1971

Statutory Pollution Control in Pennsylvania

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STATUTORY POLLUTION CONTROL
IN PENNSYLVANIA

I. INTRODUCTION

In excess of 133 million tons of aerial garbage are being deposited in our atmosphere each year.\(^1\) Simultaneously, pollution of our waterways has become so extreme, that estimated expenditures in excess of 110 billion dollars for water preservation are not exaggerated.\(^2\) Although federal programs exist to control air and water pollution, it is recognized that the primary responsibility for environmental protection rests with the states.\(^3\) The Commonwealth of Pennsylvania has responded to the pollution control challenge by enacting legislation affecting both air and water quality. The Air Pollution Control Act\(^4\) establishes the policy of the Commonwealth with regard to the regulation and enforcement of air pollution. The counterpart of this legislation in the area of water pollution is the Clean Streams Law.\(^5\) The responsibility for the administration and enforcement of these two Acts rests with the newly created Department of Environmental Resources. It is the purpose of this Comment to examine this new Department and the Pennsylvania pollution control legislation in an effort to determine the effectiveness of the Commonwealth’s response to the environmental crisis.

II. THE DEPARTMENT OF ENVIRONMENTAL RESOURCES

Apparently realizing the need for a total environmental program at the state level, the General Assembly of Pennsylvania, following the lead of the federal government\(^6\) and the State of New Jersey,\(^7\) amended its Administrative Code\(^8\) to create the Department of Environmental Resources\(^9\) (Department). The new Department assumes the pollution control

\(^1\) Hearings on S. 780 Before the Subcomm. on Air and Water Pollution of the Senate Comm. of Public Works, 90th Cong., 1st Sess., pt. 3, at 1360 (1967).

\(^2\) Hines, Controlling Industrial Pollution: Color the Problem Green, 9 B.C. IND. & COM. L. REV. 553, 554 (1968).


\(^6\) The administration of the federal government's pollution control programs was incorporated into a single agency by a plan of reorganization submitted by President Nixon to Congress on July 9, 1970, becoming effective on Nov. 6, 1970. Environmental Protection Agency, Reorganization Plan No. 3, 1970 U.S. CODE CONG. & AD. NEWS 2996. See Comment, Participation By States and Individuals Enhances the National Pollution Control Effort, 16 VILL. L. REV. 827 (1971).


\(^8\) PA. STAT. tit. 71, § 61 (Supp. 1971).


On the following page is an organizational diagram of the Department of Environmental Resources, as approved by Governor Milton J. Shapp.
responsibilities of the Departments of Mines and Mineral Industries\(^\text{10}\) and Forests and Waters\(^\text{11}\) which have been abolished. Moreover, numerous pollution control responsibilities of the Department of Health\(^\text{12}\) have also been assumed. The principle reasons for the creation of the Department was the necessity for unified control standards, centralized enforcement efforts and the formulation of coordinated pollution control policies.

The Air Pollution Control Act\(^\text{13}\) and the Clean Streams Law,\(^\text{14}\) previously administered by the Department of Health and its affiliated agencies, the Air Pollution Commission and the Sanitary Water Board, are now enforced by the Department.\(^\text{15}\) The Reorganization Act expressly abolishes the Air Pollution Commission and the Sanitary Water Board,\(^\text{16}\) assigning their functions to the new Department and its affiliated agencies, the Environmental Quality Board\(^\text{17}\) and the Environmental Hearing Board.\(^\text{18}\)

The Environmental Quality Board is empowered to enact rules and regulations for the environmental well-being of the Commonwealth and its citizens.\(^\text{19}\) It is expected that any regulations promulgated by the Quality Board will reflect consideration of the total environmental pollution control problem, rather than merely a particular segment thereof as previously experienced under separate agency administration. Until the Quality Board promulgates new air and water pollution control regulations, however, those adopted by the now defunct Air Pollution Commission and Sanitary Water Board will carry forward as the regulations of the Department.\(^\text{20}\)

It is the function of the Environmental Hearing Board to consider all appeals from determinations made by the Department.\(^\text{21}\) The Hearing Board is authorized to employ hearing examiners at such various locations as are necessary in the exercise of this function.\(^\text{22}\) The review of Department determinations by the new Hearing Board supplants the review pre-

\[15. \text{PA. Stat. tit. 71, § 510–1(16), (20) (Supp. 1971).}
\[17. \text{PA. Stat. tit. 71, § 180–1 (Supp. 1971). The Environmental Quality Board will consist of the Secretaries of the Department of Environmental Resources (who will chair the Board), Health, Commerce, Transportation, Agriculture, Labor and Industry, Community Affairs; the Executive Directors of the Game Commission and the Fish Commission; the Chairman of the Public Utilities Commission; the Executive Director of the State Planning Board; the Executive Director of the Pennsylvania Historical and Museum Commission; five members of the Citizens Advisory Council and four members of the General Assembly. Id.}
viously conducted by the Air Pollution Commission and the Sanitary Water Board under the Air Pollution Control Act and the Clean Streams Law.

The Reorganization Act also provides for a Citizens Advisory Council, composed of nineteen members — the Secretary of the Department, six members appointed by the Governor, six appointed by the President Pro-Tempore of the Senate and six appointed by the Speaker of the House — which will review the current environmental laws of the Commonwealth and recommend modification, revision, and codification of these laws.23

Although the Department of Environmental Resources will theoretically streamline the Commonwealth's pollution control programs, there will necessarily exist within the Department separate bureaus responsible for administering the particular pollution programs previously exercised by other departments.24 Whether this will result in a conglomerate department too burdensome to operate efficiently is a question open to speculation at the present time.25

III. AIR POLLUTION CONTROL

A. Introduction

The purpose of this section of the Comment is to examine the air pollution policies of the Commonwealth, the regulations adopted pursuant to the Commonwealth's air pollution laws, the investigation and issuance of complaints upon discovery of regulatory violations, and the process whereby such complaints result in administrative abatement orders. The enforcement of administrative orders, penalties for statutory violations, and the judicial review of such orders will also be considered.

B. Policy

The initial attempt by the Pennsylvania General Assembly to combat the expanding problem of air pollution resulted in the Air Pollution Control Act of 1960.26 The statutory scheme of the 1960 Act rested upon a "maximum of cooperation and conciliation among all the parties con-

24. The "bureaus" identified in the proposed organizational structure of the Department, note 9 supra, are to administer those specific pollution control programs, i.e., air, water, and mines, forests, etc., that will be carried forward from the previous departments. However, functional considerations will ultimately determine the final programs to be administered by each specific bureau. Conversation with Edward M. Seladones, Department of Environmental Resources, April 15, 1971.
25. Dr. Maurice K. Goddard, as of this writing the temporary Secretary of the Department of Environmental Resources, stated that the Department is too unwieldy and that the Commonwealth's environmental control programs should remain within already existing state agencies. Philadelphia Inquirer, Feb. 7, 1971, § 2, at 9, col. 1.
In 1966 and 1968 the General Assembly enacted substantial amendments to the 1960 Act. Of significant importance is the amended declaration of policy, which states:

It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; and (iv) development, attraction and expansion of industry, commerce and agriculture.

The amended declaration of policy reflects a change in priority from the initial declaration contained in the 1960 Act. The focus of the original declaration was to maintain the state's air resources at a "reasonable degree of purity" while not unreasonably obstructing business and industry, by means "technically feasible and economically reasonable"; whereas the policy of the amended declaration stresses the protection of the air resources of the Commonwealth to the degree necessary for the protection of the public health, prevention of injury to plant and animal life, protection of the public comfort and convenience and attraction of industry, commerce and agriculture, in that order.

Moreover, while the initial policy declaration was phrased negatively, such that the attainment of air quality should not unreasonably obstruct business, industry and agricultural development, the amended policy declaration is phrased positively, i.e., protection of the air resources to the degree necessary to encourage industrial, business, and agricultural growth and attraction.

The definition of "air pollution" was also amended so that it currently includes:

27. PA. STAT. tit. 35, § 4002 (1964). The entire text of the original declaration of policy states as follows:

It is hereby determined and declared to be the policy of the Commonwealth of Pennsylvania to maintain such a reasonable degree of purity of the air resources of the Commonwealth as shall be technically feasible, economically reasonable, and necessary for the protection of the normal health, the general welfare and the property of the people of the Commonwealth. The measures for the accomplishment of this purpose shall not unreasonably obstruct the attraction, development and expansion of business, industry and commerce within the Commonwealth, but shall be technically feasible and economically reasonable. The program for the control of air pollution under this act shall be undertaken in a progressive manner, and each of its successive objectives shall be sought to be accomplished by a maximum of cooperation and conciliation among all the parties concerned. All powers herein conferred upon the Department of Health, the Air Pollution Commission, or any Regional Air Pollution Control Association, and all powers herein reserved to any political subdivision shall be exercised solely to effectuate the policy declared in this section.


31. The specific activities subject to development, attraction and expansion lend credence to such an interpretation. Agricultural activities by necessity require the absence of air contaminants. Businesses, meaning non-industrial activities, would certainly be attracted to a pollution free environment. Industries admittedly are more conscious of the cost of pollution control and thus may be reluctant to move to areas which require pollution control devices.
[T]he presence in the outdoor atmosphere of any form of contaminant . . . inimical or which may be inimical to the public health, safety, or welfare, or which is, or may be injurious to human, plant or animal life, or to property, or which unreasonably interferes with the comfortable enjoyment of life or property.32

Focusing again on the protection of air quality rather than maintenance, the amended definition encompasses air contaminants which may have a deleterious affect upon health or property. It also extends the coverage of the Act to air contaminants not specifically covered by any regulations.

C. Rules and Regulations

The responsibility for developing a master environmental plan for the Commonwealth rests with the Environmental Quality Board.33 With respect to the Air Pollution Control Act, the Quality Board is to assume one of the two major functions of the now-dissolved Air Pollution Commission; namely the adoption of rules and regulations pertaining to air pollution control for the Commonwealth and its localized regions.34 However, as noted previously,35 until such new regulations are promulgated by the Quality Board, those promulgated by the Air Pollution Commission remain effective.36 It is therefore appropriate to determine whether the existing regulations are adequate or whether the Quality Board should

32. PA. STAT. tit. 35, § 4003(5) (Supp. 1971). The entire text of the definition states:
"Air Pollution." The presence in the outdoor atmosphere of any form of contaminant including but not limited to the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes, or any other source of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic or radioactive substances, waste, or any other matter in such place, manner, or concentration inimical or which may be inimical to the public health, safety or welfare or which is, or may be injurious to human, plant or animal life, or to property, or which unreasonably interferes with the comfortable enjoyment of life or property.

Air pollution was defined in the 1960 Act as:
The presence in the outdoor atmosphere of one or more air contaminants in sufficient quantity and of such characteristics and duration which is injurious to human, plant or animal life, or to property, or which unreasonably interferes with the comfortable enjoyment of life and property throughout the Commonwealth or throughout such areas of the Commonwealth as shall be affected thereby. PA. STAT. tit. 35, § 4003(5) (1964). The 1960 Act defines an air contaminant to be smoke, dust, fume, gas, odor, mist, vapor, pollen, or any combination thereof. PA. STAT. tit. 35, § 4003(4) (1964).

34. PA. STAT. tit. 71, § 510-20(c) (Supp. 1971). For the authority of the Air Pollution Commission to adopt rules and regulations, see Air Pollution Control Act, PA. STAT. tit. 35, § 4005f(2) (1964). The Air Pollution Control Act authorized the Air Pollution Commission to partition the Commonwealth into localized regions, apparently for the purpose of efficient administration. At present there are six air pollution control regions encompassing all of the counties within the Commonwealth. See Comment, Local Government Action In The Control Of Environmental Pollution In The Commonwealth Of Pennsylvania, 16 VILL. L. REV. 895, 896 n.11 (1971).
35. See note 20 and accompanying text supra.
establish new regulations. The six regulations presently in effect which affect the quality of air within the Commonwealth will be considered.\textsuperscript{37}

1. \textit{Regulation I — Coal Refuse and Disposal Areas}\textsuperscript{38}

The initial regulation adopted in 1962 was the result of a study which indicated that burning coal refuse and disposal areas constituted one of the most serious air pollution problems of the Commonwealth. In order to control burning coal refuse disposal areas a permit system was adopted together with specific procedures to be followed in the operation of such areas. These procedures are designed to minimize the possibility of ignition of the coal areas.

2. \textit{Regulation II — Open Burning Operations}\textsuperscript{39}

This regulation prohibits open burning operations\textsuperscript{40} with respect to garbage,\textsuperscript{41} rubbish,\textsuperscript{42} trade waste\textsuperscript{43} and salvage operations\textsuperscript{44} which cause air pollution. The standard for determining the existence of air pollution caused by open burning is established by evidence of smoke\textsuperscript{45} or emission density in excess of the degree permitted, as determined by an apparatus known as the Ringelmann Smoke Chart.\textsuperscript{46} Evidence of unreasonable
interference with the enjoyment of one's property, damage to vegetation or property, or deleterious effect upon human or animal life may also be the basis for an air pollution violation.

3. Regulation III — Approval of Construction or Modification of Air Contamination Sources and Permits To Operate Such Sources

Prior to the construction of new facilities, or the modification of established facilities by the installation of air cleaning devices, approval by the Department in the form of a permit is required. Approval is conditioned upon submission of specific data by the applicant, "sufficient in scope to allow an engineering evaluation to be made to determine whether or not the air contamination source will cause or contribute to the creation of air pollution." To assist the applicant, the regulation provides for engineering guides to be prepared by the Department indicating design criteria for various air contamination sources.

The responsibility for approving applications and issuing the requisite permit now rests with the Department of Environmental Resources. Denial, revocation or suspension of a permit by the Department entitles the operator to a hearing before the Environmental Hearing Board. The Hearing Board reviews the Department's action and renders a decision affirming, modifying or reversing the Department. Regulation III is applicable only to the air contamination sources specified in the Engineering Guides. Furthermore, it is limited in its effect since it is not applicable to facilities constructed prior to 1962 or to facilities which have not experienced a modification since that time.

4. Regulation IV — Control of Local Air Pollution From Sources of Particulate and Gaseous Emissions

Local air pollution is defined by this regulation as "[a]ir pollution in a specific area readily discernible as being caused by a single source or the particular source. See Comment, Air Pollution: Causes, Sources and Abatement, 1968 Wash. U.L.Q. 205, 221.

47. Reg. III, For the Prevention and Control of Air Pollution by Requiring Plan Approval Prior to the Construction or Modification of Air Contamination Sources and a Permit for the Operation of Air Contamination Sources, October 22, 1962, as amended, June 27, 1967, July 17, 1969.

48. Reg. III, § 1.3(1).

49. Engineering guides were subsequently approved and adopted for the following classes of sources: Boilers, incinerators, blacktop plants, cupulas, coke ovens, charcoal kilns, and nuclear reactors. Department engineers review all applications to determine compatibility with the engineering guides. See Reg. III, Engineering Guides, October 22, 1962, et seq.

50. Reg. III, § 1.3(3).


52. Reg. III, § 1.3(1).

a group of sources in close proximity to each other." Standard emission rates for particulate matter and fugitive dust are designated. Compliance with the established emission rates is determined by the concentration of the pollutant at ground level at any point outside the polluter's property, rather than at a point where the pollutant is emitted from the stack and enters the atmosphere. Thus, the higher the stack, the greater is the dispersion of the pollutant into the atmosphere with a consequent reduction of ground level concentration. While effective stack height is helpful in resolving local air pollution problems, it is suggested that such an approach has no effect upon area-wide pollution problems.

5. Regulation V — Area (Air Basin) Air Pollution

To confront the problem of air pollution which emanates from several sources, as opposed to the local air pollution problem, specifically designated areas of the Commonwealth were established as air basins. The criteria for designating these basins included: (1) the density and the characteristics of the air pollution sources; (2) the occurrences of air pollution problems; and (3) various topographical and meteorological factors. These criteria also served as the basis for classifying each air basin. Potential emission rates, or the total weight rate of particulate emissions when the air contaminant source operates at maximum capacity, are combined graphically with the area's classification, to determine a maximum emission rate for that area air basin.

6. Regulation VI — Reporting of Air Contamination Sources

The purpose of this regulation is to register new as well as existing stationary sources of air contaminants. The information received from these reports is to be used to establish a state-wide emission inventory.

54. Reg. IV, § 1.1(5).
55. Reg. IV, § 1.1(7) defines "particulate matter" as: Discrete particles of liquid (except uncombined water) and/or solid matter which is often, but not always, suspended in air or other gases at atmospheric temperature and pressure.
56. Reg. IV, § 1.1(3) defines "fugitive dust" as: Solid airborne particulate matter emitting at or near ground level from any source other than a flue.
57. Reg. IV, § 1.3(2), (3).
60. The basins presently are classified as either C or D basins. Reg. V, § 1.3.
As of this writing, it is reported that approximately twenty thousand
registration forms have been issued throughout the Commonwealth. 63

In 1969, the Air Pollution Commission (now the Department)
adopted Ambient Air Quality Standards, 64 which were, in effect, objec-
tive goals to be reached in order to assure the quality of the air through-
out the Commonwealth. These standards will be used by the Department
to evaluate air pollution studies of various communities and to determine
the need for new regulations to achieve these objectives.

In evaluating the regulations it is well to bear in mind that the extent
of their enforcement, or the lack thereof, may play a substantial part in
determining their effectiveness. Hence, a regulation may be adequate to
solve the problem but due to manpower and financial shortages its effec-
tiveness may be so curtailed as to create the impression that the regula-
tion itself is insufficient. Nevertheless, there are some who feel that the
current regulations do not go far enough to prevent harmful properties
from entering the atmosphere, irrespective of the degree of enforcement.
They feel that there is an immediate need for regulations setting emis-
sion limits for sulphur oxides, nitrogen oxides and lead. 65 The problem
encountered when attempting to limit these gaseous emissions is to deter-
mine what rate of emission will cause a harmful result. Until this can
be exhibited with some degree of certainty, any rate established will be
subject to administrative as well as judicial attack. It is necessary, there-
fore, that the new Department undertake intensive studies of the effects
of the above mentioned gaseous emissions and act quickly in establishing
at least minimal emission rates as soon as sufficient information is avail-
able. It is further suggested that the Department undertake an evaluation
of the present enforcement measures to determine whether the existing
regulations are being sufficiently enforced to be effective. 66

D. Investigation and Initiation of Complaints

The Department of Environmental Resources is responsible for the
enforcement of the regulatory standards adopted by the Quality Board.
The Air Pollution Control Act authorizes the Department to investigate
all suspected violations of the regulations. 67 Investigations are generally
conducted by control engineers staffing the six regional offices or the
offices located within the eleven air basins. Although systematic investi-

63. Report of Mr. Victor H. Sussman, former Director, Bureau of Air Pollution
Control (now within the Department of Environmental Resources), Pennsylvania
Department of Health, to the Pennsylvania Environmental Law Enforcement Work-
shop, held at Hershey, Pa., January 13-14, 1971. Transcript on file at Villanova
Law Review office.
64. Pennsylvania Ambient Air Quality Standards, Air Pollution Commission
(now the Department of Environmental Resources), October 20, 1969.
65. Interview with Mr. Steven Wasko, Air Pollution Control Engineer for
office.
66. See note 65 and accompanying text supra; see also p. 853 supra.
gation conducted on a plant by plant, or industry by industry basis is preferred by those responsible for enforcement, the lack of adequate personnel has limited the investigation of possible air contamination sources to those which are the most obvious, i.e., the large industries.\(^{68}\)

Upon discovering a violation of a regulatory standard, the Department is authorized to issue a complaint to the alleged polluter.\(^{69}\) Similarly, private parties may initiate a complaint to the Department.\(^{70}\) However, while a private individual may quite easily recognize a violation of a smoke density or open burning regulation, his ability to recognize violations of the regulations pertaining to particulate emission rates is severely limited since, for the most part, they are discoverable only by the use of technical apparatus operated by experienced Department control engineers. Regardless of who initiates the complaint, it is then forwarded to a Regional Air Pollution Control Association (Association) located in the region where the alleged violation occurred.\(^{71}\) Upon receipt of a complaint from the Department, the Association is allotted three months to undertake an assessment of the complaint, and attempt, through the “use of a maximum of conference, conciliation and persuasion, to abate, control, reduce or prevent air pollution within the region pursuant to the rules and regulations of the [Environmental Quality Board].”\(^{72}\)

The Associations were quite effective prior to the enactment of the current regulations, when, due to the absence of definite standards, cooperation and conciliation between the alleged polluter and the state authority were most necessary. However, the promulgation of regulatory standards should now make each industry aware of the objective pollution criteria applicable to its operations and therefore mark the demise of alleged unknowing emission of pollution. Moreover, although the Air Pollution Control Act provides that each Association is to meet at least four times per year,\(^{73}\) there are indications that this has not been the case.\(^{74}\) Since

68. The Chief Air Pollution Control Engineer for Region I, which encompasses the counties of Bucks, Montgomery, Chester, Delaware and Philadelphia, reported that ten per cent of the industries in the region have been formally investigated. When considered with the fact that the number of engineers assigned to Region I is six, the results are not less than could be expected. Interview with Mr. Frank J. Willard, Jr., Chief Air Pollution Control Engineer for Region I, in Norristown, Pa., on January 6, 1971. Recording on file at Villanova Law Review office.


70. PA. STAT. tit. 35, § 4004(3) (Supp. 1971), declares that the Department shall have the power and duty to “[r]eceive and initiate complaints.” While the Air Pollution Control Act does not specifically authorize private complaints, it is submitted that such action is appropriate and available.

71. PA. STAT. tit. 35, § 4004(3) (Supp. 1971). It has previously been stated that the Commonwealth is divided into six air pollution control regions; see note 34 supra. Operating within each region is a Regional Air Pollution Control Association. See notes 72–73 and accompanying text infra for an examination of the Regional Associations and their responsibilities.


74. A regional control engineer of the Department of Environmental Resources reported that the Association within his region had not called a meeting during a seven month period. Although complaints were filed and prepared, he was forced to wait until the Association called the meeting before bringing forward the complaints. Interview, supra note 65.
such a meeting is necessary before action may be taken on a complaint, followed by a maximum of three months wherein the Association may attempt to rectify the matter, it is conceivable that administrative abatement activity will not be taken for six months or more after the complaint has been filed with the Department. The Association's importance and the factor of delay become further suspect when one considers that the Association is required to return the matter to the Department for further action if compliance is not effected within the prescribed time.\footnote{75} Hence, the Department determines what corrective action is necessary irrespective of the Association's determinations.

\textit{E. Abatement Orders and Administrative Review}

If the Department uncovers a violation it is authorized to "[i]ssue orders to any person causing air pollution," and may stipulate in the order the time within which compliance is to be effected.\footnote{76} Orders are normally issued following consultation among the regional control engineers and the Department in Harrisburg. The authority of the Department to issue abatement orders results from an amendment to the Air Pollution Control Act adopted in 1968. Prior to the amendment, the issuance of an abatement order was conditioned upon a full hearing and adjudication subject to the provisions of the Administrative Agency Law.\footnote{77} The 1968 amendment removed this impediment by authorizing the Department to issue abatement orders which granted an aggrieved party the right to appeal such order to the Environmental Hearing Board — previously the Air Pollution Commission.\footnote{78} The effectiveness of this change becomes immediately apparent when one recognizes that prior to the amendment, between 1960 and 1968, only 70 orders were issued, while after the amendment became effective, between June 12, 1968 and December 31, 1970 a total of 275 orders had been issued.\footnote{79} To fill the void occasioned by the lack of a hearing prior to the issuance of the abatement order, the Air Pollution Control Act provides a statutory right of appeal from an order issued by the Department.\footnote{80} The administrative body authorized to determine all such appeals from Department orders is the Environmental Hearing Board.\footnote{81} While the pertinent sections of the Reorganiza-

\footnote{75. \textit{PA. Stat. tit.} 35, \S 4006b(3) (Supp. 1971).}
\footnote{76. \textit{PA. Stat. tit.} 35, \S 4004(4.1) (Supp. 1971).}
\footnote{77. See Air Pollution Control Act of 1960, \textit{PA. Stat. tit.} 35, \S 4005(f)(5), (7) (1964). The original Act provided that abatement orders issue from the Air Pollution Commission rather than from the Department, and that such order be issued only after a full hearing before the Air Pollution Commission. Complaints subject to review by the Regional Air Pollution Commission would move directly to the Air Pollution Commission for adjudication. \textit{PA. Stat. tit.} 35, \S 4006(b)(3) (1964).}
\footnote{78. \textit{PA. Stat. tit.} 35, \S 4004(4.1) (Supp. 1971).}
\footnote{79. Letter received from Mr. James K. Hambright, Director, Division of Abatement and Compliance, Bureau of Air Pollution Control, Department of Health, Commonwealth of Pennsylvania, dated January 18, 1971, on file at \textit{Villanova Law Review} office. This Bureau is now under the direction of the Department of Environmental Resources. \textit{PA. Stat. tit.} 71, \S 310—1(16) (Supp. 1971).}
\footnote{80. \textit{PA. Stat. tit.} 35, \S 4004(4.1) (Supp. 1971).}
\footnote{81. \textit{PA. Stat. tit.} 71, \S 510—21(a) (Supp. 1971).}
tion Act\(^{82}\) describing the duties and responsibilities of the Environmental Hearing Board do not specify the time limit for perfecting appeals,\(^{83}\) the thirty day requirement prescribed in the Air Pollution Control Act\(^{84}\) will probably be maintained by the Hearing Board.

All determinations of the Hearing Board are in the form of an adjudication subject to the provisions of the Administrative Agency Law.\(^{85}\) Thus the appealing party must be given notice of the hearing and be afforded an opportunity to be heard.\(^{86}\) Appeals taken to the Hearing Board do not automatically stay enforcement of the administrative order as existed under the Air Pollution Control Act which provided that a perfected appeal would hold an order in abeyance pending its adjudication.\(^{87}\) In this manner the right to be heard is provided for, and, more significantly, the pollution is being abated quickly rather than continuing while the sometimes slow administrative process determines the merits.

The Air Pollution Control Act provides for judicial review of administrative determinations.\(^{88}\) While the Reorganization Act is silent as to this point, the controlling sections of the Air Pollution Control Act and the Administrative Agency Law\(^{89}\) presume the availability of judicial review. Appeals from adjudications of the Hearing Board are reviewable by the recently created Commonwealth Court.\(^{90}\)

**F. Sanctions**

Section 8 of the amended Air Pollution Control Act defines "unlawful conduct" as failure to comply with the rules and regulations of the Commission (now the Environmental Quality Board) or any order of the Department.\(^{92}\) The Act authorizes corresponding approaches to contend

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\(^{82}\) PA. STAT. tit. 71, § 510-21(a-g) (Supp. 1971).

\(^{83}\) PA. STAT. tit. 71, § 510-21(e) (Supp. 1971), provides that the Environmental Quality Board shall determine its own rules for the taking of appeals to the Environmental Hearing Board, including time limits within which such appeals may be perfected.

\(^{84}\) PA. STAT. tit. 35, § 4004(4.1) (Supp. 1971).

\(^{85}\) PA. STAT. tit. 71, § 1710.1 et seq. (1962).


\(^{87}\) PA. STAT. tit. 71, § 510-21(d) (Supp. 1971).

\(^{88}\) PA. STAT. tit. 35, § 4004(4.1) (Supp. 1971).


\(^{91}\) PA. STAT. tit. 17, § 211.14(a), repealed the jurisdiction of the Dauphin County Court of Common Pleas as the proper court for administrative agency appeals; it was replaced by the newly established Commonwealth Court in 1970. PA. STAT. tit. 17, § 211.14(d) (Supp. 1971).

\(^{92}\) PA. STAT. tit. 35, § 4008 (Supp. 1971). The entire text reads as follows:

"It shall be unlawful to fail to comply with any rule or regulation or to fail to comply with any order of the department, to violate or to assist in the violation of any of the provisions of this act or rules and regulations adopted hereunder, or to in any manner hinder, obstruct, delay, resist, prevent or in any way interfere or attempt to interfere with the department or its personnel in the performance of any duty hereunder, or refuse to permit such personnel to perform their..."
with unlawful conduct. The Department may institute prosecution under the Act or "[i]nstitute in a court of competent jurisdiction proceedings to compel compliance with an order of the Department from which there has been no appeal or which has been sustained on appeal." 93

The provisions of the Act remain unclear, however, as to how compliance with a Department order may be compelled. Although the Act authorizes the Department to initiate actions to compel compliance, the pertinent section of the Act which permits application for injunctive relief premises such application upon "violations of this act." 94 The question presented is whether non-compliance with a Department order alone is a violation of the Act or must the Department first prove a prima facie violation of one of the sections of the Act. The Act seemingly differentiates between violations of the provisions of the act and failure to comply with an order of the Department. 95 Whether the vagueness is due to faulty draftsmanship or is intentional, the apparent distinction is unfortunate. If injunctive relief for non-compliance with Departmental orders resulting from regulatory violations is denied, and it appears that under section 10 such relief will not be available, then the Act's enforcement machinery is effectively limited. 96

It may be possible, however, to obtain injunctive relief through another section of the Air Pollution Control Act. Section 11 authorizes the Department, upon the approval of the Attorney General, to petition for injunctive relief to abate a health nuisance, even though such nuisance is subject to regulation by the Department. 97 Therefore, it would be

duty by refusing them, after proper identification or presentation of a written order of the department, entrance at reasonable hours to any premises.
95. PA. STAT. tit. 35, § 4010(a) (Supp. 1971). The entire section reads:

In addition to any other remedies provided for in this act, the court of common pleas in the county in which the defendant resides or has his place of business for an injunction to restrain all violations of this act. (emphasis added)

The Court of Common Pleas of Philadelphia County is conferred with equitable jurisdiction to prevent or restrain "the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals." PA. STAT. tit. 17, § 282V (1962). The equitable jurisdiction of the Philadelphia County Court of Common Pleas was extended to every common pleas court throughout the Commonwealth. PA. STAT. tit. 17, § 283 (1962).

96. The Milk Marketing Law, PA. STAT. tit. 31, § 700j–1004 (Supp. 1971), contains provisions similar to section 10 of the Air Pollution Control Act and also distinguishes between violations of the Milk Marketing Law and non-compliance with orders of the Milk Marketing Board. However, unlike the Air Pollution Control Act, injunctive relief is expressly provided for violations of either. See also Comment, Air Pollution: The Problem and the Legislative and Administrative Responses of the United States, Pennsylvania and Allegheny County, 30 U. PITT. L. REV. 633, 661 n.88 (1969).

97. Another view would be to acknowledge that regulations adopted according to statutory procedure have the force and effect of law, thus, making the regulations affecting the enforcement of the Air Pollution Control Act part of that Act. Therefore, a violation of the Act should not be distinguished from failure to comply with an order which was issued because of a violation of those regulations.

98. PA. STAT. tit. 35, § 4011 (Supp. 1971). This section was amended in 1966, probably as the result of the decision of the Pennsylvania Supreme Court in Commonwealth v. Glen Alden Corp., 418 Pa. 57, 210 A.2d 256 (1965), which held that, absent
possible to allege the existence of a health nuisance resulting from the failure to comply with the Department's order which had been issued in response to a violation of one or more of the regulations thus, constituting "air pollution" within the statutory definition. Non-compliance with an order would necessarily connote the continuance of a regulatory violation which could be a hazard to health, and therefore a nuisance.

The Air Pollution Control Act also provides penal sanctions for unlawful conduct. Summary offenses, for violations of the rules and regulations or failure to comply with an order of the Department, result in fines ranging from $100 to $500 and jail sentences up to a maximum of thirty days for default in the payment of the fine. Conviction of a third or subsequent offense constitutes a misdemeanor with corresponding fines from $500 to $1000 and/or imprisonment for one year. Thus, the Department may avail itself of alternate penal sanctions for abating air pollution. It may: (1) proceed to abate a violation of regulatory standards through its order issuing authority and later prosecute failure to comply with the order; or (2) it may directly prosecute violations of the regulations.

IV. THE CLEAN STREAMS LAW

A. Introduction

The purpose of this section of this Comment is to examine the policies of the Commonwealth of Pennsylvania toward the problem of water pollution. The Clean Streams Law and the rules and regulations promulgated pursuant thereto will be examined in detail to ascertain whether the present approach is adequate to confront the problem. Special emphasis will be directed to enumerating those activities which constitute violations...
of the Act and the judicial and administrative avenues available to the Commonwealth to abate such violations. Some consideration will also be given to the importance of controlling future pollution through planning.

B. Municipal Sewage

1. Sewage Pollution

Municipal sewage has long been one of the primary causes of the pollution of the waters of the Commonwealth of Pennsylvania. Municipalities empty millions of gallons of organic wastes into streams to a point where the matter cannot be assimilated by the stream and thereby purified by natural means. A watercourse under these conditions merely acts as a waste conduit causing the loss of the use of the stream for any beneficial or aesthetic purpose and a danger to the health of the downstream communities. In response to the obvious dangers that are presented by this situation, the Clean Streams Law declares that the discharge of sewage which causes or contributes to the pollution of a watercourse is declared to be a public nuisance. PA. STAT. tit. 35, § 691.3 (Supp. 1971). This statement which articulates the common law premise, has been recognized since the case of Howell v. McCoy, 3 Rawle 256 (Pa. 1832), that the Commonwealth has a right and duty to abate pollution of a stream when the public use is affected, or a menace to the public health is created, see Commonwealth ex rel. Shumaker v. New York & Pa. Co., 367 Pa. 40, 79 A.2d 439 (1951); McCallum v. Germantown Water Co., 54 Pa. 40 (1867); Barclay v. Commonwealth, 25 Pa. 503 (1855), clearly manifests authority under which the Commonwealth may proceed to attack all such pollution under the guise of the Clean Streams Law. Since the Act declares such activity to be a public nuisance, certain road blocks that would otherwise have to be confronted are eliminated. With the declaration that such activity is a public nuisance, it follows that the activity cannot be reasonable; hence, there is no “balancing of equities” when a case of this nature arises, see Commonwealth ex rel. Shumaker v. New York & Pa. Co., 367 Pa. 40, 79 A.2d 439 (1951). Furthermore, the rule of damnum absque injuria which arose from the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886), has no application. In Sanderson, it was determined that injuries to a lower riparian resulting from the natural use of the land were not actionable. Since the Act specifically declares that such discharges are not natural uses of the land, the Sanderson doctrine has no validity. Therefore, once a violation of the Act is alleged and proven, thereby showing a public nuisance, the Commonwealth may proceed to seek enforcement of the provisions of the Act.

104. Municipalities have always been one of the major contributors to the pollution of the Commonwealth’s waters. The major cities have exhibited a reluctance to invest the necessary funds for proper sewage treatment facilities, which has resulted in the destruction of many waterways. See generally Note, Statutory Stream Pollution Control, 100 U. PA. L. REV. 225, 230 (1951).

105. See Sanitary Water Bd. v. Wilkes-Barre, 199 Pa. Super. 492, 185 A.2d 624 (1962). In this case, the City of Wilkes-Barre was dumping approximately 13,000,000 gallons of raw sewage into a river each day, with the obvious effect of total devastation of the watercourse. The court recognized that this process was clearly objectionable, since the public health was endangered and recreational use of the river had to be halted because of the presence of disease carrying pathogenic organisms. See also Commonwealth ex rel. v. Dravesburg, 95 Pitts. L.J. 91 (Allegheny County Pa. C.P. 1947).


107. Sewage is defined as: “Products or excrementitious or other discharges from the bodies of humans or animals.” PA. STAT. tit. 35, § 691.1 (Supp. 1971).
a stream, or creates a danger of such pollution, is against public policy and is a public nuisance.108

2. Violations and Permits To Discharge

In enumerating the activities that constitute a public nuisance, the Clean Streams Law espouses an absolute prohibition against the discharge of any sewage by a municipality109 or person110 into the water of the Commonwealth,111 unless the discharge is undertaken pursuant to a permit issued by the Department or is authorized by the rules and regulations of the Quality Board.112 The burden of establishing that the activity is not contrary to the mandate of the Act and within the exception, is upon the party who is discharging, or who wishes to discharge,113 rather than on the Department since the Act requires the municipality to secure a

108. PA. STAT. tit. 35, § 691.3 (Supp. 1971). The Department is also given the authority to confront one of the crucial problems in the area of water pollution control — the protection of sources of water approved for public use. PA. STAT. tit. 35, § 691.501 (Supp. 1971). The Clean Streams Law, in addition to the powers granted it in the aforementioned provision of the Act, gives the Department specific authority to promulgate the necessary rules and regulations for the protection of the present and future water supply and to issue and enforce orders pursuant to such rules to protect the water supplies. The sections of the Act pertaining to domestic water supplies are different from the sections pertaining to industrial or municipal pollution, since it contains its own penalty provisions. Under this section, if any person, including a public water supply company, see New Castle v. New Castle Water Co., 250 Pa. 341, 95 A. 534 (1915), violates any rules of the Department, or fails to comply with an order of the Department, such person may be subject to prosecution in a summary proceeding and upon conviction may be subject to a fine. PA. STAT. tit. 35, § 691.502 (1964) (maximum $500). If the party continues to violate a rule or an order after such a conviction, he will be guilty of a misdemeanor and subject to a further fine. PA. STAT. tit. 35, § 691.502 (1964) (not less than $500 nor more than $1000). Furthermore, such a violation is declared to be a nuisance which may be enjoined under the abatement provisions of the Act. PA. STAT. tit. 35, § 691.507 (1964) (for abatement procedure, see PA. STAT. tit. 35, § 691.601 (1964)).

109. PA. STAT. tit. 35, § 691.1 (Supp. 1971). Municipality as used in the statute includes any county, city, borough, town, township, school district, institution or any authority created by one of these governmental units. Id.

110. PA. STAT. tit. 35, § 691.1 (Supp. 1971). Person is defined in the statute as a natural person, partnership, association, or corporation. Id.

111. PA. STAT. tit. 35, § 691.1 (Supp. 1971). “Waters of the Commonwealth” include all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs, and all channels of underground water. Id.


113. Under the prior statute, PA. STAT. tit. 35, § 691.202 (1964), amended by PA. STAT. tit. 35, § 691.202 (Supp. 1971), before a municipality was required to halt the pollution of a watercourse, the Sanitary Water Board had to issue an order to stop polluting. See Sanitary Water Bd. v. Coudersport, 81 Dauph. Co. Rep. 178 (Dauphin County Pa. C.P. 1963), wherein the court stated:

It appears from the above statutory language that the Legislature in its attempt to promote and improve the purity of the waters of the Commonwealth did not intend that all discharges of sewage be prohibited but only those which constitute “pollution.” Any order to discontinue an existing discharge of sewage would therefore have to follow a hearing at which evidence was presented substantially supporting the condition of “pollution” as defined.

Id. at 180-81. Under the current statute, the municipality is required to take the initial action, since it is presumed by the statutory language that the discharge of sewage is pollution.
permit. Under this system, the Department does not have to initiate an investigation of the municipality's operation; rather, it is placed in a position where the municipality must come to the Department and plead its case.

Moreover, if the municipality is successful in securing a permit, this does not mean that it may proceed to indiscriminately pollute the water. The Act requires a permittee to comply strictly with the terms of the permit. Furthermore, its activities are also limited by any existing order, decree, judicial judgment, municipal ordinance, or rules of a water company, since the issuance of a permit does not supersede any such pronouncement. These two limitations should act as an effective deterrent to sewage pollution which is against the policy of the Act.

Moreover, since the impetus of enforcement now rests with the Department, rather than with the party who is discharging the sewage, further control after the issuance of the permit should be obtained from the Department's power to revoke or change all permits issued. However, these measures can be used only after an investigation and a hearing have occurred. If the Department's investigation discloses that the permittee is violating the permit, or that there is a change in circumstances, the Department can then force it to cease discharging any wastes into the waters, within a specific period upon notice. Once this period of time has lapsed, the violator must discontinue the discharge or have all the provisions of the legislation operate against him, thus causing any further discharge to be an abatable nuisance.

3. Prevention of Sewage Pollution

Although the permit system aids in controlling pollution, it is only a stop-gap measure; the real cornerstone of the abatement of municipal sewage pollution is control through planning. Although it is obviously necessary to set out prohibitions against the discharge of pollution, it is also necessary that the Department be given authority to plan for the future through preventive measures. To this end, the Clean Streams Law sets out a comprehensive plan for municipal sewage pollution prevention. If the Department determines that an existing sewage system or treatment facility is not properly constructed to prevent pollution, the Department may require the operator involved, usually a municipality, to acquire,
construct, repair, alter, complete or extend such facilities, as preventive measures.\textsuperscript{122} The Department is vested with the authority to issue enforcement orders requiring the municipality to comply with those plans within a specified period of time.\textsuperscript{123}

To complement its authority to require a municipality to construct or alter treatment facilities, the Department may order a municipality to file reports on such facilities detailing the effect that present discharges are having on the surrounding waters.\textsuperscript{124} The submission of such plans could significantly add to the Department's ability to control future pollution in the immediate area of the discharge since the reports must be prepared so as to exhibit what effect the present facilities are having, or may have, on the water.\textsuperscript{125} Furthermore, to aid the Department in this goal, it is given the authority to order municipalities to undertake studies and to submit plans for future construction.\textsuperscript{126}

If, on the basis of this information, it is evident that the municipality must construct new facilities, or extend or alter its present facilities, all relevant plans and designs for the erection, construction, and location of such new facilities must be submitted to the Department for its approval by written permit before any action may be taken by the municipality.\textsuperscript{127} If a municipality does not comply with this provision and proceeds to undertake the construction without the approval of the Department, the construction may be enjoined as a nuisance through the abatement provision of the Act.\textsuperscript{128}

The significance of this aspect of the legislation rests in its prospective nature, i.e., it is not so much concerned with the exigencies of the current problem, but rather with the future. To achieve the goal of this section of the Act it is necessary that the relevant data be submitted immediately and foresight be employed by the planners so that multiplication of costs will not be necessary. Unless work of this nature is begun, the present treatment facilities will rapidly become outdated,\textsuperscript{129} thereby,

\begin{itemize}
\item[122.] PA. STAT. tit. 35, § 691.203(a) (Supp. 1971).
\item[123.] PA. STAT. tit. 35, § 691.610 (Supp. 1971). See p. 888 infra. If the municipality fails to comply with any of the aforementioned orders, the Department may refer the case to the Attorney General, who, upon application to the Commonwealth Court, or the Common Pleas Court of the County where the municipality is located, may institute suit to enforce the order. PA. STAT. tit. 35, § 691.210 (Supp. 1971).
\item[124.] PA. STAT. tit. 35, § 691.203(b) (Supp. 1971).
\item[125.] Id.
\item[126.] Id.
\item[127.] PA. STAT. tit. 35, § 691.207 (1964).
\item[128.] Id. See Sanitary Water Bd. v. New Oxford Municipal Authority, 79 Dauph. Co. Rep. 316 (Dauphin County Pa. C.P. 1962), wherein the court, interpreting the Sanitary Water Board's authority under section 207, declared: There is no question that the Authority's construction of the shorter outfall sewer, resulted in the discharge of effluent from its sewage treatment plant into the unnamed tributary rather than to the South Branch on Conewago Creek, constituted a departure from the approved plans and conditions established in the original permit which had been issued to it by the Board. The Board would have ample authority to consider the departure a nuisance and to order it abated under Section 207 of the Clean Streams Law, without further ado.
\item[129.] Id. at 318.
\end{itemize}

Although treatment facilities have been in operation in some areas of Pennsylvania for many years, the great majority of them were poorly planned. The effect
forcing a substantial economic burden on the municipalities for a second time. Furthermore, if the Department undertakes this program and enforces it, it is possible to avert the contamination of water and at the same time begin planning toward the reclamation of areas with the knowledge that these plans will not be frustrated by inadequate sewage treatment facilities.

4. Financing A Sewage Treatment Facility

a. Revenue Bonds

Since the municipalities have a duty to construct sewage systems and treatment facilities, they have the corresponding burden of financing their construction. The Clean Streams Law authorizes municipalities to issue non-debt revenue bonds, secured solely by pledges against the rental or charge for the use of the facilities, to fund the construction of the facilities.\(^\text{130}\) The issuance of these bonds does not create a debt, pledge the credit, or raise a charge against the general revenue, or create a lien against the property of the municipality.\(^\text{131}\) The municipality must offer the bonds at competitive bidding to the highest bidder, and if no bids are received, the bonds may be sold at private sale at no less than par.\(^\text{132}\) The bonds are payable in no more than thirty years with a maximum interest rate of six per cent.\(^\text{133}\) Municipalities are also given similar authority under the Municipal Borrowing Law,\(^\text{134}\) which provides that a municipality authorized by law to construct, acquire, or extend any public works, may borrow money for the purpose of constructing such


\(^{131}\) PA. STAT. tit. 35, § 691.211 (1964). Revenue bonds are obligations issued by a government unit which are payable only from a fund created by the income of the project erected with the proceeds of the bond issue. The holders of these bonds have no claim upon the general funds of the government unit raised by taxation, or against the general credit of the government unit. The outstanding feature of revenue bonds is that they are not included in the computation of the amount of debt that a government unit may issue under the constitutional debt limitation provisions. Thus, they are a flexible financing vehicle for government units to employ. See generally Comment, Municipal Debt Limitation in Pennsylvania, 15 VILL. L. REV. 612 (1970).

\(^{132}\) PA. STAT. tit. 35, § 691.212 (1964).

\(^{133}\) Id.

\(^{134}\) PA. STAT. tit. 53, §§ 6101 et seq. (1957), as amended (Supp. 1971).
facilities by the issuance of non-debt revenue bonds. It is clear, therefore, that the municipalities have authority to finance the construction of these facilities without endangering their general credit or placing an added burden upon their already overburdened budgets.

b. Other Means of Financing Facilities

The Clean Streams Law makes it clear that the non-debt revenue bonds are not the exclusive means by which a municipality can finance the construction of these facilities. A municipality can issue any type of bond or assess the property of landowners in any manner authorized by law. Accordingly, a municipality may partially finance the construction of a sewage system by assessment of the abutting property owners. Alternatively, a municipality, while financing a sewage treatment facility, may issue general obligation bonds. However, the availability of general obligation bonds is limited since the issuance of such bonds must be in compliance with the debt limitation of the Pennsylvania Constitution.

c. State Aid

In addition to the self-financing methods outlined above, the Commonwealth of Pennsylvania in response to the needs of the municipalities, has enacted a statute providing that the Commonwealth will contribute two per cent of the cost of construction of sewage treatment facilities. The Commonwealth, through the Department, also allocated the sum of $100 million under the Land and Water Conservation and Reclamation Act, to aid municipalities in the construction, reconstruction and improvement of municipal sewage treatment plants. The Secretary of the Department of Environmental Resources makes the grants pursuant to the rules and regulations of the Quality Board.

d. Joint Action By Municipalities

Despite the procedures outlined above, it is foreseeable that many of the smaller municipalities will be unable to raise the requisite funds

139. PA. CONST., art. 9, § 10. See generally Comment, supra note 131, at 623.
142. PA. STAT. tit. 32, § 5116(a) (2) (Supp. 1971).
143. See RULES AND REGULATIONS art. 500, §§ 1-12 (1970).
to construct or improve their sewage treatment facilities. In response to this need, it is suggested that the Clean Streams Law be amended to provide specifically for joint activity by municipalities, since it is normally more economical for a group of small municipalities to join together to finance and construct a sewage treatment unit. Although such authority partially exists under the municipal codes and within the Clean Streams Law, there is a pressing need to establish explicit guidelines within the Act to show what procedure is the most appropriate for the municipalities to follow.

C. Industrial Wastes

1. Introduction

Industrial pollution is the most detrimental type of pollution to the Commonwealth's water quality. Industries discharge organic wastes into the waters with a pollution strength double that of municipal sewage, and the range of inorganic matter that is permitted to flow into the streams causes irreparable harm to aquatic life. The complexity of industrial pollution is further magnified by the fact that, unlike municipal sewage, industrial wastes are caused by diverse sources; they flow from pulp and paper, food processing, chemical, metal manufacturing, mining, textile, or petroleum plants and from dozens of other industrial establishments that all contribute to the problem. Industry has failed to take any effective voluntary measures to solve this problem thus making it clear that governmental action is necessary. Toward this end, the Clean Streams Law has established criteria which industry must meet.

2. Prohibition Against Discharging Industrial Wastes and the Permit System

Under the Act, industrial waste is defined in the following manner:

Industrial waste shall be construed to mean any liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing...
operation. Industrial waste shall include all such substances whether or not generally characterized as waste.151

Operating within the precepts of this definition, the Act expressly prohibits the placing, permitting to be placed, discharge, permitting to flow, or continuation of a discharge of any matter which constitutes industrial waste unless the party has secured a permit.152 It is clear, therefore, that industry has an affirmative duty, much the same as municipalities do with respect to sewage, to stop discharging industrial wastes into the waters of the Commonwealth153 unless the industry has been granted a permit by the Department to discharge certain amounts of pollutants.164 One significant aspect of the Act is that the discharge of industrial waste into the water of the Commonwealth includes a discharge of such waste into a municipal sewage system which flows into the waters of the Commonwealth. This prohibition makes it clear that a party cannot avoid the impact of the Act by discharging industrial waste indirectly.155 This aspect takes on extreme importance because it links the part of the Act regulating industrial pollution with that part regulating sewage pollution thus, solving a problem which up to this time has been left uncorrected.

153. It should also be noted that the discharge of industrial waste which causes or contributes to the pollution of a watercourse is not a reasonable or natural use of the land and is a public nuisance. Thus, the defense of reasonable use or natural use is not available to a defendant when an action is brought under the Act. See Pa. Stat. tit. 35, § 691.3 (Supp. 1971). It would seem that the only defense available is the fact that the pollution is caused by an accident. See Kernan v. Gulf Oil Corp., 231 F. Supp. 339 (E.D. Pa. 1964), aff’d, 341 F.2d 920 (3d Cir. 1965); Rules and Regulations art. 600, § 1 (1970).
154. Under this declaration all discharges of industrial waste from an existing facility are a violation of the Act if they are undertaken without a permit, or if the discharge does not comply with the rules and regulations of the Quality Board. Pa. Stat. tit. 35, § 691.307 (Supp. 1971). Thus, the industry has the responsibility of making sure that it comes within the terms of the Act. Under the prior section of the Act, Pa. Stat. tit. 35, § 691.302 (repealed 1970), the Sanitary Water Board had to give notice to the polluter to discontinue discharging after an investigation. Thus the burden of initial action was on the Sanitary Water Board and the polluter could continue discharging until the Board took such action. However, failure of the Board to issue an order to discontinue such discharge did not act as a defense to an action to declare such activity a nuisance. See Commonwealth v. Sonneborn, 164 Pa. Super. 493, 66 A.2d 584 (1949). In Sonneborn, the court determined that although the burden of initial action was on the Board to require a party to secure a permit or stop discharging, the discharge of industrial waste could be prosecuted in a court whether or not the Board had issued an order. Although the Sonneborn court’s interpretation of the Act held the threat of judicial action before a violator, in reality the threat was impotent as exemplified by the lack of prosecutions. Therefore, it is clear that the present section of the Act is much more appropriate since the Department does not have to take the initial steps required under the prior Act to force the polluter to secure a permit.

The Act also provides that when a party applies for a permit, such application must be published in a newspaper in the county where the discharge is taking place, or will take place. Pa. Stat. tit. 35, § 691.307 (Supp. 1971). Theoretically, therefore, if a landowner or the general public has an interest in having the permit denied, he is given notice that an application for a permit has been made and an opportunity to express his views. Although the thrust of this requirement is totally valid and necessary it is questionable whether the public will actually be put on notice by such publication.

This problem has arisen because municipalities have in the past given very little thought in planning the construction of sewage treatment facilities to treatment of the vast array of chemicals and toxic substances that result from industrial production. Hence, these treatment facilities, although adequately purifying municipal sewage, have left industrial waste unaffected, thus allowing it to flow into the waters as if it had never been through a treatment process. This new approach should eradicate most of this problem by either forcing industry to cooperate with municipalities in providing adequate treatment facilities for industrial waste, or requiring them to construct their own facilities.\(^\text{150}\)

3. **Eminent Domain**

In order to assist an industry which is faced with the perplexing problem of being required to cease discharging industrial wastes into the waters of the Commonwealth by the construction of treatment facilities, the Act provides that the right of eminent domain may be vested in a corporation if the order to cease discharging could materially affect the operation of its business.\(^\text{157}\) If the corporation is not vested with the right of eminent domain under any other statute, it may apply to the Department for an order stating that the use of a specific piece of property is necessary to effectuate the public policy of the Act.\(^\text{158}\) If the Department finds that it is necessary for the corporation to procure this property in order to eliminate, reduce, or control pollution, it may give the corporation the power of eminent domain to be exercised under the authorization of the Department in the manner established by the Eminent Domain Code.\(^\text{159}\) The corporation, however, is not given the authority through this provision to take property that is devoted to public use.\(^\text{160}\) If a public street is taken in connection with this power, the corporation must reimburse the public utility or municipality for the expense of relocating their facilities.\(^\text{161}\)

4. **Submission of Information**

The Act also requires any party discharging industrial waste into the waters of the Commonwealth to file all information with the Department pertaining to the kind, character and rate of flow of all pollution that the

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\(^{150}\) If the industry wishes to construct its own facility it must submit all relevant plans and data to the Department for approval. It may not take any action on construction or erection of the facility until the Department has given its approval. PA. STAT. tit. 35, § 691.308 (Supp. 1971).

\(^{156}\) PA. STAT. tit. 35, § 691.314 (Supp. 1971).

\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Id.


\(^{161}\) PA. STAT. tit. 35, § 691.314 (Supp. 1971). This includes property owned by a public utility, or used as a place of worship or burial.

\(^{162}\) PA. STAT. tit. 35, § 691.314 (Supp. 1971).
person is presently discharging or may discharge in the future.\textsuperscript{163} This information can be used as a means of analyzing the probabilities that a watercourse may become polluted through the actions of many small polluters or through activities which at the present time are not causing pollution. To further this same goal, the Department has the power to undertake a complete survey of the water of the Commonwealth in order to ascertain the extent of pollution.\textsuperscript{164} With this information, the Department can fashion appropriate remedies and issue rules and regulations to maintain the purity of waters, or to purify those that are polluted.\textsuperscript{165} In addition, the Department may conduct investigations, experiments, and research for the protection of public health as well as animal and aquatic life, and the maintenance and purification of waters for domestic and recreational uses.\textsuperscript{166}

D. Operation of Mines

1. Pollution From Mines

One of the major problems that falls under the heading of industrial wastes\textsuperscript{167} is pollution from mines.\textsuperscript{168} This problem has consistently caused the pollution of thousands of miles of the waters of the Commonwealth.\textsuperscript{169} The effects of this type of pollution are widespread; it requires municipalities to install treatment facilities to purify wastes, as well as replace corroded waterworks, and the early replacement of bridges and all other

\begin{itemize}
\item \textsuperscript{163} PA. STAT. tit. 35, § 691.303 (1964). Although this section, on its face, apparently contradicts the aforementioned section which states that no person may discharge industrial waste into the waters of the Commonwealth, if interpreted in light of the fact that some industrial waste may be discharged under a permit, or within the rules and regulations of the Quality Board, the section becomes significant as a measure to prevent future pollution.
\item \textsuperscript{164} PA. STAT. tit. 35, § 691.304 (1964).
\item \textsuperscript{165} PA. STAT. tit. 35, § 691.304 (1964).
\item \textsuperscript{166} PA. STAT. tit. 35, § 691.305 (1964); Sanitary Water Bd. v. Glen Alden Corp., 83 Dauph. Co. Rep. 108, 121 (Dauphin County Pa. C.P. 1964). In Glen Alden it was recognized that the expense of conducting research must be borne by the Commonwealth and cannot be transferred to a property owner.
\item One aspect of subsection .305 could very well raise constitutional questions under the fourth amendment to the United States Constitution. Subsection .305 is phrased in the following manner: "Its agents may enter upon lands, buildings, and premises as may be necessary for its investigation." This wording would seem to bring this investigation within the confines of the term "search" as used in the fourth amendment, thus necessitating that the agent secure a search warrant. This result is dictated by the recent United States Supreme Court cases of Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. Seattle, 387 U.S. 541 (1967). In Camara and See definitive rules were laid down as to the rights of homeowners and businessmen and the method of inspection necessary to comply with the mandate of the Constitution. The focus of these cases indicate that if a homeowner or businessman refuses an inspector entry, the inspector, or agent in this case, must proceed to secure a search warrant. See generally Mulchay, Camara and See: A Constitutional Problem With Effect on Air Pollution Control, 10 ARIZ. L. REV. 120 (1968).
\item \textsuperscript{167} PA. STAT. tit. 35, § 691.1 (Supp. 1971).
\item \textsuperscript{168} PA. STAT. tit. 35, § 691.1 (Supp. 1971). The term mines as used in the Clean Streams Law specifically means coal or clay mines and more generally any facility from which minerals are extracted from the earth. \textit{Id.}
\item \textsuperscript{169} See Hearings on S. 1870 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 90th Cong., 1st Sess. 320 (1967).
\end{itemize}
structures that come in contact with it. To remedy this problem, the Commonwealth has undertaken a preventive approach to pollution from mine drainage. As it does for sewage and industrial wastes, the Clean Streams Law states that a party may not operate a mine so as to discharge wastes into the water of the Commonwealth unless such discharge is authorized by the rules and regulations of the Department or the party has obtained a permit from the Department. The Department's control over mines is especially sweeping, since by definition "operation of a mine" includes not only the actual operation, but also any preparatory work or work undertaken in conjunction with closing operations.

170. Id. at 322. In a study undertaken by the Department of the Interior in 1965, it was determined that two-thirds of the streams in the Appalachian area are polluted to the point where they could not support fishlife.

171. The preventive approach to controlling mine drainage pollution is the process by which steps are taken to remove the pollutants from the drainage before it enters a watercourse. This approach offers the advantage that the water can be used for all purposes with the mining operation being allowed to continue. A second approach to the problem is to remove the impurities from the water as the water is required for use. The obvious disadvantage to this approach is the loss of the use of the water for all purposes until the pollutants are removed. Moreover, the extraction of the impurities is a very costly undertaking. Id. at 322-23. It is suggested that the vast majority of pollutants can be stopped from reaching the waterways before damage occurs at a savings to all parties concerned. See generally Hines, Controlling Industrial Water Pollution: Color the Problem Green, 9 B.C. IND. & COM. L. REV. 553, 564 (1968).


173. See RULES AND REGULATIONS art. 700, § 1 et seq. (1970).

174. PA. STAT. tit. 35, § 691.315(a) (Supp. 1971). If a party undertakes a mining operation before the permit is actually granted or contrary to the terms of a permit, such action is a nuisance. See Commonwealth ex rel. Chidsey v. Black, 363 Pa. 231, 69 A.2d 376 (1949), wherein the court referring to the requirement of securing a permit stated:

It clearly prohibits the opening of any new coal mine, or the reopening of an old coal mine, or the continuance in operation of any existing coal mine, until a plan of mine drainage has been approved by the Commonwealth, acting through its official agency. The statute does not say that if the mine owners can show that there will be no acid mine drainage into clean streams, such approval need not be obtained. In order to avoid the peril of having its streams polluted the Commonwealth assumes that the drainage from every coal mine is a potential menace to the purity of nearby waters, and provides that before such a mine can be opened plans must be submitted which will satisfy the Commonwealth that this peril will be obviated. Id. at 239, 69 A.2d at 380. See also Sanitary Water Bd. v. Tri-County Fuel Co., 79 Dauph. Co. Rep. 128 (Dauphin County Pa. C.P. 1962), wherein the court upheld the denial of a permit because the mining operation would result in pollution.

Furthermore, the municipality within which the operation is to be undertaken must be given notice before the issuance or the hearing on the issuance, whichever is first. This aspect is significant in that it is clear that the public interest will be protected since the representatives of the citizenry must be given notice so that they have an opportunity to express their views.

175. If the coal mine operator is not financially able to undertake the expense of building a treatment facility and the Commonwealth under the auspices of the Land and Water Conservation and Reclamation Act, PA. STAT. tit. 32, § 5101 et seq. (Supp. 1971), has constructed a treatment facility, upon request to the Commonwealth, the mine operator may be permitted to discharge his drainage into the plant at a fee based on the proportionate share of the cost and the quantity and quality of the pollutant. PA. STAT. tit. 32, § 5116(1) (II). If this type of action is undertaken by the Commonwealth, it could prove to be the most effective method of abating the problem of mine drainage.

2. Abandoned Mines

The statute also makes it clear that the phrase "discharge from a mine" includes discharges which occur after the mining operations have ceased, provided the mining operations were conducted after 1966. The significance of this provision becomes evident when disclosure is made of the fact that more than fifty per cent of all pollutants discharged from mines come from those that are no longer in operation. Until the present legislation was enacted, this problem was left unsolved. If, however, this section of the Act is enforced, i.e., mine operators are held responsible for the pollution that results from the mines that they have abandoned, the problem could be effectively solved.

To aid in the enforcement of this section of the legislation, the Department may require an applicant for a permit to post a bond in favor of the Commonwealth to insure that pollution will not result from drainage from the mine. Under this section, the Department has a method to force the party to effectuate the restoration measures necessary after the mining operations have ceased so that pollution will not result in the future. If the party does not post such a bond, the Department may refuse to issue a permit.

177. PA. STAT. tit. 35, § 691.315(b) (Supp. 1971).
178. It was not until January 1, 1966, that mining operations were required by law to be undertaken pursuant to a permit. PA. STAT. tit. 35, § 691.315 (repealed 1970).
179. See Hearings, supra note 169, at 322.
180. The Clean Streams Law is presently lacking in the respect that there is no effective way to place the burden on the former mine operator who abandoned his mine before January 1, 1966. The responsibility for the discharge from these mines must rest on the Commonwealth under the Land and Water Conservation and Reclamation Act, PA. STAT. tit. 32, § 5101 et seq. (Supp. 1971). Under this Act the Commonwealth may create the Land and Water Conservation Fund, in the amount of $500 million for the conservation and reclamation of land and water resources, including the elimination of acid mine drainage, the restoration of abandoned strip-mines, and the prevention of subsidence resulting from mining operations. Under section 5116 of the Act, $200 million is allotted to the Department of Environmental Resources (formerly to the Department of Mines and Mineral Industries) for the elimination of land and water scars created by past coal mining operations. One hundred and fifty million dollars of such funds are to be used for the prevention, control, and elimination of stream pollution resulting from mine drainage. The Department is also given the Authority to construct and operate treatment facilities for the control and treatment of mine drainage. If these sections of the Act are put to use the problem of mine drainage from abandoned mines can be eliminated.
181. PA. STAT. tit. 35, § 691.315(b) (Supp. 1971).
182. The bond will remain in effect until the Department determines that there is no further risk of pollution.
183. The enactment of section 315(b) could be in response to the holding in the case of Sanitary Water Bd. v. Sunbeam Coal Corp., 47 Pa. D. & C.2d 378 (Dauphin County C.P. 1969), wherein the court overruled a refusal to grant a mine operator a permit because he failed to comply with other outstanding permits. The court was concerned with the fact that by the condition of the Sanitary Water Board's permit the mine operator would be "an insurer of pure water in the area for all time." The court stated: Of further significance is the fact that the Clean Streams Act specifically referred to the mines being opened, reopened or continued in operation. Nowhere in the Clean Streams Act is it suggested or implied that a former operator of an abandoned mine can be held in "violation" after the mine is closed. Id. at 386. Section 315(b) now avoids the problem confronted by the court since it is no longer necessary to find a party in "violation" of the Act, rather all that is necessary is to redeem the bond and undertake corrective measures. The expense of
3. Responsibility of Landowners With Respect To Abandoned Mines

The section pertaining to mines also vests in the Department the power to require a landowner or occupier to correct any condition on his land which is the result of a mining operation which is causing or may cause the pollution of a watercourse, or require the landowner to allow the former mine operator, or agent of the state, to come onto the land and correct the condition.\textsuperscript{184} The significance of this section is that it vests in the Department the power to correct conditions that are not actually causing pollution at the present time.\textsuperscript{185} It also permits the Commonwealth to take action against mines, either in operation or abandoned, which are causing pollution. One of the major shortcomings of traditional water pollution statutes was that the posture of the statute was punishment or injunctive relief for actions that were already causing pollution. Before the Department could take any action, it was necessary that damage had occurred or was in progress. The past statutes were void of any measures that could be taken to prevent or control pollution. But with the enactment of the present statute, the Department is given the authority to confront the problem before actual damage occurs. This approach seems to be the only rational means of attack if the Commonwealth is to stop pollution before it occurs since there would be very little reason to begin major reclamation programs if all the funds and efforts put into such programs could be destroyed overnight by a problem that was known to exist, but which the authorities were without the power to prevent or control.

Under this expanded authority, the Department can now require a landowner to take action to correct the condition on his land \textit{before} injury takes place, as well as correcting conditions that are actually causing damage. The Act also provides that a landowner must allow a former mine operator to come onto his land and correct a condition that is causing damage or may cause damage. Presumably, this aspect of the section is meant to operate in conjunction with the section of the Act pertaining to abandoned mines, which as previously noted, now states that a mine operator is responsible for the mine drainage, that causes pollution, even after the mine has ceased operation.\textsuperscript{186} Since the mine operators are now liable for pollution under a bond which they must post, they must be permitted to come onto the land which they formerly leased to correct the condition. An agent of the Commonwealth must also be allowed to come on the land after an order is issued to correct the condition if proper action is not taken by either the landowner or the mine operator. If the Commonwealth undertakes this operation at its own expense, it is vested

\textsuperscript{184} PA. STAT. tit. 35, § 691.316 (Supp. 1971).
\textsuperscript{185} PA. STAT. tit. 35, § 691.316 (Supp. 1971).
\textsuperscript{186} PA. STAT. tit. 35, § 691.315(a) (Supp. 1971).
with the power to assess the amount due against the landowner.\textsuperscript{187} It would also seem that the Commonwealth could undertake these activities at its own expense under the provisions of the Land and Water Conservation and Reclamation Act.\textsuperscript{188}

\textbf{E. Other Pollution}

\textit{1. Discharge From Land}

The Clean Streams Law also establishes a prohibition against the discharge, or permitting to be discharged, any substance of any kind which will pollute the waters of the Commonwealth.\textsuperscript{189} This section of the Act is couched in very broad terms, relying on the definition of "pollution"\textsuperscript{190} to delineate which substances when discharged into a watercourse constitutes a violation of the Act. With the definition of pollution as the cornerstone of this section, any discharge, whether active or passive, which is deleterious to a watercourse is brought within the terms of the Act.\textsuperscript{191} The main thrust of this section is aimed at substances which do not constitute sewage or industrial waste. Thus, the Department is given authority to control all forms of discharges which will degrade the waters, including those caused by agricultural pollution resulting from allowing nitrates, phosphates and pesticides to flow into a waterway.\textsuperscript{192} In addition, pollutants discharged from operations such as landfills, construction

\begin{itemize}
\item \textsuperscript{187} PA. STAT. tit. 35, § 691.316 (Supp. 1971). See PA. STAT. tit. 35, § 691.605 (Supp. 1971), for the procedure on how fines are to be assessed.
\item \textsuperscript{188} PA. STAT. tit. 32, § 5116 (Supp. 1971).
\item \textsuperscript{189} PA. STAT. tit. 35, § 691.401 (Supp. 1971).
\item \textsuperscript{190} Pollution is defined in pertinent part as:
\begin{quote}
"Pollution" shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration or the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof . . . .
\end{quote}
\item \textsuperscript{191} See Commonwealth v. Ebersole, 59 Lanc. L. Rev. 363 (Lancaster County Pa. C.P. 1965), wherein the court found a violation of the Act as a result of seepage of liquid substances from a landfill operation. Under the other sections of the Act, this activity would not have constituted a violation since the court did not characterize the discharge as sewage or industrial waste, but rather relied on the fact that this substance was causing the pollution of the "waters" of the Commonwealth.
\item \textsuperscript{192} It is not disputed that pollution resulting from agricultural operation causes great harm to the nation's, as well as to the Commonwealth's waterways. If the waters of the Commonwealth are to be cleaned up to any considerable extent, the efforts of those who are confronting the pollution problem are going to have to turn to the agricultural problem. See Report of Proceedings of Pennsylvania Conference on Agricultural Waste Management (Pennsylvania Dept of Agriculture 1970). See generally Hines, Agriculture: The Unseen Foe In The War On Pollution, 55 Cornell L. Rev. 740 (1970).
\end{itemize}

Although, it is possible to bring an action against a party for agricultural pollution under section 401 of the Act, the authority to promulgate rules and regulations to control the problem is not expressly vested in the Department here or in any other section of the Act, although, it is arguable that the Department has this authority under section 402. It is submitted that the legislature should give the Department the express authority and the regulatory power to undertake a full scale attack on this problem.
or lumbering sites, or impoundments which result in the deterioration of water quality, would be deemed unlawful.\textsuperscript{193}

2. Potential Pollution

The Department is also vested with power to regulate this type of pollution through the permit system.\textsuperscript{194} This is a significant addition to the Department’s power since prior to the enactment of the present Act there was no way to control non-sewage or industrial pollution through the use of permits. Under this section, the Department is vested with broad discretionary power to determine what activities must be carried on pursuant to a permit or conditions that it otherwise may establish. The Department, therefore, is given authority to control potential pollution caused by activities such as impounding, handling, storage, transportation, or processing of pollutant substances.\textsuperscript{195} To supplement this authority

\textsuperscript{193} PA. STAT. tit. 35, § 691.401 (Supp. 1971). See also RULES AND REGULATIONS art. 800, § 1 et seq. (1970).

\textsuperscript{194} It seems clear that this section is consistent with the common law tradition that a landowner is responsible for injury to others that results from an activity that is undertaken on his land. This principle has validity whether or not the landowner’s actions directly cause the injury. See RESTATEMENT OF TORTS §§ 364, 365 (1934); McArthur v. Balas, 402 Pa. 116, 166 A.2d 640 (1961); McCarthy v. Ference, 358 Pa. 485, 58 A.2d 49 (1948); Pennsylvania R.R. v. Pittsburgh, 335 Pa. 449, 6 A.2d 907 (1939); McCallum v. Germantown Water Co., 54 Pa. 40 (1867). It is also consistent with the other section of the Act which states that a person may not “place or permit to be placed, or discharged” any pollutant from his land. PA. STAT. tit. 35, § 691.301 (Supp. 1971).

Under the Act and the common law, a property owner who creates, or allows to be created a condition that will cause pollution can be forced to abate the problem. However, a serious question is raised when a party purchases land, after the condition is created and without notice of the condition and is asked to abate the problem. Under the pertinent section of the Restatement, it is stated that a party is liable if he knows or should have known that the condition was created before he took possession. See RESTATEMENT OF TORTS §§ 364, 366 (1934). Section 366 of the Restatement also places liability on a purchaser if a reasonable inspection would have disclosed the condition. In comment d of said section, it is stated that the condition must have been discoverable and the unreasonable risk realized, with the location and condition of the land being a consideration. Therefore, it is likely that a party who did not cause the condition but had knowledge of its existence and danger would also be liable under the Act. The question still remains, however, as to whether he would be liable if the condition was not discoverable on inspection. It would seem that under the Restatement he would not be liable. The answer to this question could rest in the permit system. If each landowner who intended to use his land for an activity that could potentially cause pollution, \textit{i.e.}, a landfill, was required to secure a permit and file it with the registry of deeds in the county of the situs of the property, each successor in title would be deemed to have notice of the condition and section 401 could be effectively enforced in the future.

\textsuperscript{195} PA. STAT. tit. 35, § 691.402 (Supp. 1971). The significance of this section rests in its prospective nature. The Department now has the authority to control activities that are not presently causing pollution, but may, at some future date, cause irreparable damage to the Commonwealth’s waterways. This type of foundation significantly expands the Department’s power, since it now has the discretionary authority to require all activities that might potentially cause pollution to be conducted pursuant to established guidelines, either in the form of a permit or specific rules and regulations. If this authority is effectively used, potential destruction, which could not be controlled prior to this enactment, can be avoided.

\textsuperscript{195} See RULES AND REGULATIONS art. 800, § 1 et seq. (1970). Section 2B of the rules states in pertinent part:

All persons and municipalities engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of polluting substances shall take all necessary measures to prevent such
the Department is specifically granted the power to promulgate the necessary rules and regulations for enumerating those activities which must be conducted under a permit. 196 If the Department specifies that a certain activity must be conducted under a permit, and a party fails to secure one, further pollution is an abatable nuisance. 197

F. Procedure and Enforcement

1. Abatement of Nuisance

Under the enforcement provisions of the Clean Streams Law, any activity declared to be a nuisance under the Act may be abated in the manner provided for by law or equity, which, under normal circumstances, would be through an injunction. 198 The Department is therefore vested with the authority to abate any condition which violates the Act, i.e., the discharge of sewage, industrial waste, or petty pollutants without a permit on a violation of any order or permit of the Department, or rules and regulations promulgated by the Quality Board, as well as undertaking the construction of facilities without the approval of the Department, where such approval is necessary. 202 Under this broad declaration of authority, the Department has full power to abate any nuisance resulting from any of the aforementioned violations. The propriety of substances from reaching waters of the Commonwealth, directly or indirectly, through accident, carelessness, maliciousness, hazards of weather or from any other cause. Upon notice from the department and within the time specified in the notice, such person or municipality shall submit to the department a report or plan setting forth the nature of the activity, the nature of the preventive measures taken to comply with this subsection and such other information as the department may require.

One of the important aspects of this regulation is the requirement that the party submit reports, or plans to the Department. In this way, the Department will be completely informed as to what preventive measures are being taken, and with this knowledge can thoroughly assess what steps are necessary for complete protection. 196. Pa. Stat. tit. 35, § 691.402 (Supp. 1971). 197. Pa. Stat. tit. 35, § 691.402(b) (Supp. 1971). Since this activity is a nuisance, the Department may use any enforcement technique available to it to force the violator to comply, before actual injury takes places. 198. Pa. Stat. tit. 35, § 691.601 (Supp. 1971). The Department may proceed to secure an injunction without going through the process of using the administrative agencies. In Commonwealth ex rel. Shumaker v. New York & Pa. Co., 367 Pa. 40, 79 A.2d 439 (1951), the Supreme Court of Pennsylvania recognized this stating: [W]e think the act itself makes clear that it was never intended to strip from the courts their historic jurisdiction to determine what is a nuisance in fact, and confer that power exclusively upon an administrative agency. Nor can we agree with the proposition asserted by the court below that even in proceeding under the act the Board must first determine the pollution to be harmful or that it must otherwise be shown that the defendant acted contrary to the Board’s requirements before there can be recourse to the courts to enforce its provisions. Id. at 53, 79 A.2d at 446. 199. 367 Pa. at 53, 79 A.2d at 446. 200. Since the failure to comply with an order is a nuisance, Pa. Stat. tit. 35, § 691.610 (Supp. 1971), and the violation of a permit is a nuisance, Pa. Stat. tit. 35, § 691.202 (Supp. 1971), the Department may proceed to enjoin such activity under subsection .601 of the Act. See, e.g., Sanitary Water Bd. v. New Oxford Municipal Authority, 79 Dauph. Co. Rep. 316 (Dauphin County Pa. C.P. 1962).

injunctive relief is clear since an injunction is prospective in nature, thereby giving the Commonwealth the authority to stop the discharge and then proceed to undertake reclamation activities.

Presuming that the Commonwealth could actually establish a nuisance under the Act, the operative question is not the availability of injunctive relief, but rather the proper form of injunctive relief. The Act provides that in cases where there is a danger to the public health a mandatory preliminary injunction may be issued.\footnote{203. PA. Stat. tit. 35, § 691.601(b) (Supp. 1971).} The appropriateness and necessity for such relief is obvious when consideration is given to the need to protect the citizenry from diseases that may be present in the water resulting from municipal sewage disposal or industrial wastes such as mercury or acidic compounds. In all other cases, the court, by decree, will assess what it deems to be a reasonable time within which such nuisance shall be abated.\footnote{204. PA. Stat. tit. 35, § 691.601(a) (Supp. 1971).} Although the latter procedure is appealing because of its equitable nature, it seems to have certain shortcomings when viewed in the context of the total regulatory scheme. The Act, which has been in existence since 1937, has consistently stated that persons "shall not discharge" pollutants into the waters of the Commonwealth. It is clear that all parties are aware of the steps that must be taken to meet the responsibility placed upon them, and there has been ample time to initiate and complete the construction of the facilities necessary to meet the requirements of the Act. Moreover, the propriety of the decree of the court seems to be even more questionable where the party has been under the jurisdiction of the Department of Environmental Resources and an order has been issued to comply with the provisions of the Act or the rules and regulations established thereunder. In this case, a "reasonable time" for the abatement of the problem has been established by the Department, and any further "grace period" that may be given to the party would seem to be contrary to the policy of the Act which indicates the need for immediate and decisive action by all parties. This is not to say that in a case where the party has not been operating under a permit or order or where the condition has just arisen that a decree of the court granting a "reasonable amount of time" would not be appropriate, since this party must be given time. However, when a party has consistently and blatantly violated the Act, additional time would not seem to provide the impetus that would cause the party to take steps toward abatement.

Notwithstanding the form of relief which the court may grant pursuant to the Act, it may enforce orders through its general contempt powers. If the party does not comply with the terms of the decree, the court has the power to compel compliance through a fine in favor of the Commonwealth for civil contempt. In \textit{Commonwealth ex rel. Carlin v. Echo},\footnote{205. 19 Bucks Co. L. Rptr. 110 (Bucks County Pa. C.P. 1969).} the court determined that after an order had been issued pursuant to the abatement power granted to it under the Clean Streams Law,
a willful and intentional violation of such order would constitute civil contempt of court. In reaching this determination, the court reasoned that although an injunction, granted at the request of an agency of the Commonwealth, could be enforced through indirect criminal contempt, to deny the court the power to enforce its decree through civil contempt would be to disarm it of an effective tool through which it can force compliance with its orders. The authority of the courts to enforce their decree through civil contempt is clearly significant since the appropriate fines for civil contempt may greatly exceed the fines that are permissible under criminal contempt. With this fact in mind, it is clear that the courts have an effective tool by which they can enforce their orders and thereby force compliance with the Clean Streams Law.

Under the Act, a public official must institute a cause of action for abatement of a nuisance. This declaration is consistent with the common law rule that only public officials may institute suits for a purely public nuisance since they are the only party that would fully protect the public interest. Accordingly, private individuals do not have standing to institute such a suit. While the Attorney General of the Commonwealth may institute an action pursuant to subsection .601, the court would only be able to use the minor indirect criminal contempt, thereby disarming the court of the power necessary to force compliance. Furthermore, if the court is forced to use criminal contempt, the defendant would be guaranteed the procedural safeguards of notice of charges and the right to a jury trial which are not guaranteed in a civil proceeding. If the foregoing rationale was not applicable to an injunction issued pursuant to subsection .601, the court would only be able to use the minor indirect criminal contempt, thereby disarming the court of the power necessary to force compliance. Furthermore, if the court is forced to use criminal contempt, the defendant would be guaranteed the procedural safeguards of notice of charges and the right to a jury trial which are not guaranteed in a civil proceeding. See United States v. United Mine Workers of America, 330 U.S. 258 (1946); Bata v. Central Penn National Bank, 434 Pa. 284, 249 A.2d 767 (1969).

206. Id. at 114. See also Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336 (1968); Casco Products Corp. v. Hess Brothers, Inc., 184 Pa. Super. 137, 132 A.2d 922 (1957). The distinction between civil and criminal contempt is at times obscure. The feature distinguishing civil contempt from criminal contempt is the purpose of the proceeding before the court. The dominant purpose of the contempt action determines whether it is civil or criminal and it is criminal where the purpose is to protect the dignity of the court; whereas it is civil where the purpose is to require or force compliance with an outstanding court order. See generally Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, 392 Pa. 500, 140 A.2d 814 (1958); Knaus v. Knaus, 387 Pa. 370, 127 A.2d 669 (1956). In the case of a contempt proceeding pursuant to an injunction under subsection .601, it is clear that the action is civil since the purpose is to secure compliance with the order and the defendant can relieve himself of the sanction if the court order is complied with.


In this case the interest of the Commonwealth as a whole, as well as the interest of the residents of Clarion and Butler Counties is involved. There could be no guarantee that private counsel would so conduct the litigation as to protect those interests. The only persons obligated and empowered so to do were, and are, the sworn public officials to whom the right to sue in the name of the Commonwealth is entrusted by the statute under which the proceeding was authorized and instituted.

Id. at 367-68, 106 A.2d at 243. In Shumaker, a private attorney who had formerly represented a sportsmen group attempted to institute an action on behalf of the Commonwealth stating that they were assistant district attorneys. The court found that the precise statutory procedure for the appointment of assistant district attorneys and special assistants to the district attorneys were not complied with and that the pertinent statutes did not authorize their appointment.
wealth is given the primary authority for instituting abatement actions, a district attorney of any county or a solicitor of any municipality may bring such an action after notice has been given to the Attorney General. Moreover, to further streamline public official enforcement, the Act has liberalized venue requirements by providing that the appropriate party may institute an action to enjoin the nuisance in the Commonwealth Court, in the Court of Common Pleas where the activity is taking place, where the condition exists, or where the public is affected. This section takes into consideration the not too infrequent situation where the activity is taking place in one political subdivision of the Commonwealth, but the actual injury is occurring in another, and gives the official a choice of convenient forums.

2. Judicially Imposed Penalties

The Clean Streams Law also provides that any person or municipality who violates the Act, or any rule, regulation, or order pursuant thereto, is guilty of a summary offense. Each day on which such a violation occurs is deemed to be a separate offense which may be prosecuted individually. The proper authorities may institute a summary action before any magistrate, alderman, or justice of the peace in the county where the offense occurs, where the condition is maintained, or where the public is affected. Upon conviction, the party may be fined not less than $100 nor more than $1000. Thus, a single violation of the Act can potentially

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211. Id. The district attorney or municipal solicitor must give the Attorney General notice of their action so that he has the opportunity to exercise his high prerogative to take over control of the case. See also Commonwealth ex rel. Minerd v. Margiotti, 325 Pa. 17, 188 A. 524 (1936); PA. STAT. tit. 35, § 691.601 (Supp. 1971).
212. PA. STAT. tit. 35, § 691.601(a) (Supp. 1971). See Commonwealth v. Ebersole, 59 Lanc. L. Rev. 363 (Lancaster County Pa. C.P. 1965). If the party fails to pay the fine imposed, he may be subject to imprisonment for sixty days.
213. PA. STAT. tit. 35, § 691.602(a) (Supp. 1971). Since the fine under this section is potentially in the amount of $1000, there is some question as to the procedure required to prosecute these offenses. In the case of Duncan v. Louisiana, 391 U.S. 145 (1968), the United States Supreme Court held that the sixth amendment as applied to the states through the fourteenth, requires that a defendant accused of a serious offense be afforded the right to a trial by jury. The court then stated that an offense punishable by a $500 fine or six months in prison was a serious and not a petty offense and the defendant was entitled to a trial by jury. See also Baldwin v. New York, 399 U.S. 66 (1970). Therefore, the penalty under the instant statute would require that the defendant have the right to a trial by jury. This right is provided by statute under Pennsylvania Law, see PA. STAT. tit. 42, § 725 (1966), wherein it is stated that a defendant may upon his own motion request trial by a jury of six. Although, a defendant in a criminal case is normally tried by a jury of twelve persons, the Supreme Court case of Williams v. Florida, 399 U.S. 78 (1970), held that a jury of six men is valid. See generally Rogge, Williams v. Florida: End Of A Theory, 16 VILL. L. REV. 411 (1971). Therefore, it seems that the penalty section of the Act is constitutional in that the defendant does have the right to a trial by jury.

The Clean Streams Law provides that if an appeal from a decision of an alderman, magistrate, or justice of the peace is taken, the district attorney of the County must represent the interest of Commonwealth. For appeal procedures from the decisions of an alderman, justice of the peace, or magistrate, see PA. STAT. tit. 42, § 911 et seq. (1966).
subject the party to a significant monetary loss which could have a deter-
rent effect on the party's pollution causing activities. To further this end,
it is provided that if a similar violation occurs within two years after a
conviction in a summary proceeding, the party is guilty of a misdemeanor
and may be fined not less than $100 nor more than $5000.216

3. Administrative Enforcement Through Civil Penalties

The Clean Streams Law provides that in addition to a proceeding
for an injunction or a criminal penalty in a court of law, the Environ-
mental Hearing Board, after a hearing,217 may assess a civil penalty upon
a violator.218 The penalty assessed for violation, whether or not the con-
duct is willful, may be up to $10,000 plus $500 per day for continued
violations.219 This striking departure from the traditional principles of
judicial process,220 could prove to be potentially one of the most effective
methods of enforcing the Act, although it is quite similar in nature to
criminal penalties. Since agency proceedings are more flexible, the Com-
monwealth would not have to confront the procedural problems that it
must contend with in a criminal proceeding.221 First, since the Board is
an expert in the pollution area, it would seem that much credence would
be attributed to the technical evidence necessary to prove or disprove a
violation. Second, while the Act specifically states that in determining
the amount of the penalty the Department may consider the willfulness
of the violation, the damage or injury to the waters of the Commonwealth,
and the cost of restoration, since the latter two elements are particularly
within the Department's expertise, it would seem that their findings in
this regard would be almost conclusive.222

Although this procedure does not have the same effect as injunctive
relief, i.e., abatement of the pollution, it could be much more effective

216. PA. STAT. tit. 35, § 691.602 (Supp. 1971). The Act further provides that the
party may be subject to imprisonment in the county jail for not more than one year.
Although this punishment could place a stigma on the "crime," it is seldom used in
regulatory offenses. See Kovel, A Case For Civil Penalties: Air Pollution Control,
46 J. URBAN LAW 153 (1969); Watkins, The Electrical Equipment Anti-Trust Cases:
Their Implications for Government and for Business, 29 U. Chi. L. Rev. 97, 100 (1961).

217. A hearing would assure the parties minimum due process requirements, since
the hearing would have to be held in compliance with the terms of the Administrative


219. Id. The Act further provides that all civil fines assessed and not paid, as well
as the interest and costs accrued thereon, shall become a lien in favor of the Com-
monwealth upon the real or personal property of the violator.

220. Although this is a striking departure from traditional practice in Pennsylvania,
its is not an isolated example. It is clear that an administrative agency cannot impose
criminal sanction, see United States v. Louisville & N. R.R., 176 F. 942 (D.C. Ala.
1910); Schwenk, The Administrative Crime, 42 Mich. L. Rev. 51 (1943), however,
they may constitutionally assess and collect civil penalties. See Oceanic Steam Navi-
gation Co. v. Stranahan, 214 U.S. 320 (1908); K. Davis, Administrative Law § 3.11
(1958); Kovel, supra note 216, at 162–64; McKay, Sanction in Motion: The Adminis-

221. See Kovel, supra note 216, at 153–58.

222. It is arguable that past violations of the Act could be admitted into evidence
in this type of proceeding, whereas, this evidence is not admissible in a criminal trial.
than the present criminal sanctions since the amount of the fine can be much greater. One method that might be employed that could have the same effect as injunctive relief is to revise the Act to grant the Environmental Hearing Board the authority to rebate the fine if the violator corrects the condition within a reasonable amount of time as determined by the Board. Although the civil penalties are clearly more appropriate to punish violators, they do not have the built-in coercive element that will force abatement and future control. If the Board were granted the aforementioned power, there would clearly be an incentive for all violators to correct the condition and have their fines returned and, perhaps, employed toward the costs of their pollution control efforts. This approach would also add the element of conciliation to the present procedure, thereby giving the Department the bargaining power necessary to force some polluters to comply with the pollution laws. Moreover, this approach would alleviate the time consuming and costly procedural rules attending injunctive relief. Under the present system, if the Department secures an injunction and the polluter fails to comply within the time specified in the order, the Department must go back into court and ask that the polluter be held in contempt of the order. Furthermore, additional time is wasted if the Department seeks damages since it must go through the cumbersome task of proving that the sanction of civil contempt is appropriate. The suggested system would avoid these procedures since the Department would have the fine from the beginning of the action thus making further proceedings unnecessary in the event that the violator does not comply with the order.

4. Clean Water Fund

The Clean Streams Law provides for the establishment of the Clean Water Fund to be administered by the Department for the express purpose of eliminating pollution. The liquidity of the Fund is provided in two ways. First, all fines collected by a court under the penal section of the Act, and all civil penalties assessed and collected by the Department, go into the fund. Second, the Department may accept payments to the Fund in lieu of requiring a party who is discharging contrary to the terms of the Act to construct a treatment facility. In determining the proper amount of the payment, the Department evaluates the cost of constructing a treatment facility as well as the quantity and quality of the discharge, and the effect the discharge will have on the water if permitted to continue. The Department, pursuant to the rules and regulations of the Environmental Hearing Board may accept such payment only where it determines that: (1) the payments will provide a greater benefit to the

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223. PA. STAT. tit. 35, § 691.8(a) (Supp. 1971).
224. Id. The payment of fines into this Fund could be a valid reason for maintaining the penalty sections of the Act.
225. PA. STAT. tit. 35, § 691.8(b) (Supp. 1971).
Commonwealth; (2) they would more appropriately conform to the policy of the Act than the construction of treatment facilities;\(^{226}\) and (3) the continuation of such a discharge will not affect other treatment programs in the area.\(^{227}\)

The importance of the Clean Water Fund rests in its purpose which is to provide funds for abatement programs, or for the construction of consolidated treatment facilities in an area where a permittee is discharging.\(^{228}\) Under this program, the Commonwealth now has an effective means by which it can commence activities to aid depressed areas. But, even more important, the authority to take payments into the Fund can be used where a number of small industries or municipalities are consolidated in one area and the parties are not able to construct facilities independently. Although the Commonwealth has authority to aid depressed areas under the Land and Water Conservation and Reclamation Act,\(^{229}\) the Clean Water Fund could potentially act as a supplement to any program undertaken pursuant to that Act so that effective pollution control activities may be initiated.

5. Administrative Enforcement Of The Clean Streams Law

a. Withholding Permits

The Department is given the authority to indirectly enforce the Act, and at the same time avoid future violations by withholding a permit to discharge any substance into a watercourse. If the Department finds that the applicant is in violation of the Act or any rule, regulation, or order of the Department and that such violation shows a lack of intention or ability on the part of the applicant to comply with the permit, the Board is vested with the authority to refuse to grant a permit.\(^{230}\) Since the power to withhold a permit is purely a matter of discretion, it is not mandatory that an applicant be denied a permit if he is in fact in violation of the Act. If the Department determines that it is in the best interest of the Commonwealth to withhold a permit it must take steps to inform the applicant of its decision and afford him the opportunity of a hearing. At such hearing the applicant may bring forth evidence to convince the Department of its intention and ability to comply with the terms of the permit. If the Department is convinced, it may issue the permit, notwithstanding the other violations. Thus, the Department, in its discretion, may weigh the evidence to determine if the interest of the Commonwealth

\(^{226}\) PA. STAT. tit. 35, § 691.8(b) (1) (Supp. 1971).
\(^{227}\) PA. STAT. tit. 35, § 691.8(b) (4) (Supp. 1971). The Department is granted the power to impose conditions which the permittee must comply with when payments to the Fund are accepted. This power includes the authority to establish procedures for the cessation of the operation which is of great importance in the area of mine drainage. PA. STAT. tit. 35, § 691.8(b) (3) (Supp. 1971).
\(^{228}\) PA. STAT. tit. 35, § 691.8(b) (5) (Supp. 1971).
\(^{229}\) PA. STAT. tit. 32, § 1501 et seq. (Supp. 1971).
\(^{230}\) PA. STAT. tit. 35, § 691.609 (Supp. 1971).
will be advanced by denying a permit, while at the same time considering the fairness to the applicant.

Before the enactment of this section, the Department was forced to issue a permit, as long as the applicant's plans, if followed, would be satisfactory to avoid the destruction of a waterway.\textsuperscript{231} It was not allowed to take into consideration other violations of the Act which would indicate the applicant's lack of intent to comply with the new permit, or its financial inability to do so.\textsuperscript{232} The Department had to issue the permit even though the chances were very good that when the applicant's operation started, it would result in pollution. Now, however, the Department may consider the other violations and thus make a more informed decision concerning the protection of the waters of the Commonwealth. This new provision can have a two-fold effect. First, if the applicant is aware that the Department can consider the other violations he will be indirectly coerced into complying with other permits that may be issued to him and also with the general provisions of the Act and the rules and regulations. Second, if the Department decides to deny the permit, its decision could add to the total effort toward preventing and controlling pollution since without a permit the party could not carry on the regulated activity. Denial of a permit would have the further effect of preventing many potential pollution-creating activities from ever reaching fruition. This aspect of the new provision could have its greatest impact where the applicant has consistently shown a lack of good faith in complying with the Act.

\textit{b. Enforcement Orders}

The Department may also enforce the Act through the use of enforcement orders, thereby avoiding immediate recourse to the judiciary. If the Department finds that an operation in or on the party's land is causing or creating a danger of pollution, or is violating the Act or any rule or regulation thereunder, it may issue an enforcement order requiring the party to cease its operation or it may modify, suspend or revoke any outstanding permit.\textsuperscript{233} With this broad range of powers the Department can enforce the provisions of the Act effectively and with the rapidity needed to avoid danger to the waters of the Commonwealth. First, the Department has the authority to confront situations which it deems detri-

\textsuperscript{231} See Sanitary Water Bd. v. Sunbeam Coal Corp., 91 Dauph. Co. Rptr. 70 (Dauphin County Pa. C.P. 1969). In \textit{Sunbeam}, the court ruled that the Sanitary Water Board could not deny an applicant a coal mining permit on the basis that it was in violation of prior permits. The court stated that the Board's powers were limited to a review of the drainage plans of an applicant and instituting criminal proceedings, and it was not within its authority to deny a permit if the applicant's plans for the operation of the mine in question were adequate to control pollution. This view was fortified by the reasoning that to hold otherwise would make the mine operator an insurer of pure water in the area for all time. In response to this type of analysis the legislature passed subsection .609. It is now clear that past violations of the Act may be considered, thereby giving the Department a great deal of discretion in determining if the permit should be issued.

\textsuperscript{232} Id.

mental to the purity of the waters which are not specifically covered by the terms of the Act. Second, if the party is violating the Act or a rule, regulation or order promulgated thereunder, the Department can issue an enforcement order to compel the party to comply with the Act or rule without going through judicial channels.

The Department's power to issue such enforcement orders is only limited if the order affects an operation not directly related to the violation. In this situation the Department can only issue an order if it is determined that the other enforcement provisions, i.e., injunctions or penalties, are not adequate to control the situation. Therefore, an order of this nature can only be issued if there is an immediate threat of pollution and the other remedies would take too long to secure, or, as in the case of penalties, other remedies will not cure the problem.

If an enforcement order is issued the party has a right to appeal to the Hearing Board. During the appeal, however, the order remains effective on notice and until a final hearing unless the Board determines that the appeal will act to stay the order. This provision is of particular importance since if the appeal did act to stay the enforcement order the effectiveness of the order would be severely limited.

6. Other Means to Abate Pollution

The Clean Streams Law makes it clear that the Commonwealth is not estopped from proceeding to abate the pollution of a watercourse under any other existing authority for the abatement of a nuisance. Thus, proceeding under the Act is not the exclusive means by which pollution may be abated or the polluter punished. An agent of the Commonwealth may therefore proceed to abate pollution under the traditional approach of common law public nuisance. In the case of Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co., the Pennsylvania Supreme Court made it clear that the courts have jurisdiction over such...
a cause of action and a public official could proceed to abate a nuisance without relying on the Clean Streams Law or waiting for the Department to take action. This holding was deemed to be in the public interest because of the grave menace to health, welfare and comfort of the public arising from the corruption of waters. Thus, the Clean Streams Law does not restrict the common law right to abate pollution through the action of a public official or a private individual suing under the private nuisance theory.

The Act also makes it clear that the terms for the abatement of a nuisance in no way abridge or alter the propriety of attacking pollution under the other statutes. Hence, the Commonwealth can proceed to abate water pollution from the disposal of solid waste under the Solid Waste Management Act. Furthermore, a public official could abate a nuisance under the public nuisance section of the Penal Code. Alternatively, the Commonwealth may also proceed to attack pollution under the Fish Law.

Of all the alternative remedies available, proceeding under the Fish Law may be the most significant. Beside providing for a fine, this statute gives the Commonwealth the option of instituting a civil suit to collect damages assessible for the loss of aquatic life whether or not the acts of the polluter were willful. Under this statute, the Commonwealth could proceed to seek compensation for the actual money damage suffered as a result of the loss of aquatic life, whereas, under the other alternative remedies it is limited to fines. Thus, if the watercourse is to be reclaimed, it can be done at the expense of the party who caused the damage.

V. Proposals

While the preceding has attempted to analyze the Commonwealth's pollution control laws with a critical eye, it is submitted that two glaring

238. Id. at 53, 79 A.2d at 446.
240. 367 Pa. 52, 79 A.2d 446.
243. PA. STAT. tit. 35, § 6001 et seq. (Supp. 1971). Under this act storage and disposal of garbage and other discarded material is controlled on the private and municipal level. The disposal of solid waste material presents a grave danger to the purity of a watercourse because of the impurity that may discharge from a disposal area. The Act prohibits the dumping of any solid waste on the surface of the ground, into the waters of the Commonwealth, or disposing of solid wastes by dumping the same into mines without a permit. A violation of the Act subjects the violator to a fine of not more than $300 if he is found guilty in a summary proceeding.
244. PA. STAT. tit. 18, § 4612 (1963). This section states that anyone who establishes, maintains or continues a public or common nuisance is guilty of a misdemeanor and may be fined up to $500. If the nuisance is in existence at the time of the suit, the court may order it abated.
246. PA. STAT. tit. 30, § 202 (Supp. 1971). The polluter may be fined not less than $100 nor more than $1000 upon conviction as provided by law. See PA. STAT. tit. 30, § 270 et seq. (Supp. 1971).

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inadequacies exist which necessitate legislative correction at the earliest opportunity to insure an effective pollution control program.

A. Judicially Imposed Civil Fines

The use of penal sanctions as a deterrent to air pollution is of questionable value. In the first place penal sanctions do not prevent future pollution, they only punish past activities. It is doubtful whether the penal sanction will ever be employed to incarcerate a polluter.248 Furthermore, as one commentator has pointed out, the imposition of the small fines provided for under the pollution control Acts "can only increase the cost of production — a special service charge that may be cheaper than the cost of pollution control for the offender."249

The civil penalty approach offers several distinct advantages over criminal penal sanctions. First, the specific pleading and strict venue requirements attending criminal proceedings make civil proceedings much more flexible.250 Moreover, under the civil penalty approach the traditional delaying tactics such as failure of the defendant to appear would no longer stop the judicial process since in a civil proceeding it is not necessary that the defendant be present.251 Furthermore, the Commonwealth would not have to produce its witness, since depositions of the inspectors would be admissible to prove the case.252 It is suggested, therefore, that this approach be adopted to add the necessary flexibility to the enforcement machinery. Penal sanctions might very well remain along with a civil fine in the event there should be flagrant contempt for the regulatory scheme. If this should occur, the stigma of criminality would be well deserved. This is not to unqualifiedly state that conviction for a misdemeanor will have no deterrent effect. However, while unfavorable publicity may cause some violators to comply with the law, it is submitted that those industries which do not come into direct contact with the public, as for example the steel industry, will not suffer from a newspaper account citing the company for a pollution violation.

248. Research has failed to discover a single case in which a polluter was incarcerated for violations of the Commonwealth's air pollution laws. Furthermore, analogy to the Federal Anti-Trust Laws, 15 U.S.C. § 1 et seq. (1964), which also provide for penal sanctions, shows the frequency with which such sanctions have been employed. The simple fact is that penal sanctions have hardly ever been used to deter "white collar" crimes, of which air pollution can now be included. See generally Watkins, Electrical Equipment Antitrust Cases — Their Implications for Government and for Business, 29 U. CHI. L. REv. 97 (1961) ; Koval, note 216 supra.


250. See generally Comment, supra note 249.

251. See Koval, supra note 216, at 157. This is not to suggest that these fines should always be issued ex parte since, as a matter of fundamental fairness, the defendant should always be given the opportunity to be heard. The fact that the defendant does not have to be present, however, could prove very useful especially where there are habitual violators who use their failure to appear as a delaying technique.

252. The defendant is not being deprive of his sixth amendment rights since the judgment does not involve the personal safety of the defendant, thus the witness is not one against the accused in the criminal sense. See Cafeteria & Restaurant Workers Union v. McElrey, 367 U.S. 886 (1961) ; United States v. Zucker, 161 U.S. 475 (1896).
A second argument against penal sanctions is the fact that the criminal law process is unnecessarily cumbersome thus permitting many violators to go free without any progress being made towards curing the pollution problem. Although some type of sanction is necessary for the enforcement of the pollution control laws, the penal sanction does not seem to be the most appropriate one to further the goals of the Acts. The use of civil fines, however, which are indistinguishable in force, could prove to be an effective tool for pollution control.

B. Private Remedies

Enforcement of the Air Pollution Control Act and the Clean Streams Law is exclusively within the purview of the state agency. Although a private individual can bring to the attention of the Department a possible violation of the pollution laws, he cannot himself bring a private suit to enforce the same. Therefore, a private party's only recourse to relief from air or water pollution is in the initiation of a private nuisance action. One of the disadvantages of not permitting private parties to institute actions under the Commonwealth's pollution control laws rests with the difficulties inherent in the private nuisance action. Moreover, should the private party's complaint allege injury resulting from a public nuisance, before he can secure relief for such injury he must show that the injury is special or peculiar to him and is not shared by the entire public. Because of the wide proliferation of air and water pollution, this may prove to be very difficult.

The State of Michigan recently passed legislation permitting a private individual to maintain an action under the state's pollution control laws. Legislation of this type is beneficial since it permits action against polluters, who, because of agency understaffing, or an agency determination that such pollution is too insignificant to warrant official attention, would necessarily remain unchallenged. Furthermore, the realities of political pressure should not be underestimated. Whereas agency action could conceivably be halted because of political partisanship, citizen suits would not discriminate when prosecuting a polluter.

254. The Air Pollution Control Act, PA. STAT. tit. 35, § 4012.1 (Supp. 1971), preserves private nuisance actions and remedies although the same also constitute "air pollution." In Brookhaven v. American Rendering, Inc., 434 Pa. 290, 256 A.2d 626 (1969), the Supreme Court of Pennsylvania replied to the argument raised by the defense that the Air Pollution Control Act pre-empted private nuisance actions by stating: "[i]t is now clear that equity jurisdiction attaches to restrain a public or private nuisance caused by air pollution." Id. at 292, 256 A.2d at 627.
256. Id. at 929. See also Comment, Equity and the Eco-System: Can Injunctions Clear the Air, 68 MICH. L. REV. 1254 (1970).
Identical legislation has recently been introduced in the Pennsylvania General Assembly. It would authorize citizen suits in the name of the Commonwealth against the state, any instrumentality or agency of the state, political subdivision, person, partnership or corporation for "the protection of the air, water and other natural resources of the State from pollution, impairment or destruction or for the protection of the public trust in the natural resources of the State." The proposed bill authorizes the courts to grant temporary and permanent equitable relief or impose conditions on the defendant which will insure protection of the air and water from pollution.

A question arises whether a citizen can compel an administrative official to institute proceedings against an alleged polluter under the pollution control laws, other state statutes, or a current court doctrine. It seems quite clear that no such right exists under the air or water pollution control acts since they are silent on this point. The recent federal air pollution law, however, squarely focuses upon this question by expressly providing a citizen with the power to compel an official to perform a "duty" under the pollution law.

One theory which has been forwarded to uphold such action, in the absence of specific language in the acts, is premised upon the public trust doctrine. In essence, this theory argues that certain environmental rights are held in common by the public and since the government is the trustee of this public interest, it is its duty to uphold that interest in good faith. One approach to insure compliance with this duty would be to permit private citizens to maintain mandamus actions against administrative officials to compel them to perform their statutory duty to initiate actions against polluters. The difficulty inherent in such actions is the traditional rule that mandamus will issue only to compel administrative action that is ministerial and not discretionary. However, the doctrine has been effectively employed in the pollution area in at least one instance, and its use could be expanded.

259. H.R. 400, § 2 (1971 Sess.).
260. H.R. 400, § 5(a) (1971 Sess.).
262. Id.
263. The Pennsylvania Air Pollution Control Act states:
   (3) Receive and initiate complaints of air pollution...
   (4.1) Issue orders to any person causing air pollution...
   (7) Institute prosecutions under this act.
VI. Conclusion

In conclusion, it seems clear that the Commonwealth of Pennsylvania has an adequate legislative foundation from which effective work can be done to effectuate the abatement and prevention of present and future air and water pollution. There is, however, a crucial problem remaining in the area of pollution control and adequate legislation is only the first step in creating a unified effort by the Commonwealth, municipalities, industries, and landowners toward attaining the ultimate goal of clean air and water. The Commonwealth must proceed to implement every phase of the Air Pollution Control Act and the Clean Streams Law immediately, while the other parties make every effort to "voluntarily" comply with their terms. If this unified attempt is carried forward to meet the challenge, perhaps the goal of pollution-free air and water may be achieved.

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