however, that a minimum of 30 days notice would be reasonable under most circumstances. The municipality or sewer authority would, of course, have to give proper public notice to its citizens and to the customers serviced. It must be kept in mind that we are dealing here with the property rights of citizens. In the case of the sewer authority it has a substantial investment in plant and equipment, and the right of expansion is usually contemplated. In the case of an individual lot owner preparing to build a home, the impact of the ban is too direct to require further comment. If 30 days notice

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2. The typical kinds of orders referred to are those that require some action to be taken in the future by the recipient of the order, and not where the order requires immediate action.

3. Prichard's appeal 55 D & C 2d 754.

is to be given the municipality or sewer authority, it is reasonable to expect that they in turn will give at least 20 days notice to their citizens or customers. The giving of notice has meaning, only to the extent that an opportunity for a hearing or other redress is permitted. Inasmuch as a petition for supersedeas may be filed with the Board whenever an appeal is taken from a department order we feel that the "opportunity for hearing" requirement is fully observed.

The logic used by the Department to justify its reticence preceeding the issuance of a sewer ban order is that, otherwise, permits would be requested in quantity in order to "get under the wire". It would therefore be reasonable for the Department to specifically limit the number of connections to the sewer system to: (1) The same number issued within the last 30 days, or (2) One twelfth (1/12) of the number of permits issued during the preceeding year, or (3) The number issued in the same month of the preceeding year.

The second major question presented by this case is: Does a sewer treatment plant have to meet the 85% Bio-chemical oxygen demand (BOD) requirements (or 75%)<sup>4</sup> even though the poundage of BOD discharged into the waters of the Commonwealth is less than the amount allowed by the permit, when calculated by a formula converting the factors?

The argument presented by Appellants and the logic thereof is interesting. Under the permit in question, Appellant is required to give "complete treatment". This is defined in the regulations of the Department (95.2) to mean 85% removal of the bio-chemical oxygen demand (BOD) before the effluent is discharged into the Le Tort Stream.

By converting this allowed pollution load the Appellants argue that they are allowed to place 7,410 pounds of BOD into the stream daily. They have offered expert testimony to show and forcefully argue that it is, after all, the effluent quality and not percentage of removal that should be the major concern of the Department and the fact that the plant capacity of 3 million gallons per day is frequently exceeded is unimportant. The Carlisle plant<sup>5</sup> does seem to have a higher quality effluent than would be expected based on the organic and hydraulic overload which it frequently experiences. There was substantial testimony on the consequences of this

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4. 75% during the months of November to April.

5. Considered to be one of the best managed in the State.

overload. The flooding conditions in the Borough and degradation of the Le Tort as a major trout stream are chief among the alleged effects.

The real question raised by all of this however, is whether the Regulations of the Department and the permit conditions must be and have been complied with in full by the Appellants. They must be, and they have not been. Finally, we need only decide whether based, on this fact, the action of the Department has been unreasonable, arbitrary or capricious. This of course raises the question of the limits of discretion given the Department which is the third important question to which we alluded at the outset.

The Department has stated in the Brief at page 17 "In fact, the Department's discretion with respect to regulations lies in only two areas: (1) The length of time to allow a particular party to come into compliance with the Rules and Regulations and (2) The selection among a plurality of alternative solutions to a particular pollution problem which are submitted by a party to the Department of the least cost solution." Without deciding that this exhausts the areas of discretion left to the Department, we do agree that certainly it has the authority to determine the amount of time which should be allowed for compliance. What considerations are relevant when the Department makes this determination? Again, this is basically an administrative decision but it would be unreasonable not to at least consider the following:

1. The present condition of the receiving stream, and the prospects for its improvement. Le Tort Stream has been degraded over the past twenty or more years and the lower part below the Carlisle treatment plant discharge point will not sustain more than the lowest organisms. It has no present-useful purpose beyond the one which it serves. It will not be available for fishing or recreation in the foreseeable future whether there are added sewer connections or not.

2. The present plans and commitments for a new or upgraded treatment facility. The Appellant sewer authority has taken final steps to insure, in accordance with Department orders and a consent decree, that a new treatment plant meeting Department requirements will be in operation by October 1, 1976. The old treatment plant is to be abandoned.

Along with this, the recalcitrance or cooperation given by the municipality in question is relevant.

3. The economic impact of the sewer ban order, while certainly

not controlling, is relevant. This was made clear in the case of *Commonwealth v. Bortz Coal Co.* 2 Commonwealth 441<sup>6</sup>, where the Court said "...There is power in the Commission to set time limits within which compliance with the Commission's order may be set. It is conceivable that economic factors could very well persuade the Commission to set a deadline at some time different than it would otherwise set it without such information." (page 461) Anything said to the contrary in either *Sellersville* or *Zelienople*<sup>7</sup> must be read in the light of *Bortz, supra*.

The above considerations do, of course, involve a weighing technique which should be peculiarly within the realm of the administrative expertise of the Department. This Board does not properly belong in such controversies but where, as here, these matters have been given no consideration by the Department in exercising its discretion, we believe that to be unreasonable.

We have reviewed the testimony and conclude that there is no health hazard or other compelling reason why a limited number of connections should not be permitted to the Carlisle Sewer Authority system during the interim period before the new treatment facility will be available.

#### ORDER

AND NOW, this 29th day of November, 1973, the Appeal on behalf of the Borough of Carlisle and Carlisle Borough Sewer Authority is hereby sustained. The Appellants shall issue permits for additional connections to their sewage system for new homes at a rate not greater than four (4) per month until such time as a new treatment plant is put into operation but not later than October 1, 1976, unless other terms are agreed upon with the Department.

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6. The need for clean water is as important as the need for clean air which was the subject of that case.

7. EHB Docket No. 72-173; EHB Docket No. 72-199.

CONCURRING OPINION

By ROBERT BROUGHTON, Chairman, November 29, 1973

I concur in the result, but must dissent from the reasons given for reaching that result.

I. Due Process

It has long been settled that municipal corporations are creatures of the State, and that no property they hold is held in a purely private capacity, so as to be protected from a taking without due process of law. In *Hunter v. Pittsburgh*, 207 U. S. 161 (1908), the court cited numerous cases, and went on to say, 207 U. S. at 178-179:

"...We think the following principles have been established by (these cases) and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property

owners may be such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it..."

This decision has been cited and followed in several subsequent Pennsylvania cases, see *Poor District Case No. 2*, 329 Pa. 410 (1938); *Driskell v. O'Conner*, 339 Pa. 556 (1940); *Montella v. Camillo*, 425 Pa. 199 (1967). I think the principle stated applies to the due process argument relative to the Borough and to the Authority. No property of those entities is affected in a constitutional sense by the imposition of the sewer ban order. *Nelson v. Garland*, 123 Pa. Super 257, 187 A. 316 (1936), which stated that municipalities are entitled to procedural due process is not relevant to this situation. There the State had set up procedures for adjusting the rights of various entities under the Dog Law, Act of May 11, 1921, P.L. 522, as amended, 3 P.S. §§461 *et seq.*, relative to each other. Here we are dealing with the right of municipalities relative to their creator, the State.

Furthermore, even if due process requirements were applicable to municipalities in their relation to the State, it does not seem to me that due process would prohibit the sewer ban order from being effective pending a hearing. Whether or not due process is required relative to the State vis-a-vis municipalities, it is clearly required relative to the State vis-a-vis landowners. I do not think, however, that the immediate effectiveness of the order violates due process relative to landowners, and I also think the same arguments would apply to the due process arguments of Carlisle and the Authority.

A landowner would argue that due process has been violated if he is unable to secure building permits because of the immediate imposition of the sewer ban order, with no notice period. That order, if valid, is based on the existence of conditions in the municipal sewage treatment system such that increased pollution, creating a health hazard or other public nuisance, will result if additional homes are connected to that system. It

is well settled that no one has a right to use their land or other property in such a way as to cause a public nuisance — and it matters not whether such a nuisance is so declared by common law or statute; *Commonwealth v. Emmers*, 221 Pa. 298, 303-304 (1908); *Pennsylvania R.R. v. Sagamore Coal Co.*, 281 Pa. 233 (1924); *Bortz Coal Co. v. Air Pollution Commission*, 2 Pa. Commonwealth 441 (1971). The mere fact that landowners may be faced with a delay, plus a difficult task of proving that no such havoc will occur — that is, that the sewer connection ban was not reasonable — in order to get building permits is not a denial of due process as to them. Untreated or inadequately treated sewage discharging into a public waterway is or may be a health hazard, as well as a harm to other interests of the public. *Commonwealth v. Emmers, supra*; §2, Clean Streams Act, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.2. Whether it will necessarily be a health hazard in a particular case cannot be said until after a hearing. A landowner who was unable to secure a building permit because of a sewer ban would surely have standing to contest the validity of the ban. It cannot be said, therefore, that such a landowner is being deprived of a right to a hearing relative to his use of his land. *Delay* is occurring without a right to a hearing, but the inability to use the land for residential construction is not. Where the public health may be endangered, it is not unreasonable to prevent a particular use of land pending a hearing to determine whether that use will in fact be harmful to the public interest. *Title Guaranty & Surety Co. v. Allen*, 240 U.S. 136 (1915), *Lawton v. Steele*, 152 U.S. 133 (1893); *C. J. Hendoy Co. v. Moore*, 318 U.S. 133 (1942); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) Annotations, 17 A. L. R. 574, 50 A. L. R. 98. It seems well settled that in such a situation, where the public interest may be endangered, a provision for a hearing *following* action by the government is sufficient to preserve procedural due process, *Title Guaranty & Surety Co. v. Allen, supra*; provided only that substantial property rights are not divested prior to the hearing, *Lawton v. Steele, supra*.

But it is argued that whether or not there has been a taking of private property, in the constitutional sense, any person affected by a decision, especially one adversely affected, has a right to notice and an opportunity for a hearing, prior to the time when the decision becomes final and effective. Appellant cites *National Auto Corp. v. Barford*, 289 Pa. 307 (1927); in support of this proposition.

But *National Auto Corp. v. Barford, supra*, does not decide that an opportunity for hearing must be afforded before *any* rights or interests of persons can be affected by government. It holds that "where substantial property rights are impaired, (an action of a government agency) must be predicted on notice and an opportunity to be heard." 289 Pa. and 312. The court indeed carefully distinguishes the case of *Title Guaranty & Surety Co. v. Allen*, 240 U.S. 136 (1915).

In *National Auto* the Pennsylvania Insurance Commissioner was given the power to put out of business, seize, and distribute the assets of any company he determined was in violation of the insurance laws of the Commonwealth. In *Title Guaranty* a State banking commissioner was permitted to order a bank which he determined was insolvent closed pending a hearing to determine what should be done about that insolvency. Unlike the *National Auto* situation, nothing was done to seize or redistribute the assets of the bank, or to put it permanently out of business, until after hearing.

It is well settled that where there is a sufficient hazard to the public, action to abate that hazard may be taken without a hearing. *Lawton v. Steele, supra*; *North American Cold Storage Co. v. Chicago, supra*. *Adjajian v. North Bergen Township*, 103 N. J. Super. 61, 246 A. 2d. 251 (1968), aff'd 107 N. J. Super., 257 A. 2d. 726 (1969), cert. den. 398 U.S. 9526 (1969); *Egan v. Health Department of the City of New York*, 20 Misc. Rep. 38, 45 N.Y.S. 325 (1897). An opportunity for hearing may be required *following* the action, but the fact that there was no hearing before the action does not render the action constitutionally invalid. It may well be that the Department needs to act immediately in some cases, and that delay for a hearing would endanger the public. It is well settled that summary action may be taken to abate a nuisance and that due process is not violated, so long as a hearing is afforded before substantial rights are destroyed. See 58 Am. Jur. 2d. §195-208, and cases cited therein.

In *Lawton v. Steele, supra*, fish nets were destroyed. In *C. J. Hendoy Co. v. Moore, supra*, fish nets were seized and held pending a hearing. In *Adjajian v. North Bergen Township, supra*, and *Egan v. Health Department of the City of New York, supra*, a landlord was compelled to vacate a rooming house pending a hearing. In *Title Guaranty and Surety Co. v. Allen*, a bank was forced to close its doors pending a hearing. In

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*North American Cold Storage Co. v. Chicago*, a meat freezer plant was prohibited from distributing food in storage. In perhaps the extreme case, *Goldblatt v. Hempstead*, 369 U.S. 590 (1961), a municipal legislative body prohibited, in effect, all sand and gravel mining in the municipality, without any hearing; the ordinance was upheld. (This was a zoning case, but nevertheless seems relevant in this context).

Here the municipality and municipal authority are being compelled not to add to the sewage load in a treatment plant, pending a hearing to determine whether that will exacerbate a nuisance. Landowners who might apply for and get a building permit are being compelled to wait, and not build, pending a hearing to determine whether a nuisance exists which additional connections would make worse. No property is being taken, irretrievably, pending a hearing. I do not think that such delay amounts to a substantial destruction, or taking of either property or personal rights.

I agree that a prior hearing may be desirable, from a policy point of view, see, e.g., the concerning opinion of Judge Kramer in *Sunbeam Coal Co. v. Department of Environmental Resources*, 8 Pa. Commonwealth 622 627-628 (1973); but I do not agree that in all cases it is a constitutional requirement. There may, however, be a statutory requirement in Pennsylvania, relative to the Department of Environmental Resources. Section 1921 A(c) of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 (c), provides that:

"Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified."

An adjudicatory decision of the Department, one such as the decision to issue a sewer ban order, which determines facts in a particular case, applies the law to them, and determines that an order prohibiting additional connections to a sewer system is an appropriate remedy, would seem to

me to require notice and an opportunity to be heard, however informal that hearing might be, for the decision procedure to comply with §31 of the Administrative Agency Law, Act of June 4, 1945, P.L. 1888, as amended, 71. P.S. §§1710.31. Such a decision would not be final, under §1921 A(c) of the Administrative Code of 1929 *supra*, quoted above, until there had been an opportunity for a hearing before this Board.

In the instant case, my conclusion would be that the order was *not* a final order — by virtue of the language of §1921 A(c) of the Administrative Code of 1929, *supra* — even though it was undoubtedly intended to be final, until the hearing on the supersedeas had been held before the Board.

Thus, while it may be desirable for the Department to act immediately in some cases, I think that §1921 A(c) of the Administrative Code of 1921, *supra*, fails to provide for such contingencies, although the Board and the Environmental Quality Board can promulgate regulations to make it possible for actions to be very nearly immediate, where this necessity exists.

I would certainly not be willing to say that, in all cases where a sewer ban order is imposed, a 30 day delay would be reasonable. It could be reasonable in many such cases, but there might well be somewhere a much shorter time — even approaching immediacy — was necessary to protect the public health and other values sought to be protected by Pennsylvania's water pollution laws. I would therefore propose a much more flexible procedure.

By way of illustration I am attaching one proposal for a procedural regulation that should accomplish these purposes (as well as revising and hopefully clarifying the Board's procedures relative to granting a supersedeas) as an Appendix to this opinion.

It seems to me that an absolute requirement for a thirty day (or any other specific time limit) notice period prior to a sewer connection ban joining into effect would provide, not so much for due process with respect to landowners, but for a kind of estoppel. With a thirty day notice requirement, no landowner would be subjected to a hardship because he bought land prior to a sewer ban going into effect, provided he was able to apply for and get a building permit within thirty days of receiving notice of the sewer ban. The problem is that this estoppel would apply regardless of the validity or invalidity of the sewer ban. In effect, the public interest

might be harmed because of private action prior to a hearing. In fact, the "rights" sought by a landowner in a sewer ban case are not substantially different from the rights sought in a case where a permit to construct an on-lot sewage system is denied. In the latter situation (where the landowner clearly has a right to a hearing), we have no hesitancy in requiring that nothing be done — the rights of the public under the Clean Streams Law not be compromised — pending a hearing to determine the correctness of the Department's decision. I fail to see any significant differences here.

I, too, feel sympathy for a landowner who buys land intending to build on it and then cannot because of environmental problems such use might cause. I am especially sympathetic where those environmental problems are not his fault, but rather the fault of a municipality or municipal authority. But if, after hearing, it is determined that such environmental problems will be caused by the projected, hoped for use, then I do not, myself, find that prohibiting such use offends any "concept of ordered liberty." See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

I agree, however, that due process requires prior notice and opportunity for hearing in situations other than a public nuisance situation. I also agree that as much notice as is feasible under particular circumstances should be given. In the present case, if the Department was planning and expecting to impose a sewer ban at the time it negotiated the Consent Order in Commonwealth Court, then that intent should, in fairness, have been made known to Carlisle. The fact that Carlisle may have known the Department had the power to issue a sewer ban order is not relevant to this point. By negotiating on other matters and keeping silent on this, the impression was created that the power would not be used. Procedural due process may not require prior notice and opportunity for hearing in a case where hazard from a public nuisance must be eliminated immediately, but due process does require as much as possible, given the circumstances of a particular case. Since the Department in this case knew the facts that would lead to a decision to impose a sewer connection ban order well in advance of when the order was imposed, it is difficult to conclude that there was an emergency situation. I must conclude that if there was not a violation of procedural due process in this case, the procedure of the Department certainly approached such a violation. I agree that the hearing on the Petition for Supersedeas cured whatever defect may have existed. (As an aside, by making its intent explicit in the course of negotiations

to settle that earlier litigation, a means of satisfactorily reducing pollution discharge during the period while the new plant was being built might have been found, and all the parties, and this Board, could have been spared this current litigation.)

II. The Legality and Reasonableness of the Sewer Ban Order

I concur, however, with my Brother Waters that the Department has discretionary authority, but not unbounded discretionary authority, in choosing what remedies to apply to particular pollution problems.

Section 203 of The Clean Streams Law, *supra*, 35 P.S. §691.203, provides in relevant part as follows:

"...(T)he department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs *or otherwise to meet the objectives of this act....* Such orders may prohibit sewer system extensions, *additional connections, or any other action that would result in an increase in the sewage that would be discharged into an existing sewer system or treatment facility.*" (*Emphasis Supplied*)

The purposes or objectives of the Act are spelled out in §§4 and 5, 35 P.S. §§651.4 of 698.5, in relevant part as follows:

§691.4

- ... (1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry;
- (2) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;
- (3) It is the objective of The Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted;
- (4) The prevention and elimination of water pollution

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is recognized as being directly related to the economic future of the Commonwealth; and

(5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control. ...

§691.5

... (a) The board *and the department*, in adopting rules and regulations, in establishing policy and priorities, *in issuing orders* or permits, and in *taking any other action pursuant to this act*, shall, in the exercise of sound judgement and discretion, and for the purpose of implementating the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:

(1) Water quality management and pollution control in the watershed as a whole;

(2) The present and possible future uses of particular waters;

(3) The feasibility of combined or joint treatment facilities;

(4) The state of scientific and technological knowledge;

(5) The immediate and long-range economic impact upon the Commonwealth and its citizens. (Emphasis Supplied)

...

It should be noted that §202 of the Act, 35 P.S. §691.202, specifies that a discharge of sewage in violation of valid permit requirements, the regulations of the Department, or the Act, shall be a nuisance. On the other hand, the fact that it is a nuisance does not necessarily dictate the remedy.

Where a specific statutory remedy has as great an impact on a community, as well as upon the individual appellants (here, as in most sewer connection ban cases, a municipality and a municipal sewer authority), and especially on the economy of the area affected as does a sewer connection

ban, the imposition of that remedy should serve some useful purpose. It should not be applied in an automatic and mechanical matter.

Such purposes might include (1) motivating the municipality and/or the municipal authority, or others, to do something about a particular problem, (2) preventing further degradation of a stream, and (3) speeding the regeneration of that stream by preventing any increased flow of sewage into it pending solution of the particular problem that caused the order to be issued. There should be something more than merely a technical violation of the law. All the factors listed in the statute must be taken into account.

In this case, it appears that the municipality is committed to building a sewage treatment plant. There was no showing that a sewer connection ban would speed up that process.

There was also no convincing proof that the imposition of the ban would speed up the long run recovery of Le Tort Spring Run — although perhaps the degree to which water quality is allowed to get worse before it starts to get better is not irrelevant to that recovery time.

The one factual point upon which I am not sure I can agree is on the degree to which a limited number of connections may make present water quality worse. With all respect to the fact I gain my knowledge through reading the transcript and exhibits, rather than through listening to the witnesses and seeing their demeanor, I cannot agree that present water quality in Le Tort Spring Run below the Carlisle Sewage Treatment Plant is so bad that the raw or inadequately treated sewage from 100 or so homes would produce a de minimis change in the quality of the stream.

First, the Department predicted a decrease in dissolved oxygen (DO) of 0.2mg/L from the sewage that would be added if the sewer connection ban were not imposed. With DO in the general range of 4 to 6 mg/L now, it seems to me that a 0.2 mg/L decrease is small, but not de minimis.

Second, one of the purposes of The Clean Streams Law, quoted above, §4 (3), is to restore streams to an unpoluted state. To allow a further degradation of Le Tort Spring Run during an interim period of 2 to 3 years, merely because substantial improvement will not begin to take place until after the date when the new sewage treatment plant is in operation, seems to me to fly in the face of that purpose of The Clean Streams Act.

On the other hand the Department, by its own testimony, did not consider the "immediate and long range economic impact" of its decision in this case. I must agree that this was error. To the extent that the Department failed to consider a factor that it was required by law to consider, then their decision was not in conformity with law.

Given that the Department's decision was not in conformity with law, the question is what we should do about it. One possibility is to simply remand to the Department. Another would be to consider the economic impact ourselves and then either affirm or reverse. A third would be to consider the economic impact and modify the order, permitting some specific number of connections to be made.

The first or second possibilities would be consistent with the argument that this Board has no power to modify an order of the Department — only to affirm, reverse or remand. However, when we become convinced, after a hearing, that the particular order in question exceeds what would be legal or reasonable under the circumstances of that order, then, it seems to me, we are bound — even required — to modify the order to the point where it will be reasonable. There is nothing in the language of §1921 A of Administrative Code of 1929, *supra*, that limits this Board to the functions or standards of review of a reviewing court, as those functions and standards are spelled out in §44 of the Administrative Agency Law, *supra*, 71 P.S. §1710.44, a fortiori, we have the power to modify when no hearing has been held by the Department; and no opportunity for hearing has been afforded an appellant prior the issuance of an order. *Buckeye Coal Co. v. Goddard*, \_\_\_\_\_ Pa. Commonwealth \_\_\_\_\_, 309 A 2d 431, 437 (1973).

While I think a remand would not be improper under the circumstances of this case, I think it would also be proper to modify the order. If we modify, we must ask, specifically, how could the order be modified? The only logical way is to permit a limited number of connections — something less than current, pre-sewer ban practice, but greater than zero. I might add that I agree with my Brother Waters that the power to prohibit additional sewer connections altogether, continued in §203 of The Clean Streams Act, quoted *supra*, includes the power to reduce the permissible number of connections to something short of zero.

If additional connections continue to be made at the rate of 8 homes per month for 2-1/2 years (when the new sewage treatment plant

will be completed), the total would be 240. At the rate of 4 per month there would be 120 connections. Given the nature of the overflow conditions at the plant, the amounts of sewage going into Le Tort Spring Run in bad storms would be equivalent to somewhat less than half those numbers. Storms do not, of course, occur continuously. Furthermore, during storms, the volume of water in the stream would be greater, and a given amount of BOD (biochemical oxygen demand) or other pollutants would be likely to have a smaller impact on stream water quality. The primary short run economic impacts of the order, as testified to by witnesses for the Appellants, appears to be on the orderly growth of the community, and on employment (and secondary employment) in the building construction industry during the 2 to 3 year moratorium that application of the ban would effect. Long term, adverse economic impact would include, in addition, some probable increase in economic concentration in the building construction industry, due to the fact that smaller, local firms can generally "ride out" a 2 to 3 year moratorium less easily than larger, regional or national firms. That impact is very great — but, like the effect of additional connections on Le Tort Spring Run, very difficult to measure in quantitative terms.

What weight, however, should we give to the fact that the economic impact of this sewer ban would be severe? And toward what conclusion should that fact lead us?

In *Commonwealth v. Bortz Coal Co.*, *supra*, the Commonwealth Court held we must take economic factors into account, for the purpose of determining the timing of compliance with environmental regulations. In *Commonwealth v. Exeter Borough* 62 Luz. 141 (1972), the Court similarly held that a "reasonable time" must be given to a municipality to comply with The Clean Streams Act. Presumably economic impact would be one of the factors going into the decision relative to what is a reasonable time. On the other hand, numerous cases have held that economic hardship is no excuse for failure to ultimately comply with The Clean Streams Act. See *Commonwealth ex rel Allesandroni v. Borough of Coudersport*, 35 Dauphin 82 (1966); *Commonwealth ex rel Allesandroni v. Borough of Confluence, et al.*, 87 Dauphin 214 (1967); *affd.* 427 Pa. 540, 234 A. 2d. 852 (1967); *In re Borough of Zellenople*, E.H.B. Docket No. 72-199 (February 5, 1973); *In re Sellersville Borough*, E.H.B. Docket No. 72-173 (July 31, 1973); *In re Community of Gray*, E.H.B. Docket No. 72-301.

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Here, what is involved is not the timing of compliance, but whether a municipality and municipal authority shall be permitted to discharge *additional* sewage, *additional* pollutants, to the waters of the Commonwealth. To allow this additional pollution — analogous to allowing a new source — simply because the economic impact of failing to do so would be severe, is difficult to justify.

I am not sure that the result rests solely on economics, however. A number of factors may be entered:

(1) Carlisle is relatively close to meeting the requirements of its permits most of the time; and by one measure — pounds of BOD per day --- is within those requirements all the time. The latter fact does not excuse the overflow in times of hydraulic overload, and does not indicate compliance with the law. However, it may influence one to conclude that the violation is not severe — rather, it is marginal.

(2) Existing stream quality in the Le Tort below the sewage treatment plant is such that a limited number of connections can be made with a perhaps noticable, but very small effect on stream quality. Substantial improvement, affecting the uses of Le Tort Spring Run, will not in any event occur until after the new sewage treatment plant is built.

(3) The Clean Streams Law does clearly require that the "immediate and long range economic impact" of issuing an order be considered, along with other factors. That impact is discussed above.

(4) The procedure followed by the Department in this case, while it may not have violated procedural due process, came close to such a violation, and was certainly, under the circumstances, not entirely fair.

(5) I must also give due respect to the fact that I did not see and hear the witnesses.

Considering all factors together, I must agree that a limitation on the number of connections to zero, pending *full* compliance with The Clean Streams Law and the regulations of the Department, is not a reasonable application of the sewer connection ban remedy, but that a limitation to 4 per month would be reasonable.

For the above reasons, I join in signing the Order of the Board.

**APPENDIX TO CONCURRING OPINION  
PROPOSED RULEMAKING**

a) A Petition for Supersedeas under §1921 A(e) of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 (e), may be filed at any time during the proceeding.

b) The following procedure shall be followed in cases wherein the finality of an order or action of the Department under §1921 A (c) of the Administrative Code of 1929, Act of April 9, 1929, P.C. 177, as amended, 71 P.S. §510-21 (c) is raised. In such cases, the order appealed from shall become final in any one of three ways: (1) Upon the filing of an appeal with the Board, unless a Petition for Supersedeas is filed simultaneously. If a Petition for Supersedeas is not filed simultaneously with the appeal, then the Order appealed from shall be applicable and fully effective pending action by the Board on any Petition for Supersedeas subsequently filed. (2) Upon the passage of the 30 day period for filing an appeal with the Board, without such appeal having been filed. (3) Upon the filing with the Board of a petition to make the order of the Department of Environmental Resources final, by the Department or other interested party, and action by the Board, after hearing, declaring the said order of the Department to be final.

c) A hearing on a supersedeas, or upon a petition to make an order of the Department final, shall be held as expeditiously as possible, taking into account the available time of a board member or hearing examiner, and taking into account the urgency and seriousness of the environmental or other problem to which the order of the Department applies. Such hearings shall, except in unusual circumstances, be held within one week after the filing of the petition.

d) Any petition for supersedeas shall state with particularity the facts, and citations of legal authority, upon the basis of which the petitioner believes a petition for supersedeas should be granted. A petition for supersedeas may be denied without hearing for lack of specificity.

e) A supersedeas shall be denied except where (1)(a) it appears that irreparable harm will occur to the petitioner unless it is granted, and (b) it appears that the petitioner is likely to prevail ultimately on the merits, and/or (2) it appears that the granting of the supersedeas will be unlikely to cause injury to the public. In all cases, a supersedeas shall be denied in cases where significant (more than *de minimis*) pollution, health hazard,

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or nuisance either exists or is threatened during the period while the supersedeas would be in effect.

f) A petition by the Department of Environmental Resources, or other party affected, to make an order of the Department final shall be granted where it is shown that significant (more than de minimis) pollution, health hazard, or nuisance either exists or is threatened. (The filing of such a petition shall not preclude the person subject to the Order in question from counter-petitioning for a supersedeas.)

g) In granting a supersedeas, the Board may impose such conditions as are warranted by circumstances including, where appropriate, the filing of a bond or other security.

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*East Pennsboro Township*

**EAST PENNSBORO TOWNSHIP**  
**Cumberland County, Defendant**

: **Docket No. 73-168-W**

**A D J U D I C A T I O N**

By PAUL E. WATERS, Member, December 12, 1973

On April 23, 1973, the Department of Environmental Resources (Department) issued the Order from which this appeal was taken. In substance, the Order recited a finding that the East Pennsboro Township sanitary sewer system receives excessive infiltration of groundwater and surface water during periods of wet weather, resulting in the reduction of conveyance capacity of sewers and treatment capacity.

The Order required that, within thirty (30) days, the Township should initiate a comprehensive study of the system, to be completed within nine (9) months from the date of the Order. It also required that evidence of cooperation be supplied within thirty (30) days of the Order, showing an intent on the part of the surrounding municipalities and their sewer authorities to cooperate on the project.

The Appellant contends that it has done all that it can do to comply with the order of April 23, and that any non-compliance is not on its part. The other municipalities with whom Appellant is to cooperate have failed to fully meet their obligations, it is argued and, therefore, the

matter is out of their control. In addition it contends that an infiltration study which is required in order to obtain federal funding, although not yet completed, should be accepted in lieu of any State requirements.

#### FINDINGS OF FACT

1. East Pennsboro Township maintains a sanitary sewer system, part of which is in Hampden Township, part in the Boroughs of Wormleysburg and West Fairview, all in Cumberland County.

2. The East Pennsboro Township manager contacted representatives of Hampden Township, Wormleysburg Borough and West Fairview Borough and requested they cooperate in furnishing information on infiltration into the East Pennsboro system from said municipalities; this request was made within a week of the receipt of the Order of April 23, 1973 (N.T. 124, 125).

3. Hampden Township notified the Department by letter dated June 27, 1973, that it would not initiate a study of the infiltration into the East Pennsboro system from Hampden Township (Appellant's Exhibit A-2).

4. The Department took no action to force Hampden to make such a study. (N.T. 77).

5. The Borough of Wormleysburg and the West Fairview Municipal Authority on June 25, 1973, indicated to East Pennsboro Township that they would cooperate in a study of the infiltration from Wormleysburg and West Fairview (N.T. 121).

6. East Pennsboro cannot force Hampden Township, Wormleysburg or West Fairview to proceed with inflow/infiltration studies in their respective municipalities or to cooperate with East Pennsboro to implement the Order.

7. Until inflow/infiltration studies by the other municipalities are completed and the data furnished to East Pennsboro, it is impossible for East Pennsboro to make an inflow/infiltration report to the Department.

8. The inflow/infiltration studies already made and those studies now being made by East Pennsboro Township as a condition precedent to a federal grant for the upgrading of its sewer treatment plant will substantially comply with the requirements of the Order of April 23rd. (N.T. 88, 89).

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9. The federal guidelines for inflow infiltration studies require East Pennsboro Township to make an engineering study of the sewer system which would duplicate the requirements of the Order of April 23rd but without the time limit imposed therein.

10. Thirty (30) days was sufficient time to allow East Pennsboro Township and the other municipalities and authorities concerned to submit evidence of cooperation to the Department. Appellant submitted its letter on June 25, 1973.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.

2. The portion of the Order issued by the Department requiring the Appellant to give notice of its willingness to cooperate with other municipalities has been complied with by Appellant insofar as possible.

3. The portion of the Order issued by the Department requiring Appellant to initiate a comprehensive study, has been complied with insofar as possible.

4. The portion of the Order issued by the Department requiring completion of the comprehensive study within ninety (90) days is unreasonable under the facts of this case and a remand for further consideration is required.

#### DISCUSSION

If William Shakespeare were called upon to give an appropriate title to this proceeding he might well choose "Much Ado About Nothing".

The Department has ordered the Appellant East Pennsboro Township to do three things based on information indicating excessive infiltration into its sewage treatment facility:

1. Within thirty (30) days of the date of the Order (April 23, 1973) give to the Department evidence of cooperation with the four (4) indicated municipalities and their authorities in carrying out a study of the sewer system under contract with an engineer.

The Department has submitted a letter dated June 25, 1973, which was sent to the Department by Appellant enclosing a consulting

contract with its engineer and stating "It is also the intent of East Pennsboro Township and East Pennsboro Township Authority to cooperate with the other municipalities or Authorities involved pursuant to paragraph 3 of the subject order." Under cross examination a witness for the Department stated:<sup>1</sup>

Q. "Well we understand each other that East Pennsboro Township doesn't have to do anything to comply with the portion of paragraph three requiring them to give evidence of cooperation other than to send you a letter saying they are willing to cooperate with the other municipalities in carrying out the order?"

A. "Yes, that would be acceptable. I hope that it could go beyond that, but that would be acceptable."

Q. "But if it doesn't go beyond that, then we have completely complied with that portion of paragraph three pertaining to evidence of cooperation: Is that the Department's position?"

A. "I think intent would be acceptable, yes."

Q. "Fine. All right."

It is clear that the Appellant complies with paragraph three of the Order.

2. Within thirty (30) days of the Order, initiate a comprehensive study to determine the extent and location of infiltration sources.

The Appellant has had an ongoing program to detect and correct infiltration into its system. The "comprehensive study" referred to in the Order was nowhere defined. However, the federal authorities (E.P.A.) have a similar requirement when federal funding is requested as in this case. The problem is compounded because the federal government, at the time this appeal was filed, had not issued its final requirements regarding such studies. Appellant is proceeding cautiously in an effort to kill two birds with one stone, and conducting only one study. This procedure for all of its practicality runs counter to another requirement of the Order, that the study be completed within nine (9) months.

3. The requirement of completion of a comprehensive study within nine (9) months has run into still another roadblock, and this appears to be the heart of the controversy - - such as it is.

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Three other municipalities and their sewer authorities were issued orders similar to the one here in question, and each recipient was required to cooperate in making the required study. Two of the other parties<sup>2</sup> agreed to comply with the Order, although they had not fully done so as of the date of hearing. One municipality,<sup>3</sup> however, shifted the burden of locating the sources of infiltration back to the Department.

Inasmuch as the information from all of the other municipalities must be available to the Appellant before it can fully meet the requirements of the Order and submit a comprehensive study of the entire sewer system, it is unreasonable to require such a report to be submitted under the facts of this case. The most that can be required of Appellant is that it submit a study to the Department covering those municipalities which have not met their respective obligations under the Order of April 23, 1973.

Obviously, the Department is in a better position to enforce compliance with its Order than is Appellant.

The Appellant has indicated that it can comply with the nine (9) months provision of the Order, within two (2) months after all of the required information is made available by the other municipalities. The study of Appellants' own portion of the system was projected for a December 6, 1973, completion date. Considering all of the above it is clear that this matter must be remanded to the Department to take the steps it deems proper to obtain full compliance by all of the municipalities issued the Order in question, which are not parties to this proceeding. The Department can decide based on that compliance, (or lack thereof) what would be a reasonable date to require Appellant to comply with the Order. It should, of course, consider the federal requirements in making its determination, although it is not bound thereby.

**ORDER**

AND NOW, this 12th day of December 1973, the matter of Commonwealth of Pennsylvania, Department of Environmental Resources v. East Pennsboro Township, Docket No. 73-168-W is hereby remanded to the Department of Environmental Resources for disposition

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2. West Fairview and Wormleysburg Borough
  3. Hampden Township

consistent with this adjudication.

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*Dr. Hernando Trujillo*

DR. HERNANDO TRUJILLO

: Docket No. 72-415-B

A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, December 12, 1973

This is an Appeal under the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, 35 P.S. §§750.1 *et seq.*, from a denial by the Bucks County Department of Health (Department) of an application for an on-lot sewage system. By agreement of counsel, the only basis for denial of the permit was that there was a high seasonal water table, in violation of §73.11 (c) of the Regulations of the Department. The Department concluded this based upon the fact that there was mottling in the soil at depths of from 13" to 61" under the surface.

FINDINGS OF FACT

(1) Appellant, Hernando Trujillo, M.D., owns a lot situated on a private lane 0.2 miles off Linton Hill Road, in Newton Township, Tax Map #29-7-10-7, Bucks County, Pennsylvania.

(2) Appellant desires to construct a four bedroom residence on said lot, and to install a septic tank sewage system on the lot to service that residence.

(3) Appellant applied to the Bucks County Department of Health for a permit for an on-lot septic tank sewage system on July 11, 1972. That application was denied on November 17, 1972.

(4) The sole reason for said denial was that the soil where the septic tank sewage system was to be located showed prominent mottling at 29" below the surface of the ground, indicating a high seasonal water table in violation of the regulations of the Department.

(5) By stipulation of the parties, homes to the immediate west, east and northeast of the Trujillo lot, in question, have adequately functioning on-lot sewage disposal systems.

(6) The mottling was observed in a backhoe pit approximately 6 feet deep in the area where the leach (absorption) beds would be located. The soil was identified as Lawrenceville silt loam, and from 29 inches to 61 inches exhibited many coarse prominent reddish-gray mottles.

(7) This mottling indicates a seasonal water table at 29 inches below the surface of the ground in violation of the regulations of the Department.

### DISCUSSION

As we found in *Commonwealth of Pennsylvania v. Fabiano*, EHB Docket No. 73-051 (Filed August 1, 1973), and paraphrasing our conclusions therein,

Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder — rusty appearing — colors in some spots, and grayer colors in others — a variation in "chroma", in particular — it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level, for example 29 inches in this case, for prolonged periods of time, then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer — of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops, many of these nodules will be exposed to air and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray.

We say "almost" invariably because it is conceivable that, in a particular case, a grayer mottle might be due to incompletely broken up grayer parent material, especially in an area where an iron-rich parent shale had overlain an iron deficient parent shale, or a basalt. This sort of lithochromic genesis of grey-red mottling is not (we gather) common.

There was no showing that this was the case here. Indeed one would not expect such a mixed parentage in a Lawrenceville soil.

In any event, even if we hold it is possible that some factor other than a high seasonal water table *might* produce mottling in some cases, we hold that if a qualified soil scientist concludes that the mottling in question is caused by a high seasonal water table, then the burden of proving otherwise is on the Appellant. (We should note, in passing, that there was no dispute in this case as to the existence of mottling, only as to its meaning and significance.)

In this case a qualified soil scientist, on the staff of the Department of Environmental Resources, did conclude that the mottling was caused by a high seasonal water table. As already indicated, we believe the almost overwhelming probabilities are in favor of that conclusion's being correct, just from the fact that this was prominent mottling occurring in Lawrenceville silt loam soil. Appellant offered no sufficient evidence to rebut this conclusion. The fact that on-lot sewage disposal systems on several adjacent lots function adequately may be relevant, and perhaps raises a question with respect to this lot, but it certainly does not prove that such a system would function adequately on this lot. There are too many variables, any one of which might explain why a system might work on one lot, but not on an adjacent one.

We must conclude that there was a high seasonal water table, in violation of the regulations of the Department, which require that the seasonal water table be at least 4 feet below the bottom of the absorption field trenches, or 6 feet below the surface of the ground.

#### CONCLUSIONS OF LAW

(1) The Environmental Hearing Board has jurisdiction over this appeal and over the parties thereto.

(2) The regulations of the Bucks County Department of Health require that the seasonal water table be at least 6 feet below the surface of the ground.

(3) The denial of the permit application in question was proper, in that prominent mottling of the soil at a depth of 29 inches indicated a seasonal water table at that depth.

248. *Dr. Hernando Trujillo*

**ORDER**

AND NOW, this 12th day of December, 1973, the action of the Bucks County Department of Health in the above captioned appeal is affirmed.

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*Silver Spring Township*

Silver Spring Township

: Docket No. 73-201-W

**A D J U D I C A T I O N**

By PAUL E. WATERS, Member, December 19, 1973

This matter comes before the Board on an appeal from an order of the Department of Environmental Resources hereinafter Department requiring Silver Spring Township hereinafter Appellant to enter a joint sewer project with the Municipal Authority of the Borough of Mechanicsburg, to provide for a portion of Appellant's future sewage treatment needs. Appellant contends that it has no duty or desire to use the excess capacity presently planned in the Mechanicsburg expansion project, but would prefer a new facility to be built on the confluence of Trindle Spring Run and the Conodoguinet Creek to serve the area in question.

**FINDINGS OF FACT**

1. Silver Spring and the Borough of Mechanicsburg are two contiguous municipalities in Cumberland County through both of which runs Trindle Spring Run, which flows generally northeastwardly to its confluence with the Conodoguinet Creek.

2. In 1950 Mechanicsburg constructed a .5 MGD sewage plant within the Borough, and in 1968 it was expanded to its present capacity of 1.21 MGD (N. T. 35, 37). It is the present intention of Mechanicsburg to expand the plant capacity to 2.080 MGD, and the plant as proposed would serve some portion of Silver Spring Township and Monroe Township (another contiguous township) (N. T. 37).

3. Presently, the effluent from the Mechanicsburg Sewage Plant is discharged into Trindle Spring Run, which discharge now is and at all

times material was a pollution source (N.T. 5) and such discharge is not in compliance with the water quality criteria and treatment requirements as established by DER (CX 2).

4. In 1969 Gannett Fleming Corddry and Carpenter, Inc. ("GFCC"), at the request and direction of the Tri-County Planning Commission, prepared a "Sewage Plan" for Cumberland County Planning Commission (N. T. 146, CX 3). Both Mechanicsburg and Silver Spring have adopted the Cumberland County Sewage Plan (Donato Statement p. 4, line 164, N. T. 154).

5. The Department's and Mechanicsburg's consulting engineers testified the phaseout of the Mechanicsburg plant proposed for expansion will begin in the year 1990 (N. T. 34, 147).

6. Neither Mechanicsburg nor Silver Spring has filed amendments to their respective "Plans" adopting the scheme contemplating an outfall pipe to the Conodoguinet and expansion of the Mechanicsburg plant to 2.080 MGD nor has DER requested amendments incorporating the proposed new sewage facilities (N. T. 59). Nor has Mechanicsburg ever submitted to Silver Spring documents outlining the technical details regarding the plant expansion and outfall pipe as continued in the "Preliminary Report — Sewage Treatment Plant Additions and Alteration — 1973", as prepared by GFCC for Mechanicsburg (N. T. 58, 134,) notwithstanding its departure from the Official Plan (N. T. 24).

7. In December, 1972, Silver Spring publicly authorized and signed a proposed form of agreement between itself and Mechanicsburg relative to the joint planning of the expansion of the Mechanicsburg Sewage Plant and its joint use by Silver Spring and Mechanicsburg. The proposed plan provided that Silver Spring share the planning and operation expenses (CX 5). Mechanicsburg never acknowledged to Silver Spring the receipt of this proposed agreement, although Mechanicsburg's manager testified it was received (N. T. 152). Mechanicsburg in its consulting engineers' discussions with DER in March 1973, relative to the Consent Order in Commonwealth Court mentioned the proposed agreement from Silver Spring (N. T. 121, 153).

8. A copy of the proposed Silver Spring — Mechanicsburg agreement (CX 5) was delivered to the office of the Department's Regional Sanitarian, Lewistown, in December 1972, (N. T. 16). The Acting Regional Sanitarian — the same person who signed the DER Order to Silver Spring

250. *Silver Spring Township*

dated May 16, 1973 (see Appellant's exhibit) — testified that he had no knowledge of the proposed "Agreement" until August 17, 1973 (N. T. 16, 45) and he has never taken any steps to attempt to use the proposed "agreement" as the basis of bringing the two parties together to negotiate a mutually acceptable agreement (N. T. 50), nor did he ask Mechanicsburg what action it had taken in reponse to the proposed "Agreement" (N. T. 46).

### DISCUSSION

This controversy seems to be born of the same parents as some other recent cases presented to this Board. The real issues are secondary to the posturing and the technical or procedural underbrush that obscures the matter. Basically there were very poor communication channels between the principal parties and this, more than anything else, in my opinion, has brought these proceedings to my desk.

Going first to the Board legal question, we affirm all that was said in the Uniontown and Monroe Township cases<sup>1</sup> regarding the authority of the Department to order a municipality, which itself is not presently causing water pollution, to cooperate with an adjoining sewer authority in meeting its future needs and, in so doing, to solve a present violation of The Clean Streams Law by that neighboring municipality.

Here, the main thrust of the May 16, 1973, order issued to Appellant was the need to upgrade the treatment plant of Mechanicsburg but, in so doing, an effort was also made to meet the future needs of Appellant for sewage treatment. As in the Monroe Township case, it is only the procedure followed which we feel requires further examination. We find no constitutional or statutory violations in the procedure used by the Department in failing to keep Appellant informed of the changes taking place in its dealings with Mechanicsburg, which it knew would clearly have a substantial impact on Appellant. Under the Administrative Code 71 P.S. § 510.21 c, the Department is empowered to so act.

The hearing held before this Board was intended to fully comply

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1. D.E.R. v. City of Uniontown, E.H.B. Docket No. 72-203 (Filed June 18, 1973); D.E.R. v. Monroe Township, E.H.B. Docket No. 73-177-W (Filed November 26, 1973).

with any due process or other hearing requirements. It is the *reasonableness* of this procedure which disturbed me in the Monroe Township case, and continues to do so here. We there said:

"Having said that the Appellant is bound to negotiate and enter any reasonable agreement with the Authority, what happens if the Appellant does not concede that the offered terms are reasonable? Obviously the question of the reasonableness of offered terms must be considered with a full background and understanding of the alternatives as well as all factors which influence rates, costs and the other terms. It appears that neither the Department or this Board is in the ideal position to determine the contents of an agreement after a breakdown of negotiations occurs. It also appears to us, however, that the administrative machinery and personnel of the Department are in a relatively better position to make such a determination than is this Board. We therefore hold that, when negotiations fail after the issuance of a departmental order, such as here, the Department must bring the parties together in a manner which it shall determine, and itself impose, any reasonable terms upon which the parties cannot agree. An appeal to this Board will, of course, be allowed from any such determination. In the same manner, an appeal can be taken to the Commonwealth Court from this Board's decision regarding the reasonableness of the disputed term or terms."

Appellant does not know exactly to what terms it is being ordered to agree.<sup>2</sup> Many decisions are being made unilaterally by Mechanicsburg, and they may or may not be fair. We must therefore remand this case to the Department to follow the procedure above outlined.

The Appellant has raised questions concerning the Department's compliance with federal regulations; we have reviewed the arguments and we find no merit in them. The Appellant also complains of the fact that the 1969 Tri-County Plan for Mechanicsburg, which is supposed to govern the development of sewer facilities, has not been officially changed to effect the new requirements imposed by the Department. This is a point well taken, and is an additional reason why a remand is called for.

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2. There is evidence that Mechanicsburg and Silver Spring officials have had difficulty negotiating in the past. The Department is the logical party for arbitration of future negotiations.

252. *Silver Spring Township*

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.
2. The Department has authority under The Clean Stream Law and its regulation 91.31 to issue an order to a municipality requiring it to negotiate and enter a reasonable agreement for a joint sewage treatment project.
3. The Appellant must have a reasonable opportunity to discuss the proposed terms of any agreement that it is required to enter with Mechanicsburg Authority.

#### ORDER

AND NOW, this 19th day of December, 1973, the matter of Commonwealth of Pennsylvania D.E.R. v. Silver Spring Township is hereby remanded to the Department for disposition consistent with this adjudication.

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*John G. Bintner*

John G. Bintner

: Docket No. 73-154

#### A D J U D I C A T I O N

By PAUL E. WATERS, Member, December 27, 1973

This matter comes before the Board on facts stipulated by Dennis M. Coyne, Assistant Attorney General representing the Department of Environmental Resources, hereinafter Department and Gerald F. Glackin, Esquire, representing John G. Bintner, hereinafter, Appellant.

#### STIPULATED FACTS

1. Appellant is a small independent contractor.
2. On February 16, 1973, the Department issued an Order to Lansdale Borough prohibiting further connections to the Borough's sanitary

sewer system pending an acceptable study and implementation of a proposal to increase the capacity of the Borough's treatment facility.

3. On February 21, 1973, in good faith and without knowledge of the Department's Order of February 16, 1973, Appellant entered into an Agreement to purchase a lot (lot) in Lansdale Borough for the sum of \$16,500.00, the Appellant intending to construct thereon a single-family residence for resale.

4. The lot conforms with all zoning and other regulations of the Borough of Lansdale.

5. The Agreement was free of any contingencies.

6. Appellant secured a mortgage in the amount of \$15,000.00, the monthly mortgage payment being approximately \$100.00.

7. By letter dated April 5, 1973, Appellant requested the Department to grant an exception to Order of February 16, 1973, thereby permitting Appellant to connect the proposed residence to the Borough's sanitary sewer system.

8. On April 20, 1973, Appellant completed settlement of the lot.

9. By letter dated April 25, 1973, the Department denied the Appellant an exception to the Order of February 16, 1973.

10. On May 14, 1973, Appellant filed his appeal with the Environmental Hearing Board, Docket No. 73-154.

11. The mortgage payment of \$100.00 per month creates a financial hardship for the Appellant and, as a result, he is in danger of defaulting on the mortgage and being foreclosed. Furthermore, if a residence cannot be built on the lot, the sale of the lot will not bring enough at Sheriff's sale to cover the mortgage obligation, and Appellant would then be threatened with a deficiency judgment.

12. Appellant does not contend that:

a. A building permit for new construction was issued by the municipality prior to or on the date of receipt of the ban; or

b. The connection will serve an existing occupied dwelling built prior to the date of receipt of the ban; or

c. the connection will result in no increase in sewage flows to the overloaded facilities.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter.

2. The Department has the authority to issue a sewer ban order prohibiting the Borough of Lansdale from permitting additional connections to its sanitary sewer system.

3. Sewer ban orders of the Department are subject to the due process notice and hearing requirements of the U.S. Constitution at two levels. Both the municipality immediately concerned, and the persons served or potentially to be served by the sewer system, must have reasonable notice and an opportunity for hearing.

4. The above requirement was first mentioned in the case of Department of Environmental Resources v. Borough of Carlisle, Carlisle Borough Sewer Authority and C. L. E. A. R., Intervenor, E.H.B. Docket No. 73-155-W, by adjudication issued on November 29, 1973.

5. This appeal was filed prior to the date on which the ruling was announced and is therefore not covered by it.

### DISCUSSION

In my opinion the only question raised by these facts which requires comment is the constitutional one of due process.

It has often been said that "hard cases make bad law." This is indeed a hard case, but the temptation to make "bad law", we believe, has been resisted. I believe, as stated in my opinion in the *Commonwealth of Pennsylvania Department of Environmental Resources v. Carlisle Borough, et al*, EHB Docket No. 73-155-W issued November 29, 1973, that there is a violation of procedural due process when an order is issued by the Commonwealth and this is not properly communicated to the municipal authority or citizenry before its effective date. It was suggested that 30 days notice be given by the Commonwealth to the municipality concerned, and they in turn would give at least 20 days notice to the public, of the impending sewer ban.

Inasmuch as the order was agreed upon but the reasoning was not adopted by a majority of the Board we must here face the issue again. The Chairman reaches the conclusion that, although there is no

constitutional violation, the estoppel doctrine is here sufficient to require an exception. I agree with him that there was a "duty" to give notice but I believe it arises from the due process requirements of the U.S. Constitution. I also believe that the recent decision in the Derry Township case (673 C.D. 1972) supports this view. The court there clearly recognized a due process question exists unless it is waived or there is some major health hazard requiring immediate governmental action. No one has suggested that the reason prior notice was not given was because there was insufficient time to do so.

The real difficulty is determining how this new rule should be applied to this and future cases to be decided by the Board. It is my opinion that, because this will require some change in the procedure of the Department, the notice requirement should be closely examined and enforced in all cases decided by the Board after the date of this opinion. To apply this new requirement retrospectively would be unreasonable. The imagination cannot do justice to the turmoil that would be created by such a procedure. The courts have held in another branch of the law where personal liberty was at stake and not just property rights, as here, that the rule newly announced would be limited to cases which arose or were decided after the date of the decision in question. We adopt that procedure in the interest of the administration of justice without chaos.

We are not unaware of the hardship imposed upon this Appellant by our decision. He is, however, no worse off than hundreds, perhaps thousands, of others who were affected by sewer ban orders issued across our State. This decision is forward looking, and its purpose is to see that many of the inequities of the past will not be repeated in the future.

#### ORDER

AND NOW, this 27th day of December, 1972, the appeal of John G. Bintner is hereby dismissed.

#### CONCURRING OPINION

By ROBERT BROUGHTON, Chairman, December 31, 1973

I do not think a due process problem exists simply because the Department fails to give notice prior to the issuance of a sewer connection

ban, when a landowner who bought land prior to the imposition of the ban cannot secure a building permit because of the imposition of the ban. See my concurring opinion in *Commonwealth v. Carlisle Borough*, E.H.B. Docket 73-155-W, (Filed November 29, 1970.) See also *Ewing v. Mytlinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *R. A. Holman & Co. v. S.E.C.*, 799 F. 2d 127 (C.A.D.C., 1962); *NorAM Agricultural Products, Inc. v. Hardin* 435 F. 2d 1151 (C.A. 7, 1970).

The mere fact that there is hardship on any particular Appellant because of the lack of notice of the imposition of the sewer ban does not necessarily mean that lack of notice was a violation of due process.

The sewer connection ban issued to the Borough of Lansdale is currently under litigation before this Board, E.H.B. Docket No. 73-057. I would think it is clear that this Appellant has a right to intervene in that litigation. However, if and when the sewer connection ban imposed on the Borough of Lansdale has been determined to be valid, it seems to me that would ordinarily settle the question whether it applies to this Appellant.

On the other hand, that does not necessarily settle the question of whether an exception should be granted in this case. If it did, then no exception would be granted in any case, since an exception, by definition (if the sewer ban is held valid), does result in additional pollution to the waters of the Commonwealth.

The entire rationale for granting exceptions, see our Opinion and Order in *Commonwealth v. Moon Nurseries* E.H.B. Docket No. 72-395 (Filed December, 1973) has two bases. One is administrative convenience and the problem of developing a rational control point relative to the question of to whom a sewer ban applies, and to whom it doesn't. See *F & T Construction Co. v. Department of Environmental Resources*, 7 Pa. Commonwealth Ct. 52 (1972), where it was held that the time when a building permit was applied for was a reasonable cutoff time for the application of a sewer ban order to particular cases. The other is equitable treatment of citizens of the Commonwealth. *Commonwealth v. Moon Nurseries, Inc.*, *supra*, and cases cited therein.

Here, the Department imposed a sewer ban, but quite obviously that action was not publicized well enough so Appellant heard about it prior to purchasing his land over two weeks later. Clearly he did not have a building permit prior to the issuance of the ban. The question then

is whether any recognized principles of equity should cause an exception to be made in this case.

The principle of equitable estoppel — or estoppel in pais — operates where one is induced to take action in reliance upon the existence of certain facts, the belief in the truth of which has been induced by another. It is well settled in Pennsylvania, as well as in most other jurisdictions, that "if a person is silent when he has a duty to speak, that person will not be permitted to speak when it is his duty to be silent." *Moore v. Smith*, 14 Sarg. & Rawle 388 (1826); *Appeal of Weldy*, 102 Pa. 454 (1883); *Logan v. Gardner*, 136 Pa. 588 (1890); *Leininger v. Goodmen*, 277 Pa. 75 (1923); *Fried v. Fisher*, 328 Pa. 497 (1938); *Allegheny County Housing Authority for use of Dobson v. Caristo Construction Corp.*, 90 F. Supp. 1007 (D.C., WD. Pa., 1950); see also *Kirka v. Hamilton*, 102 U.S. 68, 77 (1880). However, it is also settled that "mere silence is not a ground for estoppel unless there is a duty to speak." *Brown v. Haight*, 435 Pa. 12, 20, 255 A. 2d 508, 512 (1969).

Before dealing with the question of whether there was a "duty to speak" in this case, or whether that duty was such that an exception should be granted in this case, the threshold question of whether the principle of equitable estoppel applies at all in this sort of case should be dealt with.

As a general rule, the government is not subject to estoppel when acting in a governmental capacity, as distinguished from a proprietary capacity. *City of New Castle v. Withers* 291 Pa. 216 (1972); *Commonwealth v. Western Maryland Railroad Co.*, 377 Pa. 312 (1954); cert. den. 348 U.S. 857 (1954); see also Annotations 1 A.L. R. 2d 338 (1948).

On the other hand, it is also settled that equitable estoppel does apply to the government, given the proper circumstances and, in Pennsylvania at least the distinction between "governmental" and "proprietary" capacities seems blurred at best. *Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia*, 327 Pa. 497 (1937); *Ervin v. City of Pittsburgh*, 339 Pa. 241 (1940); *In re Melon Street* 192 Pa. 331 (1899); *United States v. Jones*, 176 F. 2d 278 (C.A. 9, 1949); *Trustees of Internal Improvement Fund of the State of Florida v. Bass*, Fla., 67 So. 2d 433 (1953).

In a field where one of the principal factors in the

Commonwealth's decision involves equitable treatment of citizens affected by the imposition of a sewer connection ban, I think there is no question that the principles of equitable estoppel apply, even though this is also a question involving, *potentially*, what the legislature has defined as a public nuisance, §202 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691, 202. Appellant purchased land with the expectation that he could build a residence and connect to the municipal sewer system. This expectation was induced by the fact that insufficient publicity was given the sewer ban order. That insufficient publicity was in part a result of the failure of the Department to publicize the issuance of the order. (In part, it must have been also a result of lack of widespread news media coverage, which could have resulted in giving the order sufficient publicity independently of Department action.)

Relative to whether a failure to give sufficient publicity in this case was a violation of a duty to speak, such that it would raise an estoppel, I have found no case holding that the Commonwealth — or any state or government, for that matter — has a duty to publicize orders so that persons *potentially* affected by those orders may avoid being so affected. Such a duty may not be found in the due process clause of the constitution, in this case regardless of whether it might in other cases. As of the date the order was issued, Appellant was not affected by it at all, and would have had no right to prior notice and hearing.

On the other hand, if due process has anything to do with fundamental fairness by governmental (and other) authorities in their dealing with persons affected by their actions, then the policy of the due process clause should certainly apply here. The Department took an action — issued a sewer connection ban order — that affected a myriad of people in a community in many different ways. The order was communicated to the municipality alone. No effort was made to communicate it to the human beings affected. Because of this failure of effort, Appellant suffered. Part of the reason for requiring notice, as an aspect of procedural due process, is to give affected citizens an opportunity to do something to protect their interests — as, e.g., demanding, and preparing for, a hearing. That reason applies equally here. (Again, admittedly, the publicity might have been given in this case by someone else, but the fact that it wasn't is irrelevant, if that someone else did not have a duty to do so.)

I would conclude that where a government agency takes action

that affects people generally in an area, that agency does have a duty to make reasonable efforts to publicize that action to the people affected. Where it does not do so, and someone takes action in reliance upon the prior state of facts — the facts and legal relationships that existed before the agency acted — the equitable estoppel will apply, at least where sovereignty is not at issue, and where a public nuisance is not created thereby. It is true, in this case, that the legislature has declared sewage discharges of this type to be a public nuisance. See §202 of The Clean Streams Law, *supra*, 35 P.S. §691.202. On the other hand, if that legislative declaration were applied literally there would be no exceptions, under any circumstances, to sewer ban orders. I think, in cases such as this one, the doctrine of equitable estoppel should be applied, and an exception granted.

Questions might be raised, how this case can be distinguished from a case where someone purchased another lot, let us say also in Lansdale, for the same price, two days before the sewer ban went into effect. The financial hardship on that landowner would be essentially identical to the hardship on this Appellant.

I do not think that same rationale for an exception exists. If one is to have a sewer ban at all, there must be some date when it becomes effective, some cutoff point to determine to whom it applies and to whom it does not. Having some cutoff point is an inevitable, logical necessity of having the ban.

Whatever cutoff point is chosen, there will (or may) always be someone who purchased land just before (or even a long time before) the ban went into effect, and that person will be subjected to a financial hardship because of the imposition of the ban. Even requiring a 30-day notice period, as suggested by my brother Waters, would not prevent such hardship cases from arising, if some landowner were not able to prepare the necessary plans and specifications to secure a building permit within that 30-day period.

I conclude that, if the ban is valid, and since there must be *some* cutoff point, then mere hardship does not create a reason for an exception, *provided* the cutoff date chosen is reasonable. Commonwealth Court, in *F. & T. Construction Co. v. Commonwealth*, 7 Pa. Commonwealth Ct. 52 (1972), has held that applying the ban to all sources as to which a building permit has not been issued on the effective date of the order is a reasonable

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cutoff point.

In this case, the hardship was not an inevitable result of the ban plus the logical necessity for some cutoff date. It was instead a preventable result of the failure to publicize the fact that the ban had been issued.

I do, however, agree that my conclusions of law, and the result based upon it, the latter agreed to by a majority of the Board, should be applied only prospectively, for the reasons stated by my brother Waters. (I am a little perplexed as to just exactly what the conclusions of law by the Board would be, in a similar case arising in the future, since our reasons for reaching the same result in this case do not absolutely guarantee a similar result in all hypothetical future cases. I think we can only await those cases, and perhaps the appointment of a third Board member, for a resolution of my perplexity.)

For the above reasons, I join in signing the Order of the Board.

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*Fred Thies*

**FRED THIES**

: Docket No. 72-302

**A D J U D I C A T I O N**

By THE BOARD, December 31, 1973

On October 18, 1971, Fred Thies (hereinafter referred to as Appellant) filed an application with the Township of Brighton, Beaver County, Pennsylvania, (hereinafter referred to as Township) to install an on-lot sewage disposal system to service a residence dwelling constructed on certain property situate in the Township owned by him and his wife.

On November 1, 1971, the Township rejected this application.

On November 9, 1971, Appellant appealed this decision to the Board of Supervisors of the Township, said appeal being proper under and by virtue of the provisions of Section 7 (a) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, 35 P.S. 750.7 (e).

On November 22, 1971, a hearing on this appeal was held before the Township Board of Supervisors, and on December 17, 1971, the Township Board of Supervisors dismissed the appeal.

On December 20, 1971, Appellant appealed the decision of the Township Board of Supervisors to the Department of Environmental Resources, (hereinafter referred to as Department) said appeal being proper under and by virtue of Section 12.1 of the Pennsylvania Sewage Facilities Act, *supra*, 35 P.S. 750.12a.<sup>1</sup>

On June 12, 1972, the Department notified Appellant that, as the result of percolation tests conducted on May 20, 1972, and as the result of an on site evaluation which was conducted, the Department concurred with the decision of the Township in denying Appellant a permit to construct an on lot sewage disposal facility on his property.

On June 26, 1972, Appellant filed an appeal to this Board from the decision of the Township and from the concurring decision of the Department, by virtue of which his application for a permit to install an on lot sewage disposal facility on his property was denied.

A hearing in this matter was held before Louis R. Salamon, Esquire, hearing examiner, on Monday, March 5, 1973.

The parties waived the filing of briefs.

The Board makes the following

#### FINDINGS OF FACT

1. Appellant and his wife own a parcel of land in the Township which is bounded on the south by Midway Drive and on the East by Beaver Street. (R. 123)

2. At one time, a run or a watercourse entered Appellant's property at the Northwest corner and flowed across the property in a Southwesterly direction. (R. 147, 148) This run has been diverted around Appellant's property by means of a diversion ditch. (R. 148) The channel or course which this run took as it flowed across Appellant's property was covered by soil and fill material. (R. 224, 84)

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1. By virtue of the provisions of the Act of April 9, 1929, P.L. 177, as amended by the Act of December 3, 1970, P.L. 834, No. 275, Section 20, 71 P.S. 510-1 (14), the Department assumed the powers and performed the duties previously vested in and imposed upon the Pennsylvania Department of Health under the Pennsylvania Sewage Facilities Act, *supra*. One such duty was to hear appeals such as that filed by Appellant.

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3. When the Township improved and paved Midway Drive in 1959, it was necessary to install underdrains along the Northerly side of Midway Drive to intercept the groundwater flowing from land situate to the North of Midway Drive, including the land presently owned by Appellant, in order to prevent such groundwater from flowing under the new road base. (R. 125, 126)

4. On-lot sewage disposal systems, installed prior to 1962, servicing three homes on lots situate directly across Midway Drive from Appellant's property, are malfunctioning in that effluent is overflowing either into the underdrains or flowing directly onto the surface of the land. (R. 139, 140)

5. In 1971, John Loncar who is a sewer inspector and a sewage treatment plant operator in Center Township, Beaver County and William Waddell who is building contractor, were contacted by Appellant and asked to perform a percolation test on Appellant's property in order to determine if said property was suitable for an on-lot sewage disposal system. (R. 9, 10, 76, 78)

6. On either the evening of August 15, 1971, or the morning of August 16, 1971, Appellant and Mr. Waddell dug six percolation holes on the property to a depth of almost three feet which would be the approximate depth of the proposed subsurface absorption area. (R. 107, 100, 78) The holes were made to be twelve inches in diameter. (R. 108) The sides of the holes were scratched with a wire brush. (R. 100) One to two inches of gravel were placed in the bottom of each hole. (R. 78)

7. On the morning of August 16, 1971, Mr. Waddell poured water into each hole to the extent that the water rose to a height of eighteen inches from the top of each hole. (R. 78, 107) Mr. Waddell returned to the test area one or two times on August 16, 1971, and added water to each hole to keep the water level at the same original height. (R. 78)

8. On the morning of August 17, 1971, Mr. Waddell returned to the property and again filled each hole to the extent that the water rose to a height of eighteen inches from the top of each hole. (R. 81) Mr. Waddell and Mr. Loncar then inserted a nail at the high water level in each hole. (R. 81) They then measured the drop in the water level in each hole using the nail as their point of reference, at fifteen minute intervals, for a half hour. (R. 106) Both men made computations as to the average percolation rate, using the same figures for the drop in the

water level in each hole. (R. 15-17, 79-80) Each man used a different method of computation. (R. 81) Mr. Loncar found the average percolation rate to be 30 minutes per inch, and Mr. Waddell found the average percolation rate to be 43 minutes per inch. (R. 17, 80)

9. On a date prior to September 30, 1971, Appellant filed an application with the Township to construct an on-lot sewage disposal system on this property. Attached to this application was a document upon which the results of the August 17, 1971, percolation tests were recorded. On September 30, 1971, Daniel C. Baker, Jr., the Township officer whose duty it was to receive and review such applications, sent a letter to Appellant wherein Appellant was notified that his application was rejected. In said letter Appellant was directed to make additional percolation tests in Mr. Baker's presence and to make two deep test excavations with a backhoe to determine groundwater elevation. (R. 132, 134)

10. Mr. Loncar and Mr. Waddell performed a second percolation test on Appellant's property on October 16, 1971, in the presence of Mr. Baker. (R. 87, 88, 136, 137)

11. The holes utilized in the performance of the October 16, 1971 percolation test were prepared for said test in the same manner as the holes utilized in the performance of the August 17, 1971 percolation test were prepared for said earlier test. (R. 14)

12. The percolation test of October 16, 1971, was of a one-hour duration with one measurement of the drop in the water level in each hole being made at the end of the hour. (R. 74) Each man used a different method of computation to determine the average percolation rate. (R. 81) Mr. Loncar found the average percolation rate to be 60 minutes per inch, and Mr. Waddell found the average percolation rate to be 131 minutes per inch. (R. 12, 13, 82)

13. Mr. Loncar, Mr. Waddell and Mr. Baker agreed that the Southeast corner of Appellant's property was not suited to be the subsurface absorption area for an on-lot sewage disposal system because there were extremes in the percolation test findings from the test holes dug in the Southeast corner, because water was found in one of the deep test excavations in the Southeast corner and because fill had been placed on said property at the Southeast corner. (R. 84, 161)

14. Mr. Loncar, Mr. Waddell and Mr. Baker agreed that any data obtained from percolation test holes located in the Southeast corner of

Appellant's property, to-wit, test holes 5A and 6A from the August 17, 1971 percolation test and test holes 4B and 5B from the October 16, 1971 percolation test, would not be considered in the evaluation of Appellant's property for an on lot sewage disposal system. (R. 84, 161) They agreed that the data obtained from eight test holes, four from the August 17, 1971 percolation test and four from the October 16, 1971 percolation test would be considered in the evaluation of Appellant's property for an on-lot sewage disposal system. (R. 86, 161, 162)

15. Mr. Waddell determined that the total drop in the water level for the eight holes, in one hour, was 8 1/2 inches; he divided 8 1/2 inches by eight and determined that the average drop in the water level for each hole in one hour was 1 1/16 inches; he divided 1 1/16 inches by sixty minutes and concluded that the average percolation rate for the eight holes was 57 minutes per inch. (R. 87) Mr. Baker used the same figures as to the drop in the water level as did Mr. Waddell, but according to his method of computation, the average percolation rate for the eight holes was 63 minutes per inch. (R. 137)

16. On October 16, 1971, Appellant again filed an application with the Township to construct an on-lot sewage disposal system on this property. Attached to this application were documents upon which the results of the composite percolation tests of August 17, 1971 and October 16, 1971 were recorded. (R. 3) On November 9, 1971, the Township, by Mr. Baker, rejected this application. (R. 4) On December 17, 1971, the Township Supervisors affirmed the decision of Mr. Baker. (R. 4) On December 20, 1971, Appellant appealed to the Department from said decision. (R. 4)

17. Barry L. Wolf is a soil scientist who has been employed by the United States Department of Agriculture, Soil Conservation Service, as a soil scientist since June 1969. (R. 202) He has a Bachelor of Science degree, with a major in agronomy and with eighteen credits in soils courses. (R. 203) He has received considerable on-the-job training and he has attended soils training courses. (R. 203) His primary duty is to make a soil survey in Beaver and Lawrence Counties. (R. 202)

18. On Map APQ-IV-115, found in Volume 1, "Soil Interpretations for Developing Areas, Beaver County, Pennsylvania, 1968", published by the United States Department of Agriculture, Soil Conservation Service, the soil on Appellant's property is classified as

Monongahela silt loam. (R. 204, 205)

19. A major characteristic of Monongahela silt loam is the presence of a "fragipan", defined as an impermeable layer located from twenty to thirty inches below the surface. (R. 207) When a fragipan is present in the soil, water does not move rapidly through this impermeable layer and a perched water table develops. (R. 207)

20. On January 19, 1972, Mr. Wolf visited Appellant's property, during which time he walked over the property, examined percolation test holes which had been previously dug, probed into the soil with a soil auger, to a depth of forty-two inches and examined the soil. (R. 213, 223)

21. Mr. Wolf found water in each of the six percolation test holes at which he looked, at points between twelve inches and twenty-four inches below the surface of the ground. (R. 213) The average depth below the surface of the ground at which he found water was eighteen inches. (R. 213) He concluded that the presence of water in these holes at said average depth was the indicator that the maximum elevation of the water table on Appellant's land was eighteen inches. (R. 213, 226)

22. Mr. Wolf found that the soil was silty, that it had a fragipan characteristic and that it was mottled and gray in color. (R. 213, 221)

23. Mottling is a variable coloration in the soil caused by a high water table within the soil. A gray colored mottle arises because the water in the soil causes the iron in the soil not to be oxidized. (R. 214)

24. Mr. Wolf's examination of the soil on Appellant's property confirmed the finding, noted on Map APQ-IV-115, *supra*, that the soil on Appellant's land was Monongahela silt loam. (R. 214)

25. Sewage passing through a subsurface absorption area in an on-lot sewage disposal system is treated and is to an extent renovated and purified by the natural action of the soil. (R. 177) The presence of a high water table in the subsurface absorption area would prevent this treatment, renovation and purification from taking place. (R. 217)

26. Although the run which previously flowed across Appellant's property had been filled, Mr. Wolf found that water continued to follow the course which the run took and was filtering through the soil. (R. 224)

27. On May 30, 1972, the Department, by Edward I. Neville, supervising sanitarian, and Kathleen Miller, a sanitarian, in the presence of and with the assistance of Mr. Waddell, performed a percolation test on

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the west side of Appellant's property. (R. 93, 168, 169)

28. Mr. Waddell prepared the test holes for the May 30, 1972 percolation test in the same manner as he had prepared the test holes utilized in the prior percolation tests. (R. 93, 94)

29. Although six test holes were dug and utilized during the May 30, 1972 percolation test, the drop in the water level in a test hole identified as No. 5, but not identified as to its specific location on Appellant's property, was not considered by Mr. Neville in reaching an average percolation rate because the drops in the water level in test hole No. 5, measured at fifteen minute intervals, fluctuated wildly and did not accurately represent soil conditions in the area. (R. 172, 181)

30. The percolation test of May 30, 1972, was performed over a period of approximately three hours. (R. 183) Measurements of the drop in the water level in each hole were made at the end of each half hour during the test and the drop in the water level in each hole during the final thirty minutes was used to calculate the average percolation rate. (R. 185) Mr. Neville computed the average percolation for the five test holes to be 73.2 minutes per inch. (R. 172)

31. Water remained in each of the five test holes considered by Mr. Neville in his computation of the average percolation rate on the morning of May 30, 1972, when he performed said percolation test. (R. 231)

32. The length of time that it takes water to fall one inch in a percolation test will increase during the course of the test until a saturation point has been reached. (R. 194) When a saturation point has been reached, stablization will occur. (R. 194)

#### DISCUSSION

By virtue of section 3 of the Pennsylvania Sewage Facilities Act, *supra*, 35 P.S. 750.3, the Department of Health was and the Department of Environmental Resources is<sup>2</sup> directed to adopt such rules, regulations, standards and procedures as are necessary to carry out the provisions of

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2. See footnote No. 1, *supra*.

said Act, including adoption of rules, regulations and standards for construction and installation of individual on lot sewage disposal systems.

In compliance with this mandate the Department adopted, on August 2, 1971, rules and regulations as follows: Chapter 71. Administration of Sewage Facilities Act, Chapter 73, Standards for Sewage Disposal Facilities. Each said Chapter was revised on April 29, 1972.

By virtue of Section 7(a) of the Pennsylvania Sewage Facilities Act, *supra*, no person can install an individual on-lot sewage disposal system unless he has first obtained a permit indicating that the site and the plans and specifications of such system are in compliance with the provisions of said Act and with the standards adopted pursuant to said Act.

By virtue of Section 8(a) of the Pennsylvania Sewage Facilities Act, *supra* all municipalities (including the Township in this case) must administer the provisions of Section 7 of said Act, *supra*, and the standards adopted by the Department pursuant thereto.

By virtue of Section 8(c) of the Pennsylvania Sewage Facilities Act, *supra*, municipalities are directed not to adopt any standards or promulgate any regulations or procedures not in conformity with the standards, regulations or procedures of the Department.

Appellant was, therefore, bound to comply with the requirements of Chapters 71 and 73, *supra*, in order to receive a permit to install an on-lot sewage disposal system on his property situate in the Township.

Furthermore, Appellant had the burden of proving to the Township and to the Department and Appellant has the burden of proving to this Board that his application has, in fact, met the requirements contained in Chapters 71 and 73, *supra*.

Our study of the record leads us to conclude that if Appellant is to prevail in his appeal, he must prove that his application for an on-lot sewage disposal system meets all of the following requirements:

a. The maximum elevation of the groundwater table on his property must be at least four feet below the bottom of the excavation for the subsurface area of his proposed system. (As required under Chapter 73, *supra*, Section 73.11(c). *Overall requirements*)

b. Rock formations and impervious strata on his property must be at a depth greater than four feet below the bottom of his excavation for the subsurface area of

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his proposed system. (As required under Chapter 73, *supra*, Section 73.11(c). *Overall requirements*)

c. The percolation time shall be not less than six minutes per inch nor more than sixty minutes per inch, with the caveat that percolation rates shall not apply where soils are mottled as a result of seasonal high water tables or where perched water tables preclude adequate effluent renovation. (As required under Chapter 73, *supra*, Section 73.11(d). *Overall requirements*); Section 73.63(a). *Absorption area requirements for private residences*; Section 73.63 b (2). *Absorption area requirements for private residences*.

If Appellant's application does not meet one or more of said requirements, or if soil or geological conditions exist which would preclude safe operation of his proposed system, the Township and the Department properly denied his application. See Chapter 71, *supra*, Section 71.55. *Denial and revocation of permits*.

We find that Appellant has completely failed to sustain his burden of proof in this matter.

His only witnesses were a sewer inspector and a building contractor whose testimony was devoted exclusively to a discussion of the manner in which three percolation tests were conducted on this property and the method by which they computed the average percolation rate from the data which they gathered during the performance of these tests.

These witnesses offered no proof as to the maximum elevation of the groundwater table on Appellant's property, nor did they offer proof as to the depth of rock formations and impervious strata thereon. Furthermore, there was no testimony offered by Appellant as to soil and geological conditions on his property, other than testimony that fill had been placed in a portion thereof.

This is in sharp contrast to the testimony offered on behalf of the Township and the Department. Daniel C. Baker, Jr., the employee of the Township whose duty it was to receive and review applications for on-lot sewage disposal systems, testified that on-lot sewage disposal systems previously installed on properties adjacent to and opposite Appellant's property, were malfunctioning in that effluent is overflowing into underdrains or directly onto the surface and that significant amounts of water flow from Appellant's property into these specially constructed

underdrains.

Barry L. Wolf, a soil scientist, testified, upon the basis of his examination of an authoritative soil map and upon the basis of his actual examination of Appellant's property and the soil thereon that the maximum elevation of the water table on this property was eighteen inches, that there was an impermeable layer, called a fragipan, located twenty to thirty inches below the surface, that a perched water table developed, that water does not percolate rapidly through this fragipan and that the soil on Appellant's property was mottled, a term which he used to describe a variable coloration in the soil caused by the presence of a high water table within such soil.

There can be no clearer proof than this unrebutted testimony of Mr. Wolf, a qualified soil scientist, that conditions exist on Appellant's property which make it impossible for his application to meet the aforesaid requirements for the permitted installation of an on-lot sewage disposal system thereon.

One such condition is the presence of the water table on this property at a point only eighteen inches below the surface, when the proposed subsurface absorption area would be at a point approximately three feet below the surface.

This testimony, coupled with the testimony offered by Mr. Baker, demonstrates to this Board that Appellant's property is totally unsuitable for the installation of an on-lot sewage disposal system thereon. Accordingly, we conclude that the Township, in rejecting Appellant's application, and the Department, in concurring in this rejection, made the proper determination.

A great portion of this record is devoted to testimony on both sides, dealing with the manner in which three percolation tests were conducted on this property and the methods by which the average percolation rate was computed from the data which was gathered during the performance of these tests.

As we have previously pointed out, percolation rates are not applicable where soils are mottled as a result of seasonal high water tables or where perched water tables preclude adequate effluent renovation.<sup>3</sup>

Since we have found that the soil on Appellant's property is mottled as the result of a seasonal high water table and that there is a

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3. Chapter 73, *supra*, Section 73.63 b (2)

perched water table on Appellant's property which precludes adequate effluent renovation, a discussion of the percolation test findings is not necessary to our adjudication of this Appeal.

We did, however, carefully examine the record as it pertains to these percolation tests. We have found that the manner in which Mr. Loncar and Mr. Waddell performed the tests of August 17, 1971, and October 16, 1971, and the manner in which they computed the average percolation rate, using the data which they obtained, did not conform to percolation test procedure as set forth in Chapter 73, *supra*, Section 73.62, *Percolation Tests*.

We find also that the Department, by Mr. Neville, did not perform its May 30, 1972 percolation test according to percolation test procedure as set forth in Chapter 73, *supra*, Section 73.62, *Percolation Tests*.

As such, it would have been difficult, if not impossible, for this Board to have utilized these results to make a determination as to whether Appellant's land was suitable for the system which he proposed.

In our Adjudication in *Commonwealth of Pennsylvania Department of Environmental Resources v. Vito Fabiano*, Docket No. 73-051, August 1, 1973, we stated, p. 5, as follows:

"We are in sympathy with the plight of the prospective home owner in the instant case. However, we have no jurisdiction to offer him equitable relief . . . . Neither the Environmental Hearing Board nor the Department of Environmental Resources has the discretion to enforce or not to enforce the statute or regulations or to balance equities."

Those words are equally applicable to Appellant. We would hope that some solution to the dilemma in which Appellant finds himself, perhaps even the construction of sewers and a treatment facility for the entire area in which this property is situate, can be speedily achieved.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction of the parties and subject matter, and said matters are properly before the Environmental Hearing Board for decision.

2. The burden of proof with respect to compliance with requirements and facts necessary and sufficient to justify the granting of

a permit to Appellant for the installation of an on-lot sewage disposal system on his property is upon Appellant.

3. Appellant has failed to satisfy his burden of proof and under all of the evidence, it must be concluded that the Township and the Department properly denied Appellant's application for the installation of an on-lot sewage disposal system on his property.

**ORDER**

AND NOW, this 31st day of December, 1973, it is hereby ordered that the Appeal of Fred Thies is dismissed.

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*Moon Nurseries, Inc.*

Moon Nurseries, Inc.

: Docket No. 72-395

**OPINION AND ORDER**

By **ROBERT BROUGHTON**, Chairman, December 31, 1973

This matter is before the Board on Appeals filed by Moon Nurseries, Inc. (Moon) and BACS Realty, Inc. (BACS) from an Order of the Department of Environmental Resources (Department), dated October 31, 1972. By this Order Moon and BACS were denied permission to connect 18 proposed homes in two subdivisions which they jointly developed, situate in the Township of Lower Makefield, to the sanitary sewer system of the Municipal Sewer Authority of the Township of Lower Makefield.

A hearing was held on March 20, 1973, by Gerald H. Goldberg, Esquire, who was formerly a member of this Board.

The Board makes the following

**FINDINGS OF FACT**

1. Moon is a corporation engaged in the custom building of homes in the Township of Lower Makefield, Bucks County, Pennsylvania. (N.T. 35, 36, 41)

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2. In the type of business conducted by Moon, building permits for construction cannot be sought until such time as Moon has sold a particular lot and determined with its purchaser the type of dwelling to be erected thereon. (Stipulation N.T. 35, 36)

3. Sometime prior to July, 1970, Moon applied to the Township Planning Commission for approval of subdivision of certain tracts of land in the Township which Moon owned. These tracts upon which residence dwellings were to be constructed were named Homestead Acres and Wynnewood II.

4. On or about July 14, 1970, the Municipal Sewer Authority of the Township of Lower Makefield (Authority) filed an application, No. 0970423, with the Department for a permit which would authorize the construction of sewage conveyance facilities to serve the homes to be constructed in Homestead Acres and Wynnewood II. (Stipulation N.T. 5, from Statement of Facts in Trial Brief of Department)

5. This application disclosed that the sewage which would be collected in these proposed sewage conveyance facilities would be transported to the sewage treatment plant of the Municipal Authority of the Borough of Morrisville (Morrisville Plant) for treatment. (Stipulation N.T. 5, from Statement of Facts in Trial Brief of Department)

6. In a letter dated November 13, 1970, the Department notified the Authority, in writing, that:

a. Conditions were such at the Morrisville Plant that said Plant would exceed its hydraulic capacity within the next five years.

b. Application No. 0970423 would be refused unless the Municipal Authority of the Borough of Morrisville (Morrisville Authority) submitted an approvable time schedule, indicating that said Plant would be expanded and in operation prior to the anticipated point of hydraulic and/or organic overload.

c. If no such approvable time schedule was received from the Morrisville Authority, the Authority could withdraw its application, or revise its application to provide for capped sewers, or request that its application be processed under the circumstances which then existed. (Stipulation N.T. 5, from Statement of Facts in Trial Brief of Department)

7. On November 24, 1970, the Planning Commission sent

written notice to Moon that its final subdivision plans would be recommended to the Township Supervisors for approval, subject, *inter alia*, to approval by the Authority and to the granting of a permit by the Commonwealth before houses were constructed. (Stipulation, N.T. 27)

8. On December 23, 1970, the Department sent written notice to the Morrisville Authority by which the Morrisville Authority was informed that no further sewer extensions would be recommended for approval until the Department received an acceptable Project Status Schedule Card (PSS Card) from the Morrisville Authority showing the steps to be taken in the expansion of the Morrisville Plant to prevent future sewage treatment deficiencies. (Stipulation, N.T. 5, from Statement of Facts in Trial Brief of Department)

9. On December 31, 1970, the Department received a PSS Card from the Morrisville Authority, which PSS Card was found to be acceptable by the Department on a date subsequent thereto. (Stipulation, N.T. 5, from Statement of Facts in Trial Brief of Department)

10. On August 13, 1971, the Department issued Water Quality Management Permit No. 0970423 to the Authority by the terms of which the Authority was authorized to construct pump stations, sewers and appurtenances and to discharge treated sewage as per its earlier application. (Stipulation, N.T. 5, from Statement of Facts in Trial Brief of Department)

11. On August 19, 1971, the Township Supervisors sent a letter to Moon in which, *inter alia*, Moon was notified that said Permit pertaining to its developments had been granted by the Department. (Stipulation, N.T. 33)

12. Moon assigned certain of the lots contained in Homestead Acres to BACS as part of an agreement under which Moon and BACS became obligated to jointly improve and develop Homestead Acres. (Stipulation, N.T. 6, 7, 8)

13. Between August 19, 1971, and September 19, 1972, Moon and BACS incurred expenses for on-site improvements at Homestead Acres in the sum of \$194,790.56. Of this sum, \$44,024.78 was spent for the construction of sanitary sewers in Homestead Acres. (Stipulation, N.T. 28, 33)

14. During 1972, the hydraulic and organic overloading of the Morrisville Plant continued unabated. (Stipulation, N.T. 5, from Statement of Facts in Trial Brief of Department)

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15. On September 19, 1972, the Department issued an Order to the Authority in which the Department imposed a sewer connection ban into that part of the Authority's sanitary sewer system from which sewage was transported to the Morrisville Plant with the exception that said ban did not apply to connections to approved sewers serving new construction for which building permits had been previously issued. (Stipulation, N.T. 5, from Statement of Facts in Trial Brief of Department)

17. On October 31, 1972, the Department rejected this request for an exception. (Stipulation, N.T. 5, from Statement of Facts in Trial Brief of Department)

18. BACS, Moon and the Department stipulated that the issues in the Appeal of Moon are identical to those which would be involved in the Appeal of BACS and that both Appeals should be consolidated for hearing and adjudication. (Stipulation, N.T. 8)

19. The parties hereto have stipulated that the validity of the Order by which said sewer connection ban was imposed is not in issue in these Appeals. (Stipulation, N.T. 4)

20. There are 16 lots in Homestead Acres out of a total of 31 lots therein which are adversely affected by this sewer connection ban. (Stipulation, N.T. 28)

21. There are 2 lots in Wynnewood II out of a total of 13 lots therein which are adversely affected by this sewer connection ban. (Stipulation, N.T. 29)

22. On-site improvements for the 2 lots in Wynnewood II which are adversely affected by this sewer connection ban were made prior to November 1970. (Stipulation, N.T. 29)

23. Of the total of 18 lots in Homestead Acres and Wynnewood II which are adversely affected by this sewer connection ban, 1 lot, situate in Homestead Acres, meets Department criteria for the installation of an on-lot sewage disposal system. (Stipulation, N.T. 29)

24. Neither Moon nor BACS presented evidence which would entitle either or both of them to an exception from this sewer connection ban under the existing policies and procedures of the Department. (Stipulation, N.T. 41)

25. If Moon and BACS are permitted to build homes on the 18 lots which are adversely affected by this sewer connection ban and to connect said homes to the existing sewers, there will be an increase in flow to the Morrisville Plant. (Stipulation, N.T. 41)

### DISCUSSION

The Department, on page 900-9.2 of its Sanitary Engineering Policy and Procedures Manual, has delineated the types of situation which must exist before the Department will consider the granting of exceptions to sewer connection bans. They are as follows:

1. Where a building permit for new construction was issued by the municipality prior to or on the date of receipt of the ban.
2. Where the connection will serve an existing occupied dwelling built prior to the date of receipt of the ban.
3. Where the connection will result in no increase in sewer flows to the overloaded facilities.

This Board has been called upon to hear numerous cases wherein builders, developers and individual property owners have appealed from decisions wherein the Department has denied requests for exceptions to sewer connection bans.

In one such case, *In The Matter of Alan Mitchell Corporation*, Docket No. 71-108 (decided June 7, 1972), where Appellants argued that they were denied equal protection of the law, in violation of the United States Constitution, when exceptions were granted to some, but refused to some, we stated, p.6, that the law requires only that where classifications are made, they must have some reasonable basis for the different treatment accorded. We held, p.6, that exceptions as established by the Department were fair and reasonable and were proper in substantive content.

In *F. & T. Construction Company, Inc. v Department of Environmental Resources*, 6 Pa. Commonwealth 59, 293 A2d. 138 (1972), the Commonwealth Court held that where the Department had established the date of issuance of a building permit as the cut-off date for allowing an "exemption" to the sewer connection ban, such cut-off date was a reasonable standard.

We have, however, discovered that the Department will, under certain circumstances, recognize exceptions based on facts other than those set forth in its Sanitary Engineering Policy and Procedure Manual.

In *In The Matter of Mrs. Elsie Strawley*, Docket No. 71-109 (decided May 8, 1972), we found, Pp. 3, 4, that the Department would recognize an exception to a sewer connection ban where a delay in the granting a building permit, which would otherwise have been granted before

the imposition of such ban, was caused by governmental action for which the applicant for an exception was not responsible. Similarly, in *In The Matter of Alan Mitchell Corporation*, Docket No. 71-108 (decided June 7, 1971), we received testimony from the Department from which we made a finding that the Department would recognize an exception to a sewer connection ban where a delay in the granting of the application to connect to a sewer system was caused by the government itself, prior to the imposition of the ban.<sup>1</sup>

Furthermore, we have held that we have the authority to grant exceptions not previously recognized by the Department.

In *In The Matter of Township of Nether Providence, Delaware County*, Docket No. 71-107 (decided May 8, 1972), we held, Pp. 4-5, that where homes were constructed and occupied prior to the issuance of the sewer connection ban, and continued use of malfunctioning on lot sewage disposal systems servicing said homes has caused and will continue to cause an immediate and serious hazard to public health, it would be irresponsible to deny these homeowners the opportunity to connect to the sanitary sewers solely in order to preserve inviolate the terms of the ban.

We reached the conclusion in the *Alan Mitchell* case, *supra*, p. 7, that "the Board alone, governed by settled equitable principles, may grant an exception not specifically and previously authorized by Department regulations."

We applied this conclusion in *In The Matter of David C. Starr*, Docket No. 72-266 (decided November 16, 1972) when we granted an exception to a property owner whose building was connected to the sewer system before the imposition of a sewer connection ban but not occupied prior thereto.

We found, in that case, Pp. 6-7, that there was no equitable distinction between an exception granted because a building permit was issued prior to the ban and a case where a building was built and connected but unoccupied.

We also took the opportunity in the *David C. Starr* case, *supra*, to again state that we could grant an exception to a sewer connection ban where the facts presented by the person or entity seeking same indicated a situation which was equitably indistinguishable to exceptions granted by the Department as a matter of policy.

1. In the matter of application of Alan Mitchell Corporation, *supra*, Finding of Fact No. 7, p.2.

We now reach the merits of the instant case.

We have made a finding that neither Moon nor BACS have presented evidence which would entitle either or both of them to an exception from this sewer connection ban under the existing policies and procedures of the Department.

What remains for us to determine, therefore, is whether these entities have presented facts which would lead us to conclude that an exception should be granted on the theory that their circumstances are equitably indistinguishable from circumstances under which the Department will grant an exception as a matter of policy.

We understand Moon and BACS to be contending, first, that by the very nature of their home building operation they were precluded from obtaining building permits prior to the date when this sewer connection ban was imposed. They distinguish this circumstance from the situation where some entity, not a custom builder of homes, could have sought and obtained building permits soon after receipt of subdivision approval and sewer extension and construction authorization. They also allege, in support of their first contention, that by the very nature of their business they were required to spend considerable sums in site preparation prior to finding a purchaser. They allege that the amount of this investment may actually be much greater than that of a contractor who, before he finds a purchaser, prepares the site, obtains building permits and completes his construction.

They assume that the reason why the Department will consider an exception when a building permit has been obtained prior to the imposition of the ban is that the Department has recognized the fact that a builder has made a substantial commitment in reliance upon his building permit. Moon and BACS reason that they have made as much, if not more of a commitment, in reliance upon the fact that they were notified by the Township that the Department had issued Water Quality Management Permit No. 0970423 to the Authority, by the terms of which the Authority was authorized to construct pump stations, sewers and appurtenances and to discharge treated sewage to the waters of the Commonwealth.

This leads the Board to the second contention made by Moon and BACS. The parties hereto have stipulated that said Water Quality Management Permit was issued to the Authority on August 13, 1971, by the Department. They have also stipulated that on August 19, 1971, Moon was notified by the Township that said Permit had been granted. They

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have further stipulated that between August 19, 1971, and September 19, 1972, the date when the ban was imposed, Moon and BACS spent almost \$195,000.00 for site improvements at Homestead Acres, including the sum of \$44,024.78 to construct sanitary sewers.

Moon and BACS contend that they had a vested right to rely on the fact that said Water Quality Management Permit had been granted. They contend that such vested right cannot lawfully be impaired or destroyed by the Department some 13 months after this Permit was granted. They contend that there is no rational difference between the granting of an exception based upon the existence of a building permit which was issued prior to the ban and the granting of an exception based upon the existence of a Water Quality Management Permit to construct sewers and to discharge sewage therefrom, which was also issued prior to the ban. They allege that there would be no more harm to the waters of the Commonwealth if their request would be granted, than there would be in the case where an exception would be granted to someone with a pre-existing building permit, since in both cases there would be additional flows of sewage to the already overloaded plant.

We have considered the first contention and we hold that this Board will not create a new ground for an exception to a sewer connection ban based upon the distinction between a custom home building operation and an operation which is not, or based alone upon the ordinary ramifications of that distinction. In the first place we would be "opening the door" to a plethora of claims by home builders who, for obvious reasons, would insist that no sewer connection ban would ever be applicable to them because they were custom home builders. Such claims could certainly defeat the purpose for which the ban was intended and could lead to great confusion and uncertainty. In the second place, we are persuaded that a custom home builder should be held to the date when a building permit is granted in determining whether an exception is granted to him since he certainly has an opportunity to find his purchasers at a stage no earlier in his development plans than his non-custom home builder counterpart.

The second contention by Moon and BACS could, perhaps, have merit. It could very well be that in this particular circumstance, Moon and BACS have a case for an exception which is equitably indistinguishable to exceptions granted by the Department as a matter of policy.

We cannot, however, thoroughly evaluate this contention for the

reason that we deem the record to be incomplete. We have several questions, unanswered on the record, the answers to which we deem necessary to a proper adjudication of this matter. They are as follows:

1. Did Moon and BACS have evidence prior to August 19, 1971, that there were serious problems at the Morrisville Plant which could affect future connections to sewers in the Township which Moon and BACS agreed to build to serve Homestead Acres?

2. What events took place between August 13, 1971, and September 19, 1972, which caused the Department to decide, in effect, to change its earlier decision to permit the construction of new sewers in the Township, the sewage from which would be carried to the Morrisville Plant?

3. Did Moon and BACS know or should they, in the exercise of reasonable diligence and business judgment, have known that conditions and circumstances at the Morrisville Plant had changed so radically between August 13, 1971, and September 19, 1972, so as to warrant the imposition of this ban despite the submission of the PSS Card which apparently satisfied the Department?

4. What was the intention of the Department when it granted this Water Quality Management Permit to the Authority, and, has the Department in other cases imposed a sewer connection ban after it has, only 13 months earlier, permitted the construction and, presumably, the utilization of sewers in the area included under the ban?

5. Was there any governmental action or bad faith in this matter which has seriously prejudiced Moon and BACS?

Although we realize that the burden was on Moon and BACS to show why they are entitled to an exception to this ban, see *F. & T. Construction Company v. Department of Environmental Resources, supra*, at p. 140 of the A2d. Volume, we will permit a re-hearing in this matter in order to bring onto the record the answers to these questions. This re-hearing will be limited to the receipt of evidence, from each party, which will provide these answers to the Board and it should be held promptly.

We will, following the receipt of the transcript of the testimony introduced at said re-hearing, issue our adjudication on the issue of whether the facts presented by Moon and BACS, with regard to the existence of

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the Water Quality Management Permit and with regard to their subsequent reliance upon said Permit, create a situation where we should grant them an exception to this sewer connection ban on the theory that a situation has resulted which is equitably indistinguishable to exceptions granted by the Department as a matter of policy.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter.

2. Neither Moon nor BACS presented evidence which would entitle either or both of them to an exception from the sewer connection ban of September 19, 1972, under the existing policies and procedures of the Department.

3. Neither Moon nor BACS are entitled to an exception from the sewer connection ban of September 19, 1972, based solely upon the fact that they are custom home builders.

4. There is not sufficient evidence on the record in the matter for this Board to determine whether Moon and BACA are entitled to an exception from the sewer connection ban of September 19, 1972, based upon the existence of Water Quality Management Permit No. 0970423 and based upon the subsequent reliance of Moon and BACS thereupon.

5. A re-hearing of this matter is necessary for the sole purpose of determining whether the existence of said Permit and the subsequent reliance thereupon by Moon and BACS create a situation which is equitably indistinguishable to exceptions granted by the Department as a matter of policy.

#### ORDER

AND NOW, this 31st day of December, 1973, it is Ordered that a prompt re-hearing be held for the sole purpose of receiving evidence which will enable this Board to determine whether Moon Nurseries, Inc., and BACS Realty, Inc. are entitled to an exception from the sewer connection ban of September 19, 1972, based upon the existence of Water Quality Management Permit No. 0970423 and based upon their subsequent reliance upon said Permit.

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Ramey Borough

: Docket No. 73-108-B

A D J U D I C A T I O N

By ROBERT BROUGHTON, Chairman, December 31, 1973

This case comes before the Environmental Hearing Board on an appeal by Ramey Borough from an Order at the Department of Environmental Resources (Department), dated April 6, 1973, which required Ramey to plan, design, construct and operate sewage treatment facilities.

In its Pre-Hearing Memorandum, and at the hearing, Ramey's sole basis for contesting the Department's Order was financial impossibility. In its appeal form, Ramey also contested the Department's finding that untreated or inadequately treated sewage is being discharged from Ramey Borough to the waters of the Commonwealth; this issue was not pursued further, nor was it supported by testimony.

At the hearing, before the writer, evidence relating to Ramey's financial ability to comply with the Order was admitted. We did so despite the fact that the law is clear that we could not reverse the Department and hold that the order was invalid on these grounds. Too many cases — decisions made by the Commonwealth Court or its predecessor, and therefore binding on us — have held that financial hardship is not a valid excuse for polluting the waters of the Commonwealth, or for failure to obey an order of the Department to construct sewage treatment facilities, to allow us to reverse on these grounds. See *Commonwealth ex rel Allesandroni v. Borough of Coudersport*, 35 Dauphin 82 (1966); *Commonwealth ex rel Allesandroni v. Borough of Confluence, et al.*, 87 Dauphin 214 (1967); *affd.* 427 Pa. 540, 234 A. 2d 852 (1967); *Commonwealth ex rel Sennett v. Dunbar Township*, 89 Dauph. 357 (1968). See also this Board's Adjudication in *In Re: Borough of Zeligople*, EHB Docket No. 72-199 (February 5, 1973); *Department of Environmental Resources v. Frailey Township*, E. H. B. Docket No. 72-271 (March 9, 1973); *In Re: Sellersville Borough*, E. H. B. Docket No. 72-172 (July 31, 1973); *In Re: Community of Gray*, E. H. B. Docket No. 72-301, (filed September 10, 1973).

At the same time, the Commonwealth must recognize reality. If the money cannot be obtained, the sewer system will not be built, regardless

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of what the law says. And if it is enough of a hardship, construction may be put off for a long time.

Ramey is a community that grew up in the last century as a coal-mining town. No one then thought about the potential inefficiency of providing public services such as sewage treatment. Perhaps, today, such a community would not grow up without such planning; but that does not mean that Ramey should be disbanded and the people forced to move elsewhere. No one in this or similar cases, suggests that.

Ramey is no longer prosperous, if it ever was. There are 342 parcels of real estate, with a total assessed value, in 1973, of \$399,296.00.<sup>1</sup> There are 204 taxpayers who own real estate in the Borough; 39 residents are on social security or pension, 4 are on public assistance.

The presently estimated project cost for the construction of a sewer system for Ramey is \$1,210,000.00. The share that would have to be financed by Ramey, after grants from the federal and State governments of 75% of the cost of construction, is \$434,000.00.

We have seen other cases where the total cost of a sewer system exceeds the total assessed valuation of a municipality. See, e.g. *Department of Environmental Resources v. Frailey Township, supra.*, but this is the first case the writer recalls where the municipality's 25% share of that cost was greater than the total assessed valuation of the municipality — meaning that the total cost is more than *four times* the total assessed valuation!

The decisional law is clear that there is no judicial solution to Ramey Borough's problem. See the cases cited, *supra*. We therefore must dismiss this appeal. On the other hand, given the cost and land value figures, we have some doubts whether Ramey will be able to get together the necessary money to actually be able to comply with the Department's Order.

Accordingly, we urge both Ramey and the Department to seek a legislative solution for this case, (and for cases like this one). We can think of three (3) general types of solutions: (1) Increased State and/or federal aid in hardship cases. (2) Some sort of "State Sewer Building Authority" whereby the State paid for or itself built the sewer system and then billed the municipality for the capital cost over some reasonable period of time. See e.g. for an analogy, the State Public School Building Authority

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1. We do not know what proportion assessed value is of full market value, in Clearfield County.

Act, Act of July 5, 1974, P.L. 1217, as amended, 24 P.S. §§791.1 *et seq.* The idea of empowering the General State Authority to do this, with (or even perhaps without) additional authorizing legislation, could be explored. (3) Some sort of individual aid and assistance for individuals on, e.g., social security or pension, where sewer bills may have the effect of reducing their very close to or below subsistence levels. This latter form of individual aid would not get the sewer system built faster, necessarily, but could help to resolve some of the human problems connected with building and operating it.

All or any of these would take money, of course, and this makes them difficult for the State, which also has budget problems. So far we have been unable to think of any possible solution that does not require money. The above suggestions are made only tentatively, and with the hope that someone else may be able to come up with something better.

The above constitutes our findings of fact and conclusions of law in this case.

**ORDER**

AND NOW, this 31st day of December, 1973, the above captioned appeal of Ramey Borough is dismissed.

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*George Cerjanec*

George Cerjanec

: Docket No. 73-323-B

**A D J U D I C A T I O N**

By **ROBERT BROUGHTON**, Chairman, December 31, 1973

This case is an appeal from an action of the Secretary of Environmental Resources, taken pursuant to § 2 of the Act of June 3, 1943, P.L. 848, 52 P.S. § 12, (hereinafter "Certification Act of 1943") suspending the certification of George Cerjanec as a mine foreman, and the certificates of Willard May and Emil Paci as assistant mine foremen, pending a hearing under the same statute relative to what further action

should be taken. The appeal was taken both from the temporary suspension, pending a hearing, and from the Secretary's action in selecting the hearing offices and setting the procedure for that hearing.

This adjudication deals only with the issues relating to the temporary suspension.

#### FINDINGS OF FACT

1. Appellant George Cerjanec is mine foreman for the Nemacolin Mine, owned and operated by Buckeye Coal Company. Appellants Willard May and Emil Paci are assistant mine foremen at the same mine. All are certified for the positions they hold under the Certification Act of 1943.

2. On September 4, 1973, a mine inspector for the Department, Paul H. Hyatt, made a complaint to the Secretary of Environmental Resources under § 2 of the Certification Act of 1943, that the Appellants had failed on July 6, 1973, to perform certain duties with which they were charged by law.

3. On September 20, 1973, by a letter sent to each of the Appellants, the Secretary of Environmental Resources gave notice that a hearing would be held on October 12, 1973, to determine whether sanctions should be imposed under § 2 of the Certification Act of 1943, and also temporarily suspended the certificates of each of the Appellants pending that hearing.

4. The duty that was not discharged was the duty to maintain adequate ventilation in the mine on July 6, 1973, especially in the "844 Section of the Nemacolin Mine".

5. The said inadequate ventilation was a result of failure in temporary — fabric — barriers to prevent the passage of air through passageways short of the working face. There were, in the 844 Section, an unusually large number of such temporary barriers, or checks. Three of these checks had failed on the morning of July 6, 1973, within 3 hours of having been inspected by Assistant Mine Foreman Paci.

6. The conditions that existed on July 6, 1973, did not and could not have been reasonably taken to indicate such a safety problem

as would justify the immediate temporary suspension of Appellants as of September 20, 1973.

#### DISCUSSION

Section 2 of the Act of June 3, 1943, P.L. 848, provides:

Upon complaint of any mine inspector that a mine foreman, assistant mine foreman or fire boss has failed or refused to perform any duty with which he is charged under the provisions of the law, or has engaged in any acts or activities interfering with the safe and lawful operation of any mine or colliery, specifying the particular acts, failure or refusal, the Secretary of Mines, or in his absence or incapacity to act, any deputy secretary, may, after written notice to such official, setting forth said complaint, a hearing thereon and appropriate findings as hereinafter provided, suspend for a period of not more than one year, or revoke absolutely, the certificate of such mine foreman, assistant mine foreman or fire boss. The Secretary of Mines, upon receiving any such complaint, shall have the power, if he deems such action advisable, forthwith to suspend the certificate of such official temporarily until such hearing and determination of the charges have been completed.

It is with the last sentence of this section that this adjudication is concerned. That sentence allows a certificate to be suspended forthwith, without a hearing — but pending hearing — if the Secretary "deems such action advisable".

On the surface these are no standards at all, no criteria to guide the Secretary in deciding whether or not he deems such action "advisable" in any particular case. Nor is there any standard explicitly set forth to help us decide whether the Secretary's deeming was reasonable in this case.

Implicitly, however, we think the standard is reasonably obvious. Clearly, in determining what the legislative standard is, we must look not merely to § 2 of the Certification Act of 1943, but to the entire statute *Green Springs Co. v. Water and Power Resources Board*, 394 Pa. 1 (1958). Further, we think it is clear that, in turn, the Certification Act of 1943

must be read in the context of other statutes unmistakably incorporated therein. In particular, the Certification Act of 1943 must be read in light of the Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §§ 701-101 *et seq.*<sup>1</sup>

The latter statute sets forth the duties of mine foremen and assistant mine foremen which, when violated, give rise to the possibility of sanctions under the Certification Act of 1943.

The purpose of the Bituminous Coal Mine Act of 1961 is to protect the health and safety of miners. The duties of mine inspectors, as set forth in the Bituminous Coal Mine Act of 1961, relate to safety. So do the duties of mine foremen and assistant mine foremen. The "complaint" of a mine inspector referred to in § 2 of the Certification Act of 1943, quoted *supra*, could therefore relate only to safety.

The provision for suspension after hearing appears to have a punitive aspect, being designed to give mine foremen, assistant mine foremen, and mine examiners<sup>2</sup> a negative incentive to perform the duties devolved on them by the Bituminous Coal Mine Act of 1961, *supra*. But the Certification Act of 1943 also appears to contemplate that if, after hearing, the Secretary decides that a mine foreman, assistant mine foreman, or examiner has done, or failed to do, his duties in a way that indicates that person is no longer qualified to adequately protect the safety of miners as a mine foreman, assistant mine foreman, or mine examiner, then the Secretary may revoke that person's certificate absolutely.

It is our opinion that the power to temporarily suspend such a certificate pending hearing — and therefore without hearing — may not be reasonably exercised in support of the punitive or deterrent purpose of the Act of June 3, 1943, P.L. 848. If punishment is to be meted out, we think procedural due process requires that it be meted out after hearing.

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1. We note that although the Bituminous Coal Mine Act of 1961, *supra*, was enacted in 1961, the purpose of the Certification Act of 1943 was not affected thereby. There were earlier statutes also relating to mine safety in force at that time. The earliest general law was the Act of May 15, 1893, P.L. 52, though there seem to have been other laws in force before that one dealing with particular safety problems.

2. The term "fire boss," was changed to "mine examiner" in the Pennsylvania Bituminous Coal Mine Act of 1961, *supra*, in 1961.

If it appears to the Secretary, however, that a mine foreman, assistant mine foreman, or mine examiner is so unqualified to perform his duties that his continued employment constitutes an immediate hazard to the health and safety of miners, during the time pending hearing, then it would not be a violation of due process to temporarily suspend a certificate pending hearing. *Ewing v. Mytinger & Casselberry, Inc.* 339 U.S. 594 (1949). In such a case, of course, the Secretary must act reasonably, and the hearing must be held and the case disposed of following the hearing within a reasonably short period of time. This Board has jurisdiction, as well, to hear and decide an appeal from the temporary suspension.

We do not think, in this case, that 3 weeks (September 20 to October 12, 1973) is on its face an unreasonably long period of time. We note that in one analogous type of case, temporary suspension of policemen or firemen pending a hearing on charges of misconduct in office, the law commonly requires a hearing to be held within 30 days of the suspension. See, e.g. the Act of June 25, 1919, P.L. 591, as amended, 53 P.S. 12638; but see the Act of July 9, 1963, P.L. 217, as amended, 52 P.S. §23437; where suspension is allowed for only ten days prior to hearing.

The case leaves the question of whether the Secretary acted reasonably, in this case.

We are satisfied that the conditions that existed in the 844 Section of the Nemaocolin Mine on July 6, 1973, were extremely serious. The inadequacy of the ventilation was a violation of §242 (a), and was a result of violations of §243 (b), (e), and (f), of the Pennsylvania Bituminous Coal Mine Act, *supra* 52 P.S. §§701-242 (a) and 701-243 (b), (e), and (f). The large number of temporary checks in the No. 4 header, together with the three entirely open cross cuts immediately outby<sup>3</sup> the working face, made periodic losses of adequate air flow almost inevitable, in the absence of nearby continuous monitoring and patrolling. Such nearby continuous monitoring and patrolling was not provided, at least on the

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3. In mining terminology, "outby" means "toward the entrance from", and "inby" means "toward" the working face from."

morning of July 6, 1973. The person responsible for that failure to provide the necessary monitoring and patrolling were Appellants Emil Paci and George Cerjanec — Paci directly and Cerjanec indirectly. The fact that the Bituminous Coal Mine Act, *supra*, requires less frequent monitoring is irrelevant. If continuous monitoring is required to maintain adequate ventilation then we believe §242 (a) of the Bituminous Coal Mine Act, *supra*, which was enacted in order to protect the health and safety of the miners, would mean that continuous monitoring would be required. We are stronger in this conviction where, as here, the conditions requiring continuous monitoring — the large number of temporary checks — were created by these Appellants, among others.

In addition to relying on too many temporary checks, with insufficient policing of those checks, there was a clear violation of §243 (b) of the Pennsylvania Bituminous Coal Mine Act, *supra*, which provided as follows:

*Crosscuts between intakes and return air courses shall be closed, except the one nearest the face; crosscuts between rooms shall be closed, where necessary, or when required by the mine inspector in the district, to provide adequate ventilation at the working face.*

According to the testimony of Emil Paci, there were 3 checks out by the face in the No. 4 header of Section 844, on the right as one approached the face, that were entirely open. As a result, it was practically impossible to get an air flow reading that would inform one whether §242 (b) of the Pennsylvania Bituminous Coal Mine Act of 1961, *supra*, was being complied with. §242 (b) requires that there be a flow of 6000 cubic feet per minute (cfm) in the last open crosscut before the face. In this case Emil Paci (and later on July 6, 1973, George Cerjanec) took readings 3 open crosscuts before the face (and in fact before the last split of air, between the right and left sides of the 844 Section and by their testimony felt that to be sufficient. The fact that they felt that measurement indicated sufficient air does at least call into question their competence to continue to perform these duties under the Bituminous Coal Mine Act of 1961, in view of the clear requirement of §242 (b) of that

Act that 6000 cfm be maintained at the *last* open crosscut.

If the temporary suspension, pending hearing, had occurred shortly after July 6, 1973, before the conditions in the 844 Section had been corrected, then under the standards we have enunciated above, we would probably have upheld the Secretary. At that time an immediate hazard to the health and safety of miners existed and it existed because of the ventilation and testing procedures followed by these individuals.

But the Secretary's action was taken on September 20, 1973, nearly 2 1/2 months after the inadequate ventilation was discovered. On July 6, 1973, Mine Inspector Paul Hyatt closed down the 844 Sections, presumably under §120 of the Pennsylvania Bituminous Coal Mine Act of 1961, *supra*, which provides as follows:

Mine Inspector; Cease Work. — If the mine inspector discovers any room, entry, airway, or other working places being driven in advance of the air current, contrary to the requirements of this act, he shall order the workmen in such places to cease work at once until the law is complied with.

On July 30, 1973, Mine Inspector Hyatt allowed the reopening of the 844 Section. This must by law have been based on a finding by him that the law was then being complied with, and that finding would be required to consider the adequacy of the procedures followed by those in charge of ventilation in the 844 Section. In addition, we note that there have been other inspections by Mine Inspector Hyatt since July 30, 1973.

No evidence was introduced that there is, now, an immediate hazard to the health and safety of miners at the Nemaquin Mine, nor was there any showing that the health and safety of miners was likely to be threatened by the continued employment of these Appellants during the three to five weeks pending hearing and determination of the charges. Instead, the evidence tended to show that Inspector Hyatt was satisfied that proper procedures were being followed as of July 30, 1973.

Under these circumstances we reverse the action of the Secretary in suspending the certificates of George Cerjanec and Emil Paci temporarily,

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pending the hearing called for by the first sentence of §2 of the Act of June 3, 1943, P.L. 848.

Similar action was taken with respect to Willard May, at the hearing held September 27, 1973, at the close of the Department's presentation of evidence, for the reason that none of the evidence submitted by the Department at that hearing tended to implicate May as responsible for the inadequate ventilation on July 6, 1973. Had we not taken that action at that time, we would be reinstating May's certificate as of the effective date of this order, along with Cerjanec's and Paci's, for the same reasons.

By way of summary, and including only what we consider to be crucial findings of fact,<sup>4</sup> we make the following findings of fact and conclusions of law:

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the subject matter of this appeal and over the parties before it.

2. The Certification Act of 1943 contemplated immediate, temporary suspension of a mine foreman or assistant mine foreman, pending a hearing only if the Secretary of Mines (now Secretary of Environmental Resources) reasonably believed such immediate, temporary suspension was necessary to protect the safety and health of miners.

3. The Secretary had no reasonable basis for his action in immediately suspending the Appellant's certificates under the Certification Act of 1943, in this case.

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4. We limit our findings of fact strictly to those necessary to the result, in order to limit as far as possible any bias in connection with the hearing on the ultimate merits, or possible future proceedings before this Board or in the courts.

**ORDER**

AND NOW, effective the 29th day of September, 1973, it is ordered that the certificates of George Cerjanec as a Mine Foreman, and Emil Paci as an Assistant Mine Foreman, be reinstated pending a hearing and determination on the charges under §2 of the Act of June 3, 1943, P.L. 848, and that, effective the 29th day of September 1973, the certificate of Willard May be reinstated pending a hearing and determination under the same Act. (We note for the Record that this Order was read orally to counsel for all parties on September 29, 1973, and that it was indicated at that time that no appeal would be taken. However, should the Department wish to take an appeal, this is intended to be a final adjudication with respect to the action of the Secretary temporarily suspending the said certificates pending a hearing and, although this Order became effective September 29, 1973, it is being formally entered and distributed in writing to the parties on the filing date indicated below. We take no action at this time or any other aspect of, or issue raised by, the above captioned appeals of Messrs. Cerjanec, Paci and May.

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