

APPENDIX Q:

PADEP Administrative Order (2006)



Pennsylvania Department of Environmental Protection

2 Public Square
Wilkes-Barre, PA 18711-0790
September 20, 2006

Northeast Regional Office

570-826-2511
Fax 570-830-3016

CERTIFIED MAIL NO. 7005 1160 0001 3021 7646

Bear Creek Township Board of Supervisors
3333 Bear Creek Boulevard
Wilkes-Barre, PA 18702

Re: Sewage
Act 537 Planning
Bear Creek Township, Luzerne County

Dear Supervisors:

Enclosed is an Order issued by the Pennsylvania Department of Environmental Protection pursuant to the provisions of the Pennsylvania Clean Streams Law and the Sewage Facilities Act, as amended. Failure to comply with this Order may subject you to the penalty provisions of these statutes.

Sincerely,

Kate Crowley
Water Program Manager
Water Management Program

Enclosure

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In The Matter Of:

| | |
|--|--|
| Bear Creek Township Board of Supervisors | : Violations of the Sewage Facilities |
| 3333 Bear Creek Boulevard | : Act, Clean Streams Law and the rules |
| Wilkes-Barre, PA 18702 | : and regulations promulgated thereunder |

ORDER

NOW this 20th day of September 2006, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") has found and determined the following:

A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a ("Sewage Facilities Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 *et seq.* ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code") and the rules and regulations promulgated thereunder.

B. Bear Creek Township is a legally incorporated township of the second class in the Commonwealth of Pennsylvania located in Luzerne County and doing business at 3333 Bear Creek Boulevard, Wilkes-Barre, PA 18702. Bear Creek Township is a "municipality" within the statutory definition at Section 2 of the Sewage Facilities Act, 35 P.S. § 750.2, and Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

C. The legislature has declared through the Sewage Facilities Act, 35 P.S. § 750.3, the policy of the Commonwealth "[t]o protect the public health, safety and welfare of its citizens through the development and implementation of plans for the sanitary disposal of sewage waste."

D. The Sewage Facilities Act requires that "[e]ach municipality shall submit to the Department an officially adopted plan for sewage services for areas within its jurisdiction . . . and shall from time-to-time submit revisions of such plans as may be required by rules and regulations . . . or by order of the Department." 35 P.S. § 750.5(a)

E. Section 71.12 of the Sewage Facilities Planning Program Regulations at Chapter 71 of the Pennsylvania Code, 25 Pa. Code § 71.12, requires municipalities to "review and revise their official plans whenever the municipality or the Department determines that the plan is inadequate to meet the existing or future sewage disposal needs of the municipality or a portion thereof."

F. On August 30, 1973, Bear Creek Township adopted Sewer Section of the Master Plan for Water Supply and Waste Water Management as prepared by the Luzerne County Planning Commission (1973 Master Plan).

G. The 1973 Master Plan recommended central sewers be installed in the Llewellyn Corners, Forest Park and Trailwood areas of Bear Creek Township.

H. On September 1, 1987, the Department issued an order to Bear Creek Township to submit a plan which addresses the total sewage needs documented in the Township in accordance with the requirements of the Pennsylvania Sewage Facilities Act.

I. Bear Creek Township appealed the Department's September 1, 1987 Order to the Pennsylvania Environmental Hearing Board ("EHB").

J. On November 19, 1990, the EHB issued an adjudication concerning Bear Creek Township's appeal of the Department's September 1, 1987 Order. The EHB affirmed the Department's September 1, 1987 Order. The Board determined that the order was justified in light of the evidence showing the widespread malfunctioning of on-lot septic systems in the Township which is causing the release of untreated or partially treated sewage to the environment. A true and correct copy of the Board's Adjudication is attached hereto as Exhibit A and is incorporated here and by reference as fully set forth.

K. On January 16, 1991, representatives of the Department met with officials of Bear Creek Township. During this meeting, the Township's representatives committed to expeditiously comply with the Department's Order by formally submitting an Official Sewage Facilities Plan which adequately addresses the sewage needs of the Township.

L. On August 13, 1991, the Department received a draft Sewage Facilities Plan from Bear Creek Township dated August 1991. The August 1991 Sewage Facilities Plan was not adopted by Bear Creek Township.

M. On November 12, 1991, the Department sent a letter to Bear Creek Township indicating that the August 1991 Sewage Facilities Plan suffers from several major deficiencies including the fact that it was not adopted by a resolution of Bear Creek Township.

N. On April 20, 2000, a representative of the Department observed numerous raw sewage discharges to drainage ditches throughout the Forest Park and Forest Park East areas of Bear Creek Township.

O. On May 9, 2000, the Department received a complaint from a resident of Bear Creek Township that a culvert in the vicinity of her residence was contaminated with sewage.

P. On May 9, 2000, the Department issued a letter to the Bear Creek Township Board of Supervisors indicating that Bear Creek Township continues to be in violation of the Department's final September 1, 1987 Order requiring the Township to submit an adopted Sewage Facilities Plan that addresses all sewage needs in the Township.

Q. On June 23, 2000, representatives of the Department met with officials from Bear Creek Township. At this meeting, the Department discussed Bear Creek Township's obligations to adopt and implement an Official Sewage Facilities Plan that addresses sewage needs within their jurisdiction. At the meeting, the Township representatives agreed to pursue professional assistance in preparing an update to their Official Sewage Facilities Plan. Also, the representatives of the Township agreed to complete a draft of the Plan Update Revision by October 1, 2000.

R. On June 29, 2000, the Department sent a letter to Bear Creek Township as a follow-up to the June 23, 2000 meeting. The letter indicated that the Township would secure professional assistance in preparing an update revision to its Official Sewage Facilities Plan and to prepare a draft of the plan by October 1, 2000.

S. On August 14, 2000, the Department sent a letter to Bear Creek Township confirming the representations of the Township's SEO that many of the existing malfunctions septic systems in the Township cannot be repaired using sewage renovation on-lot technology.

T. In late November of 2000, the Department received a draft Task Activity Report from Bear Creek Township concerning a potential revision to the Township's Official Sewage Facilities Plan. The draft Task Activity Report contemplated addressing existing sewage facilities needs by a sewage management program.

U. On January 10, 2001, the Department sent a letter to Bear Creek Township in response to the November 2000 draft Task Activity Report indicating that the Township should conduct a more detailed need survey to determine if a sewage management program alone would be sufficient to adequately address the Township's sewage system malfunctions.

V. On February 21, 2001, representatives of the Department met with representatives of Bear Creek Township concerning the Township's ongoing obligation to develop and implement an Official Sewage Facilities Plan that addresses identified sewage needs within its jurisdiction. At this meeting, the Township agreed to conduct a sewage disposal needs identification study for the entire Township. The Township represented that the sewage analysis survey would begin as soon as weather conditions allow in the Spring of 2001.

W. On February 21, 2001, the Department sent a letter to Bear Creek Township concerning the February 21, 2001 meeting and the Township's commitment to conduct a sewage analysis survey for the entire Township in the Spring of 2001.

X. On June 21, 2001, the Department received a draft Task Activity Report from Bear Creek Township concerning a planned sewage facilities plan update. The draft Task Activity Report indicated that the planning efforts were in furtherance of the Township's preparation of an on-lot sewage facilities management plan to address the documented sewage needs in its jurisdiction.

Y. On June 22, 2001, the Department sent a letter to Bear Creek Township indicating that the Department has concerns whether an on-lot management program would be adequate to address Bear Creek Township's sewage facilities needs. The letter further indicated that an on-lot management program would need to be determined to be adequate to address the needs which are identified by the Township's planned Sewage Needs Survey.

Z. On November 15, 2001, the Department received a letter from Bear Creek Township's consultant indicating that the Sewage Needs Surveys will begin in early Spring 2002 despite the fact the Township previously represented to the Department that such study would be completed in Spring of 2001. The letter further indicates that the Township expects to have a draft Sewage Needs Analysis Study completed for submission to the Department by late Spring or early Summer of 2002.

AA. On April 2, 2002, the Department received a letter from Bear Creek Township's consultant indicating that they are beginning to collect the on-lot sewage disposal data associated with the Sewage Needs Survey and anticipated this process to take approximately six to eight weeks to complete.

BB. On October 4, 2002, the Department received a Sewage Needs Analysis Report from Bear Creek Township. The report indicated that the sewage surveys completed in the study area show a high potential for on-lot sewage system malfunctions in the study area. Also, the study area of Forest Park, Trailwood and Country Club Estates was determined to have 56% of the surveyed households to have a confirmed malfunctioning on-lot sewage treatment system. The report further stated that almost 80% of the homes in this study area had either confirmed or suspected malfunctioning on-lot sewage disposal systems.

CC. On February 12, 2003, representatives of the Department met with representatives of Bear Creek Township to discuss the Township's Sewage Needs Study. At the meeting, Bear Creek Township represented that a Task Activity Report that addresses alternatives to correct the documented malfunctioning on-lot sewage treatment systems in the study area shall be submitted to the Department no later than April 15, 2003.

DD. On February 19, 2003, the Department sent a letter to Bear Creek Township as a follow-up to the February 12, 2003 meeting with representatives of Bear Creek Township. The letter indicated that Bear Creek Township shall submit a Task Activity Report that addresses all alternative measures to correct the documented malfunctioning on-lot sewage systems by April 15, 2003.

EE. On May 5, 2003, the Department received an initial Sewage Disposal Alternatives Evaluation submitted by Bear Creek Township. The alternatives identified in the study included central sewage collection in various configurations of treatment at both new and existing facilities and the potential for implementation of an on-lot management program.

FF. On July 9, 2003, representatives of the Department met with representatives of Bear Creek Township to discuss the May 2003 Initial Sewage Disposal Alternatives Evaluation and the Township's responsibility to adopt and implement a revision to its Official Sewage Facilities Plan to address identified sewage disposal needs within its jurisdiction. At the meeting, the Township committed to submit a modified final Task Activity Report within 30 days from the date of the meeting. This final Task Activity Report is to explain how existing on-lot malfunctions will be evaluated for potential repair, and the Task Activity Report is to identify the date for the submission of an adopted update revision by the Township.

GG. On August 8, 2003, the Department sent a letter to Bear Creek Township summarizing the key points discussed during the July 9, 2003 meeting between representatives of the Department and Bear Creek Township. In the letter, the Department expresses its strong reservations concerning the Township's plan to develop an on-lot management program. The Department believes this approach will not provide a reliable long-term solution due to the high percentage of confirmed malfunctions and the physical limitations where the malfunctions have been documented due to poor soil conditions and small lot sizes. In order to demonstrate that such an alternative will address the Township's sewage needs, the Department indicated that the sewage needs assessments in the Township to-date through surveys are not adequate to identify all of the malfunctions that would need to be addressed through an on-lot management program. Further, the Department indicated that all confirmed malfunctions need to be assessed in order to determine that on-lot replacement or repair is feasible.

HH. On August 28, 2003, the Department received a letter from the Township's consultant along with a Task Activity Report. The letter indicated that it was the Township's intention to investigate and test 46 on-lot systems that have been determined to be confirmed malfunctions in order to determine whether a repair replacement of the on-lot system is feasible.

II. On October 15, 2003, the Department sent a letter to Bear Creek Township indicating that the draft Task Activity Report received by the Department on August 28, 2003 is acceptable as an initial approach to evaluating alternatives for resolving the sewage needs in Bear Creek Township. However, the Department's letter acknowledged that additional study may be necessary to determine that an on-lot sewage management/repair alternative is feasible. Again, in

its correspondence, the Department stated that it has strong reservations that an on-lot sewage management/repair alternative will not provide a reliable long-term solution because of the high percentage of confirmed malfunctions and physical limitations such as poor soils, high groundwater and small lot sizes in the identified problem areas.

JJ. On November 17, 2003, the Department received a final Task Activity Report from Bear Creek Township concerning the Township's study of the feasibility of an on-lot management/repair plan.

KK. On December 10, 2003, representatives of the Department met with representatives of Bear Creek Township to discuss Phase I and Phase II of the Township's on-site sewage analysis as described in its November 17, 2003 Task Activity Report. At the meeting, the parties agreed that an independent soil scientist chosen and hired by Bear Creek Township would assist in at least Phase I of the on-site sewage analysis. The Department again expressed its reservations that an on-lot sewage management/repair alternative may not be feasible to address the Township's sewage facilities needs. Also at the meeting, the Township and the Department agreed to an implementation schedule so that Phase I of the study would begin May 31, 2004 and end by August 1, 2004. The schedule further contemplated that a final Act 537 Plan Update will be completed and submitted to the Department by February 1, 2005.

LL. On December 22, 2003, the Department sent a letter to Bear Creek Township as a follow-up to the December 10, 2003 meeting with representatives of Bear Creek Township. In its letter, the Department again stated its strong reservations that Bear Creek Township's on-lot sewage management/repair alternative will not be a viable solution to the Township's sewage treatment needs due to the high percentage of confirmed malfunctions and physical limitations on individual lots. The Department's letter also recounted the agreed-to schedule for conducting additional fieldwork in the preparation of an update revision to the Township's Act 537 Sewage Facilities Plan.

MM. On January 2, 2004, the Department received a letter from the Township's engineer that indicated that the Township will provide an amended Task Activity Report to account for the Township's soil scientist that shall be used in the study to determine the viability of repairing or replacing existing malfunctioning on-lot sewage treatment systems.

NN. On March 5, 2004, the Department sent a letter to Bear Creek Township indicating that as of that date it has not received the amended Task Activity Report that was requested in the Department's December 22, 2003 correspondence. The letter requested that an amended and signed Task Activity Report be submitted to the Department within 15 days of the receipt of the letter.

OO. On March 22, 2004, the Department received a letter from Bear Creek Township's consultant indicating that the amended Task Activity Report will be signed by the Township on April 5, 2004. The letter further indicated that "[t]he work on the project will continue without delay according to the original schedule as per the December 10, 2003 meeting with the Department."

PP. On June 30, 2004, the Department received a request from Bear Creek Township's consultant for draft wastewater treatment plant effluent discharge limits to be used in the planning estimates for Bear Creek Township's Official Sewage Facilities Plan Update Revision.

QQ. On September 9, 2004, the Department sent a letter to Bear Creek Township indicating that it still has not received an amended, signed Task Activity Report that it had originally requested on December 22, 2003. The Department's letter requested that the amended Task Activity Report be submitted to the Department within 15 days from receipt of the letter.

RR. On September 15, 2004, the Department sent a letter to Bear Creek Township's consultant indicating that their June 29, 2004 request for preliminary effluence limits at six different locations is unreasonable and the scope of the request should be narrowed.

SS. On September 28, 2004, the Department received a letter from Bear Creek Township's solicitor. This letter indicated that the Township will not hire a soil scientist to conduct soil testing on lots with documented malfunctions despite the Department's request to do so during the December 10, 2003 meeting which was also followed-up through correspondence.

TT. On October 29, 2004, the Department provided proposed effluent limits in response to Bear Creek Township's September 21, 2004 request.

UU. On November 3, 2004, the Department received a letter from the solicitor of Bear Creek asking whether it is necessary that the Township secure a soil scientist to evaluate the ability of existing documented malfunctioning on-lot sewage systems to be corrected through repair or replacement.

VV. On December 17, 2004, the Department sent a letter in response to the Township's September 24, 2004 and November 1, 2004 correspondence. The Department indicated that a soil scientist is necessary to evaluate the Township's designed alternative of addressing existing malfunctions of on-lot sewage systems through repair and replacement of those systems because several of the possible alternate on-lot systems that can be sited on properties with poor soils and seasonal high groundwater tables require a soil morphological analysis in accordance with the Department's alternate systems guidance. The Department requested a modified Task Activity Report be submitted to the Department by no later than January 20, 2005 concerning the use of a soil scientist. The Department's letter also indicated

that the Township's desired sewer treatment alternative does not appear viable given the Department's experience with similar problems in similarly situated municipalities.

WW. On January 18, 2005, the Department received a draft revision to Bear Creek Township's Official Sewage Facilities Plan for comment.

XX. On May 20, 2005, the Department sent a letter to Bear Creek Township indicating that the Department believes the draft plan submitted by the Township on January 18, 2005 is deficient in that it does not address the concerns previously raised by the Department through correspondence and in-person meetings. The Department indicated that the draft plan does not demonstrate that the chosen alternative to repair or replace malfunctioning on-lot systems is viable because no fieldwork and soils analysis has been completed. The letter further requests the Township to meet with Department representatives on June 9, 2005.

YY. On June 9, 2005, representatives of the Department met with representatives of Bear Creek Township to discuss the status of the Township's revision to its Official Sewage Facilities Plan. During this meeting, the Department expressed its disappointment that as of yet, the Township has not completed the first phase of study, which it had promised to do. Also during this meeting, the Department reiterated its concern that a soil scientist was necessary to conduct the contemplated evaluation.

ZZ. On September 19, 2005, the Department received a letter that as of that date the Bear Creek Township Sewage Enforcement Officer had not completed the review of the Forest Park area to confirm whether any malfunctioning systems can be corrected.

AAA. On November 16, 2005, the Department received a resolution of Bear Creek Township indicating that it shall continue to review existing malfunctioning sewage systems to identify those that could be repaired. The resolution further indicated that a progress report shall be submitted to the Department on or about December 15, 2005. As of this date, the Department has received no such progress report.

BBB. On June 1, 2006, the Department sent a letter to Bear Creek Township concerning recent communication from the Township's Sewage Enforcement Officer. The Department's letter expressed its disappointment with the Township's failure to make meaningful progress towards the adoption of an update to its Official Sewage Facilities Plan. Again, the Department expressed its doubts of the efficacy of the Township's contemplated on-lot sewage management/repair program.

CCC. "Municipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems, provide for the future sewage needs of new land development and provide for the future sewage disposal needs of the municipality." 25 Pa. Code § 71.11.

DDD. A municipality is required to implement its adopted Official Sewage Facilities Plan. 25 Pa. Code § 71.31.

EEE. The corporate authorities of a municipality upon whom an order is issued pursuant to Section 203 of the Clean Streams Law are required to proceed diligently in compliance with the Department's Order. 35 P.S. § 691.210.

FFF. Bear Creek Township has failed to comply with the Department's September 1, 1987 Order in violation of Section 610 of the Clean Streams Law. 35 P.S. § 691.610, and 25 Pa. Code §§ 71.11 and 71.12.

GGG. Violation of the Department's September 1, 1987 order constitutes a nuisance. 35 P.S. §§ 691.503, 691.610.

HHH. Bear Creek Township's failure to comply with the Department's September 1, 1987 order is unlawful. 35 P.S. § 691.611.

III. Bear Creek Township has failed to develop, adopt, and implement an Official Sewage Facilities Plan in accordance with Section 5 of the Sewage Facilities Act, 35 P.S. § 750.5, and 25 Pa. Code §§ 71.11, 71.12 and 71.31.

NOW THEREFORE, the Department, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Sections 4, 5, 203, and 610 of the Clean Streams Law, 35 P.S. §§ 691.4, 691.5, 691.203, and 691.610; and Section 1917-A of the Administrative Code, 71 P.S. § 510.17, hereby Orders that:

1. Within 120 days from the date of this Order, Bear Creek Township shall submit for Department review and approval an Official Plan Update Revision to the Township's Official Sewage Facilities Plan to address the need for sewage treatment facilities in its jurisdiction.

2. An update revision submitted pursuant to Paragraph 1, above, shall comply fully with the sewage planning requirements contained in Sections 71.21 and 71.31 of the Department's rules and regulations, 25 Pa. Code §§ 71.21 and 71.31. Bear Creek Township shall adopt a sewage facilities alternative that provides for the sewage treatment needs in the Llewellyn Corners, Forest Park, Trailwood and Country Club Estates areas by installation of a central sewage collection system. The update revision shall include a present-worth cost effectiveness analysis for all alternatives considered in the plan revision. If Bear Creek Township's chosen alternative contemplates a negotiation of a service agreement with another municipality, Bear Creek Township shall negotiate any such agreement in good faith. The schedule of implementation contained in the Official Plan Revision shall include, but not be limited to, an identification of the dates by which the following tasks shall be completed:

- a. submission of an NPDES Permit Application if applicable;
- b. submission of a Water Quality Management Part II Permit Application;
- c. submission of project funding applications;
- d. advertising for project bids;
- e. awarding of all necessary construction contracts;
- f. initiation of construction of the project;
- g. completion of construction of the project.

3. The schedule of implementation shall provide for a completion of construction and initiation of operation of the project by no later than September 30, 2009. Schedule of implementation shall identify dates that are reasonable to effectuate the September 30, 2009 operation date.

4. Bear Creek Township shall implement the Official Plan Revision as approved by the Department and in accordance with the schedule of implementation submitted pursuant to paragraphs 1 through 3 above.

5. Bear Creek Township shall submit written progress reports to the Department on a quarterly basis. The reports are due on or before the 15th day of the month following the end of the quarter. The first progress report is due on or before January 15, 2007.

6. All correspondence with the Department concerning this Order shall be addressed to: Kate Crowley, Program Manager, Water Management Program, Commonwealth of Pennsylvania, Department of Environmental Protection, 2 Public Square, Wilkes-Barre, PA 18711-0790, telephone number (570) 826-2511, fax number (570) 830-3016.

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A, to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, 717-787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, 800-654-5984. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also available in Braille or on audiotape from the Secretary to the Board at 717-787-3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST REACH THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD.

IMPORTANT LEGAL RIGHTS ARE AT STAKE, HOWEVER, SO YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. IF YOU CANNOT AFFORD A LAWYER, YOU MAY QUALIFY FOR FREE PRO BONO REPRESENTATION. CALL THE SECRETARY TO THE BOARD (717-787-3483) FOR MORE INFORMATION.

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:



Kate Crowley

Program Manager

Water Management Program



COMMONWEALTH OF PENNSYLVANIA
 ENVIRONMENTAL HEARING BOARD
 101 SOUTH SECOND STREET
 SUITES THREEFIVE
 HARRISBURG, PA 17101-0105
 717-787-3483
 TELECOPIER 717-783-4738

[Handwritten signatures and initials]

M. DIANE SMITH
 SECRETARY TO THE BOARD

RECEIVED
 NOV 20 1990
 OF CHIEF COUNSEL
 EAST REGION

BEAR CREEK TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 87-428-F

Issued: November 19, 1990

ADJUDICATION

By Terrance J. Fitzpatrick, Member

Synopsis

An order of the Department of Environmental Resources requiring a Township to file an adequate plan for disposing of sewage in the Township is affirmed. The order was justified in light of evidence showing the widespread malfunctioning of on-lot septic systems in the Township, which is causing the release of untreated or partially treated sewage to the environment. In addition, a letter from the Township to DER will not be considered a sewage facilities plan where it does not meet the form requirements set by statute and regulation.

INTRODUCTION

This Adjudication involves an appeal by Bear Creek Township (Bear Creek), Luzerne County, from an order of the Department of Environmental Resources (DER) dated September 1, 1987. In the order in question, DER directed Bear Creek to submit "an adequate 201 Facilities Plan which addresses the total sewage needs documented in the Township."

The sewage needs of Bear Creek's residents are currently met, or attempted to be met, through individual, on-lot, septic systems. Bear Creek asserts in this proceeding that DER has not shown a need for a revised plan for providing sewage services in the Township. Alternatively, Bear Creek asserts that it did submit an adequate plan in July, 1986 when it sent a letter to DER proposing to up-grade the individual on-lot systems. DER, on the other hand, asserts that the present plan is inadequate to meet the sewage needs of Bear Creek. DER also contends that the July 2, 1986 letter failed to meet the form requirements for a plan, and, furthermore, was inadequate to meet Bear Creek's sewage needs.

A hearing on the merits was held on June 12, 1989. DER presented testimony from three witnesses, Bear Creek from two. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellant in this proceeding is Bear Creek Township, a second class township located in Luzerne County, Pennsylvania.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency authorized to administer and enforce the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §750.1 et seq.; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the regulations promulgated under the above statutes.

3. On August 30, 1973, the Township adopted an official sewage facilities plan - this plan was part of the sewer section of the "master plan for water supply and waste water management" prepared by the Luzerne County

Planning Commission. (Stipulation No. 4 - "Stip. 4")

4. The official plan called for construction during the period of 1974 to 1977 of central sewers in portions of the Township known as Llewellyn Corners, Forest Park, and Trailwood, with conveyance of the sewage to the Wyoming Valley Sanitary Authority Sewage Treatment Plant. (Stip. 5)

5. On December 6, 1973, DER gave "qualified" approval to the plan. The Township was required to submit, within 120 days, further studies as to existing sewage problems or the suitability of soils in the developing areas of the township for individual on-lot sewage systems. (Stip. 4)

6. The Township never submitted the studies required by DER's December 6, 1973 letter. (Stip. 4)

7. The Township did not implement its official plan by constructing central sewers in Llewellyn Corners, Forest Park, and Trailwood in 1974-1977, or at any time thereafter. (Transcript - "T" - 94-95, 199-200)

8. On December 10, 1973, DER issued a Notice of Violation to the Township concerning malfunctioning on-lot sewage systems in the areas of the Township known as Country Club Estates, Trailwood, and Forest Park. The notice provided that these malfunctions had the potential to contaminate water supplies, cause disease, pollute surface waters, and attract vectors. (Stip. 6)

9. On December 18, 1973, the Township authorized Chester Engineers, Inc. to prepare a sewage feasibility report covering transportation and treatment of sewage in the Township. (Stip. 7)

10. In February, 1975, Chester Engineers submitted the report to the Township. The report outlined six alternatives to address the Township's sewage problems, and recommended an alternative No. 6 which called for central sewers to serve Llewellyn Corners, Trailwood, Country Club Estates, Forest

Park, Bear Creek Lake, the Highway Building and an Elementary School. The sewage would be conveyed to a treatment plant to be constructed on the east bank of Bear Creek. (Stip. 10, T. 182, Township Exhibit - "Twp. Exh." - D, page VIII-1)

11. On April 28, 1975, DER submitted comments on the Chester Engineer's report. DER recommended that the Township adopt alternative No. 6 (construction of central sewers) - the option recommended by Chester Engineers. DER's comments made it clear that its recommendation was advisory only, since an official review and decision could not be made until the Township chose an alternative and comments were received from planning agencies. (Stip. 11)

12. The Township never adopted any of the alternatives outlined in the Chester Engineers report. (Stip. 12)

13. On February 21, 1977, the Township engaged Smith, Miller and Associates, Inc. (Smith, Miller) to conduct an independent evaluation of the Chester Engineers report. (Stip. 13)

14. On September 19, 1980, the Township accepted a Step 1 Grant Award from the Environmental Protection Agency (EPA) to develop a sewage facilities plan which would act as a revision to the 1973 official plan. This revised plan was to address alternatives for alleviating the sewage problems, which posed public health and environmental hazards, in the Township. (Stip. 14)

15. Smith, Miller issued a proposed facilities plan in November, 1982, and a revised plan in September, 1983. Appendix A of the proposed plan documented the sewage needs and problems of the Township - it found a total of 183 malfunctioning on-lot systems in the study area of the Township. The malfunctions included soil eruptions, liquid visible on the surface of drain

fields, overflow pipes discharging sewage into drainage ditches and separate piping for gray water (wash water) discharges. (Stip. 16)

16. The Smith, Miller plan outlined several alternatives for remedying these problems, and recommended an alternative calling for, among other things, construction of sewage collection systems to transport sewage from areas where the soils were not suitable for on-lot disposal systems. The sewage thus collected would be conveyed to cluster systems of septic tanks located on suitable soils. (Twp. Exh. 6, pp 1-2, 47, 72-74)

17. On November 1, 1983, the Township Supervisors rejected the proposal of the Smith, Miller plan. (Stip. 18)

18. On November 17, 1983, DER informed the Township that it would be required to update its official plan. (Stip 19, DER Exh. H)

19. On November 21, 1983, DER notified the Township that, pursuant to Section 7(b)(4) of the Sewage Facilities Act, 35 P.S. §750.7(b)(4), DER was limiting the Township's ability to issue sewage permits for on-lot disposal systems. (Stip. 20, DER Exh. I, T. 97-98)

20. After rejecting the Smith, Miller plan, the Township and DER agreed that the physical inspection of homes - especially in the developed areas - was warranted to document the scope of the Township's on-lot sewage problems. (T. 26-29, 45-46, 120-121)

21. On March 19, 1985, the Township retained the engineering firm of Michael J. Pasonick, Jr., Inc. to prepare a sewage facility plan which would include walking to each residence within the Township looking for evidence of malfunctioning on-lot sewage systems. (Stip. 21, T. 25-28, 45-46, 120-121)

22. Daryl Pawlush, the project manager for Pasonick, walked to residences within the Township looking for evidence of malfunctioning on-lot systems. He observed residences where sewage was discharging directly to a

ditch or stream via a pipe. (T. 58-62) Water from these ditches and streams flows into lakes which are used as sources of water by Pennsylvania Gas & Water Co. (T. 62-64) He also performed dye tests, took photographs, and talked to residents about malfunctions. (T. 60-61, 65-68, 85-86, Twp. Exh. J, Sec. 6)

23. Of the 1,133 homes studied by Pasonick, 290, or 26%, had malfunctioning on-lot systems. Four areas within the Township had particularly high rates: Trailwood (74%), Forest Park (58%), Country Club Estates (73%), and Llewellyn Corners (32%). (Stip. 24)

24. The on-lot sewage malfunctions in the Township present a threat to public health. The presence of untreated or partially treated sewage on the ground or in groundwater or surface water creates the risk of disease, including giardiasis and hepatitis. (T. 74-75, 81-82, Twp. Exh. J, p. 6-2)

25. The United States Department of Agriculture, Soil Conservation Service, classifies soils according to the limitations the soils place upon use of on-lot septic systems. The three classifications are "slight," "moderate," and "severe." Soils rated "slight" are generally favorable for on lot systems. Soils rated "moderate" have properties that are unfavorable but can be overcome or modified by special planning and design. Soils rated "severe" are so unfavorable that their use is seriously limited. Using soils with severe limitations will increase the probability of failure, add to the cost of installation, and will require special design or intensive maintenance. (Twp. Exh. 6, pp. 20-22, Twp. Exh. J, Sec. 5-9)

26. Of the twenty-one types of soil found in populated areas of the Township, all but one (which makes up a small percentage of the land area of the Township) are rated "severe." (Twp. Exh. G, p. 22, Twp. Exh. J, Sec. 5-9)

27. The Pasonick plan contained alternatives for dealing with the

Township's sewage problems - the plan recommended an alternative involving construction of central sewers to serve the more densely populated areas of the Township where high on-lot system malfunction rates were found:

Trailwood, Forest Park, Country Club Estates, and Llewellyn Corners. (T. 77-78,; 86-87; DER Exh. J, Sec. 1-3, 7-1)

28. The Township never adopted or implemented any of the alternatives set out in the Pasonick plan. (Stip. 25)

29. The Township was awarded a total of \$43,133 in grants from the Environmental Protection Agency to conduct the Smith, Miller and Pasonick studies. (T. 21)

30. By letter dated July 2, 1986, the Township proposed to address sewage problems in the Township by requiring the systematic upgrading of on-lot septic systems, or for homes which could not be upgraded, either condemnation or the construction of small cluster systems. (DER Exh. 0)

31. The Township's letter of July 2, 1986, was not accompanied by either evidence that it had been adopted by the Township Supervisors or a statement from the Luzerne County Planning Commission. (DER Exh. 0, T. 104, 126, 130, 203)

32. The July 2, 1986 letter did not contain dates for implementation of the proposal. (DER Exh. 0)

33. On September 1, 1987, DER issued the instant order, which required the Township to file by November 1, 1987, a revision to its 1973 official plan which would be adequate to address the sewage needs of the Township. (Stip. 26)

34. The Township has not complied with DER's September 1, 1987 Order. (Stip. 27)

DISCUSSION

The question in the present case is whether DER erred in ordering Bear Creek to file an adequate sewage facilities plan pursuant to Section 5 of the Sewage Facilities Act, 35 P.S. §750.5. DER bears the burden of proof in this appeal. 25 Pa. Code §21.101(a), (b).

Section 5 of the Sewage Facilities Act, 35 P.S. §750.5, provides in relevant part:

§750.5. Official plans

(a) Each municipality shall submit to the department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable period as the department may prescribe, and shall from time to time submit revisions of such plan as may be required by rules and regulations adopted hereunder or by order of the department: Provided, however, That a municipality may at any time initiate and submit to the department revisions of the said plan. Revisions shall conform to the requirements of subsection (d) of this section and the rules and regulations of the department.

* * * *

(d) Every official plan shall:

* * * *

(3) Provide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste;

* * * *

(8) Be reviewed by appropriate official planning agencies within a municipality, including a planning agency with area wide jurisdiction if one exists, in accordance with the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," as amended, for consistency with programs of planning for the area, and all such

reviews shall be transmitted to the department with the proposed plans

DER contends that the existing sewage facilities plan for Bear Creek Township does not provide for the safe and sanitary treatment of waste in the Township. The existing plan, which was adopted in 1973,¹ provided for construction of central sewers in the portions of the Township known as Llewellyn Corners, Forest Park, and Trailwood to take place from 1974 to 1977. (FOF 3,4) The Township never followed through on its plan to construct these sewers. (FOF 7) DER contends that the present situation in Bear Creek is unacceptable due to the high number of malfunctioning on-lot septic systems. See FOF 15, 22-24. DER points out that these malfunctioning systems are causing untreated or partially treated sewage to be discharged to the surface of the ground, to drainage ditches, to groundwater, and to surface waters. (FOF 22) DER contends that these discharges cause a risk of disease, including giardiasis and hepatitis. (FOF 24)

Bear Creek takes the position that DER did not submit sufficient evidence to establish that its sewage problems are serious and that a revised plan is necessary. Bear Creek cites the lack of evidence that any streams or lakes in the area have become degraded. In the alternative, Bear Creek claims that it did submit a revised plan in a letter to DER dated July 2, 1986. In this letter, Bear Creek proposed to address its sewage problems chiefly by requiring the upgrading of on-lot septic systems. (FOF 30) Condemnation or the construction of small cluster systems were mentioned as possibilities where on-lot systems could not be upgraded. (Id.) With regard to construction of central sewers, which was called for in the more densely populated areas of the Township by each of the three proposed sewage

¹ Bear Creek contends that it submitted a revised plan on July 2, 1986. We will address this contention below.

facilities plans prepared by Bear Creek's engineering consultants (See FOF 10, 16, 27), Bear Creek objects to the "tremendous economic burden" which construction of central sewers would place on the residents of the Township. (Bear Creek Brief, p. 10)

Evaluating these arguments, it is clear that DER has met its burden of proving that Bear Creek's existing sewage facilities plan is inadequate. In addition, the July 2, 1986 letter from Bear Creek to DER cannot be construed as a "plan."

Bear Creek offered virtually no testimony to rebut DER's evidence that there are serious problems with on-lot system malfunctions in the more densely populated areas of the Township. Daryl Pawlush, project manager for Michael J. Pasonick, Jr., an engineering firm hired by Bear Creek to study problems with on-lot systems in the Township, testified regarding the results of his inspections of on-lot systems in the Township. Among other things, he observed liquids from septic tanks emanating to the surface of the ground and direct discharges of sewage from pipes to ditches outside the homes. (FOF 22) Water from these ditches flows into streams and lakes which are used as sources of water supply by Pennsylvania Gas and Water Co. (Id.) Mr. Pawlush testified that conditions in the more densely populated areas of the Township were not suitable for on-lot septic systems due to the types of soil found there and due to the high groundwater table.² (FOF 25, 26, T. 70-72, 80-81) Mr. Pawlush found the following rates of malfunction in the densely populated areas of the Township: Trailwood (74%), Forest Park (58%), Country Club Estates (73%), and Llewellyn Corners (32%). (FOF 23) Overall, he found that

² Permeable soils and a high groundwater table tend to prevent sewage from being retained in the ground long enough for bacteria to act upon it. (T. 64, 70-71, Twp. Exh. J, Sec. 1-2)

26% of the homes he studied had malfunctioning systems. (FOF 23)

Bear Creek did not refute this evidence at the hearing; in its brief, it simply argues that DER did not show that the Township had a "serious problem." (Bear Creek Brief, p. 8) Apparently, Bear Creek rests its belief that the problem is not serious on the lack of evidence showing degradation of streams and lakes in the area. This reasoning is unacceptable. The Sewage Facilities Act mandates that each municipality "provide for the safe and sanitary treatment of sewage." 35 P.S. §750.5 (d)(3). The Act does not provide for degradation of a water supply as a precondition to requiring a municipality to provide adequate sewage service.³

Based upon the above evidence, we conclude that the sewage facilities plan adopted by Bear Creek Township in 1973 is inadequate. It is true that this plan provided for construction of central sewers in three of the more densely populated areas of the Township; however, the dates for construction of the sewers (1974-1977) have long since passed without action by the Township. Moreover, the status quo which exists under the plan does not constitute "safe and sanitary treatment of sewage," as required by Section 5 of the Sewage Facilities Act, 35 P.S. §750.5(d)(3).

We next turn to Bear Creek's allegation that its July 2, 1986 letter to DER constituted an adequate plan for treatment of sewage. If this letter did constitute an adequate plan, then DER did not have a basis for issuing the order at issue here, which directed Bear Creek to file an adequate plan. The

³ With regard to Bear Creek's argument that construction of central sewers would place an unreasonable economic burden on the Township, this argument is not a valid defense to DER's order to file an adequate plan. Such an argument could only be raised if DER ordered Bear Creek to install central sewers, if Bear Creek refused to comply, and if DER then brought a contempt action against Bear Creek. See Ramey Borough v. Commonwealth, DER, 466 Pa. 45, 351 A.2d 613 (1975), Kidder Township v. Commonwealth, DER, 41 Pa. Commonwealth Ct. 376, 399 A.2d 799 (1979).

letter provided, in relevant part:

The Board of Supervisors therefore conclude that we will submit a plan for the systematic upgrading of on lot septic systems, especially those installed before 1972, to meet title 25 standards.

The Board of Supervisors will also enact an ordinance for mandating cleaning of tanks; and to, support administrative/legal fees, a milling increase will be enacted. The initial step would be to improve those systems that can be improved. The second phase would be to either address the possibility of two tanks (one for sewerage and one for grey water, or retrofitting for those areas where this would be possible (see pages 19-25, Index, 201 Report and attachment 1). A third step would be to either condemn those homes that could not accept either; or if possible, small cluster systems for only those who absolutely must go that route. We will submit a request for grants on a system by system basis. The one acre lot system will be maintained unless additional land is required for technological safety. The plan will carry this township well into the next century when we would all hope the engineering schools of this nation can produce reliable, economical sewerage advancements.

Sincerely yours,

Bonnie J. Masilewski/for
Bear Creek Township
Board of Supervisors

DER Exh. 0.

This letter was not accompanied by comments from the Luzerne County Planning Commission (FOF 31), as required by Section 5 of the Sewage Facilities Act, 35 P.S. §750.5(d)(8). In addition, the letter did not contain evidence that it had been officially adopted by the Township Supervisors

(FOF 31), as required by the regulations. 25 Pa. Code §71.16(b)⁴ Since the letter did not constitute a "plan" or a "plan revision," it did not affect DER's authority to issue the 1987 order which directed Bear Creek to submit an adequate plan.

DER also took the position in its brief (pp 28-30) and through the testimony of one of its witnesses (T. 126-128) that the July 2, 1986 letter - even if it had met the form requirements for a "plan" - did not constitute an "adequate plan" in that it provided for a continuation of the present system of on-lot disposal throughout the entire Township. This conclusion is not surprising in light of the evidence of unsuitable soils in the Township. (FOF 25, 26) We note also, however, that DER's witnesses refused to rule out the possibility that DER might accept as adequate a properly filed plan which provided for some form of continuation of on-lot disposal. (T. 34, 123-124)⁵ Since DER has not ordered Bear Creek to install central sewers, we need not rule upon whether that is the only method of adequately addressing the Township's sewage problems.

⁴ This section of the regulations was repealed in 1989, but it was in effect at the time Bear Creek submitted the letter. The current regulations require adoption of the plan by a "resolution" of the municipality. See 25 Pa. Code §§71.31(b),(f), 71.32(a).

⁵ We must take this testimony with a grain of salt in light of the testimony of one of DER's witnesses that a plan which continues on-lot disposal "is like putting a Band-Aid on a cancer sore." (T. 104) In addition, all three engineering firms which studied the Township's sewage problems recommended construction of central sewers for the more densely populated areas of the Township. (see FOF 10, 16, 27)

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.
2. DER bears the burden of proving that it was justified in ordering a municipality to file an adequate sewage facilities plan. 25 Pa. Code §21.101(a)(b)
3. To be considered adequate, a sewage facilities plan must "[p]rovide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste." Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. §750.5(d)(3)
4. DER met its burden of proving that it was justified in ordering a municipality to file an adequate sewage facilities plan where it presented evidence of wide-spread malfunctioning of on-lot septic systems, resulting in discharges of untreated or partially treated sewage to the environment, and where the municipality's existing plan, which called for construction of central sewers in certain areas ten to thirteen years before DER's order, was never implemented.
5. To be considered a "plan" or a "plan revision," a municipality's submission must meet the form requirements of the Sewage Facilities Act and the regulations implementing the Act.
6. The Township's July 2, 1986 letter to DER did not constitute a sewage facilities plan or a plan revision because it was not accompanied by either evidence of official adoption by the Township Supervisors or comments from the Luzerne County Planning Commission. 25 Pa. Code §71.16(b)(repealed), Section 5(d)(8) of the Sewage Facilities Act, 35 P.S. §750.5(d)(8)

ORDER

AND NOW, this 19th day of November, 1990, it is ordered that DER's order dated September 1, 1987 is sustained, and the appeal of Bear Creek Township at EHB Docket No. 87-428-F is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 19, 1990

cc: Bureau of Litigation
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Mark M. Mack, Esq.
Wilkes-Barre, PA

jm