

05-1593-CD

Comm of PA vs Burnside Borough

Commonwealth of Pa. vs Burnside Boro  
2005-1593-CD

Date: 12/12/2005

**Clearfield County Court of Common Pleas**

User: LBENDER

Time: 11:11 AM

**ROA Report**

Page 1 of 1

Case: 2005-01593-CD

Current Judge: No Judge

Commonwealth of Pa., Department of Environmental vs. Burnside Borough

**Civil Other**

Date		Judge
10/14/2005	New Case Filed.  X Filing: Civil Complaint Paid by: Commonwealth of Pa., Department of Environmental (plaintiff) Receipt number: 1910173 Dated: 10/14/2005 Amount: \$85.00 (Check) 2 CC Atty 2 CC Sheriff	No Judge No Judge
10/21/2005	X Order, NOW, this 19th day of October, 2005, upon consideration of the foregoing Complaint, Ordered that: A rule is issued upon the Respondent, Respondent shall file an answer to the Complaint within 30 days of this date; The Complaint shall be decided under Pa.R.C.P. No. 206.7; Argument shall be held on December 14, 2005 at 2:00 p.m. in Courtroom Number 1; Notice of the entry of this Order shall be provided to all parties by the Petitioner. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty, 2CC Shff	Fredric Joseph Ammerman
11/16/2005 <i>not yet filed as of 12/12/05</i>	Preliminary Objections To Complaint By Burnside Borough, filed by s/ Kim C. Kesner, Esquire. 3CC Atty Kesner  X Answer to Rule to Show Cause by Burnside Borough, filed by s/ Kim C. Kesner Esq. 3CC Atty Kesner.	No Judge No Judge
11/23/2005	X Sheriff Return, October 28, 2005 at 10:16 a.m. served the within Complaint to Compel Compliance with Order of Dept. on Burnside Borough. So Answers, Chester A. Hawkins, Sheriff by s/Marilyn Hamm Shff Hawkins costs pd by atty \$57.47	No Judge
12/09/2005	Petition, filed by s/ David M. Chuprinski, Esquire. 2CC Atty. Chuprinski Praecipe, filed by s/ David M. Chuprinski Esq. No CC. Petitioner Department of Environmental Protection's Answer to Respondent's Preliminary Objections, filed by s/ David M. Chuprinski Esq. 2CC Atty Chuprinski.  X Petitioner Department of Environmental Protection's Answer to New Matter Raised in Respondent's Answer, filed by s/ David M. Chuprinski Esq. 2CC Atty Chuprinski.	No Judge No Judge No Judge No Judge

Date: 12/07/2005

**Clearfield County Court of Common Pleas**

User: LBENDER

Time: 11:19 AM

Hearings by Judge

Page 7 of 19

CT COMMON PLEAS,

All Case Types

From 12/12/2005 08:00 AM to 12/16/2005 05:00 PM

Fredric Joseph Ammerman

Begin Date and Time    End Date and Time

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Shawver, Gregory Brian	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Shawver, Donna Lee	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Flango, Anthony J. Jr.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Flango, Shelley	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Holley, Jeffrey A.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Holley, Shelly R.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Nestlerode, Parker T.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Nestlerode, Tina M.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Flango, Gerald J. Jr.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Litzinger, Joseph L.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Litzinger, Betty A.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Litzinger, Theresa M.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Ponist, John P.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Ponist, Susan E.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Soupart, Raymond Jr.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Wagner, Joel A.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Williams, Jon R.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Williams, Robert S.	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Wiliams, Dean	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Williams, Dorothy	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>
Williams, Sally	
<b>Days to Speedy Trial:</b>	<b>Speedy Trial Date:</b>

IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

FILED

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

OCT 14 2005  
M/2:30 (w)  
William A. Shaw  
Prothonotary/Clerk of Court  
4 cent +  
1477

Petitioner, : Civil Action in Law and Equity

: Compel Compliance with January 23,  
2003 Order of Department

: No. 05-1593-CD

ORIGINATOR  
TO CLIA

v.

BURNSIDE BOROUGH

Respondent

W/600

Complaint

AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931, who files this Complaint to Compel Compliance with Order of Department. In support thereof, the Department respectfully represents as follows:

1. Your Petitioner, the Department, is the Administrative agency with the authority and responsibility to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* ("PA SFA"); 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.

CA

**IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

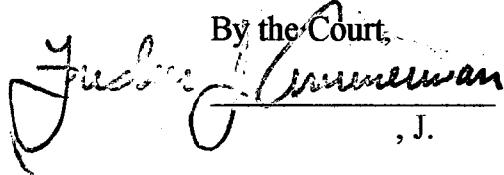
Petitioner,	:	Civil Action in Law and Equity
	:	Compel Compliance with January 23, 2003 Order of Department
	:	No. 2005-1593-CV
v.		
BURNSIDE BOROUGH,	:	
Respondent.	:	

**ORDER**

AND NOW, this 19 day of October, 2005, upon consideration of the foregoing Complaint, it is hereby ordered that:

1. A RULE is issued upon the Respondent to show cause why the Petitioner is not entitled to the relief requested;
2. The Respondent shall file an answer to the Complaint within 30 days of this date;
3. The Complaint shall be decided under Pa. R.C.P. No. 206.7;
4. Argument shall be held on December 14, 2005 at 2:00 p.m. in Courtroom Number 1 of the Clearfield County Courthouse; and
5. Notice of the entry of this Order shall be provided to all parties by the Petitioner.

By the Court,

  
G. Zimmerman

**FILED**  
01/11/2005  
cc: Atty  
OCT 21 2005  
cc: Sheriff

William A. Shaw  
Prothonotary/Clerk of Courts

4334-21  
CITY OF CINCINNATI, OHIO, et al., Plaintiff,  
v. ROBERT COOPER, et al., Defendants.

4334-21  
Robert Cooper, et al.  
Plaintiff, et al., Defendants.  
Plaintiff, et al., Defendants.

Plaintiff, et al., Defendants. 4334-21

Cooper, et al., Defendants.  
Plaintiff, et al., Defendants.

Plaintiff, et al., Defendants.

4334-21  
Robert Cooper, et al.  
Plaintiff, et al., Defendants.

Plaintiff, et al., Defendants.

Plaintiff, et al., Defendants.  
Robert Cooper, et al., Defendants.  
Plaintiff, et al., Defendants.  
Robert Cooper, et al., Defendants.  
Plaintiff, et al., Defendants.  
Robert Cooper, et al., Defendants.  
Plaintiff, et al., Defendants.

Plaintiff, et al., Defendants.  
Robert Cooper, et al., Defendants.  
Plaintiff, et al., Defendants.  
Robert Cooper, et al., Defendants.  
Plaintiff, et al., Defendants.

Plaintiff, et al., Defendants.

FILED

OCT 21 2005

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

Civil Action in Law and Equity

Compel Compliance with January  
23, 2003 Order of Department

No.

v.

BURNSIDE BOROUGH,  
Respondent.

**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.**

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

MidPenn Legal Services  
211 ½ E. Locust Street  
Clearfield, PA 16830  
(814) 326-9177

**FILED**  
**OCT 14 2005**  
William A. Shaw  
Prothonotary/Clerk of Courts

197  
The author would like to thank Dr. J. R. G. Williams for his help in the preparation of this paper.

CA

**IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS**

**FILED**

OCT 14 2005  
W/2.301W

William A. Shaw  
Prothonotary/Clerk of Courts  
52CENR +

ATTN  
2CC Shff

COMMONWEALTH OF :  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January 23,  
: 2003 Order of Department  
: No. 05-1593-CD  
v. :  
BURNSIDE BOROUGH, :  
Respondent. :  
:

**Complaint**

AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931, who files this Complaint to Compel Compliance with Order of Department. In support thereof, the Department respectfully represents as follows:

1. Your Petitioner, the Department, is the Administrative agency with the authority and responsibility to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* ("PA SFA"); 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.

2. Respondent Burnside Borough ("Burnside") is a local agency as that term is defined in Section 2 of the PA SFA, 35 P.S. § 750.2. Burnside's mailing address is P.O. Box 208, Burnside, PA 15721.

3. This Court has jurisdiction over this proceeding pursuant to Sections 761 and 931 of the Judicial Code, 42 Pa. C.S.A. §§ 761(b) and 931.

4. Pursuant to the PA SFA at 35 P.S. § 750.10, on May 10, 2002 the Department issued an Enforcement Order against Burnside (hereinafter "May 10, 2002 Enforcement Order"). The May 10, 2002 Enforcement Order involved Burnside's inaction in addressing the discharge of raw sewage on private property within the Borough. The May 10, 2002 Enforcement Order is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit A".

5. Following an appeal of the May 10, 2002 Enforcement Order filed by Burnside, and pursuant to the PA SFA at 35 P.S. § 750.10, on January 23, 2003 the Department issued another Enforcement Order against Burnside (hereinafter "January 23, 2003 Enforcement Order"). The January 23, 2003 Enforcement Order is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit B".

6. The Department served via Certified Mail, Return Receipt Requested, the January 23, 2003 Enforcement Order which was received by a John H. Siford at Burnside's mailing address of P.O. Box 208, Burnside, PA 15721 on January 24, 2003. The Domestic Return Receipt is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit C".

7. Pursuant to 25 Code § 1021.52(a)(1), Burnside had thirty (30) days in which to file with the Environmental Hearing Board (“EHB”) an appeal of the January 23, 2003 Enforcement Order, or by February 24, 2003.

8. As documented in an EHB Certification of Official Records dated January 31, 2005, Burnside did not file an appeal of the January 23, 2003 Enforcement Order by February 24, 2003. *See* Certification of Official Records attached hereto marked as “Exhibit D” and incorporated herein by reference as though fully set forth.

9. Because Burnside did not appeal the January 23, 2003 Enforcement Order, it is precluded from contesting its content or validity in this proceeding. *DER v. Wheeling-Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320 (1977); *DER v. Williams*, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981).

10. The following facts and violations are conclusively established by the January 23, 2003 Enforcement Order:

a. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. (“Sewage Facilities Act” or “Act 537”); 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. Burnside Borough is a municipality located in Clearfield County, duly organized and existing under the laws of the Commonwealth (the “Borough”). The Borough acts and conducts business through its elected Borough Council. The Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

c. On May 10, 2002, the Department issued an Order to the Borough directing the Borough to investigate and abate the discharge of raw sewage onto the surface of the ground at and next to the residence of Suzanne Koziel located on East Fifth Street in the Borough ("Koziel Property").

d. On June 12, 2002, the Department met with Borough Council members and others to discuss the Borough's investigation into resolving the discharge of sewage onto the surface of the ground at and next to the Koziel Property. The Borough preliminarily indicated that a Borough-wide approach to correcting sewage system problems might be more appropriate than an approach limited to the Koziel Property.

e. Previously, a comprehensive plan dated January 1969 for water and wastewater programs for the County of Clearfield had been developed to serve as the Official Sewage Facilities Plan for the Borough, as well as other areas within Clearfield County. The Official Sewage Facilities Plan identified the Borough to be in need of a sewage collection system and a central treatment plant. The recommended plan called for a collection system and secondary treatment works with a capacity of 0.04 million gallons per day to serve the area of the Borough. The implementation schedule was to have the collection system and primary treatment completed by 1970 and achieve secondary treatment by 1980. The Borough never implemented these recommendations.

f. On June 19, 2002, the secretary of the Borough Council informed the Department that the Borough had retained Hess & Fisher Engineers, Inc. to develop a Borough-wide plan for adequate sewage treatment facilities through the preparation and submission of an Act 537 update revision to the Official Sewage Facilities Plan ("Act 537 Update Revision") in accordance with Section 5 of the Sewage Facilities Act, 35 P. S. § 750.5.

g. Under cover letter dated July 26, 2002, Hess & Fisher Engineers, Inc. submitted on behalf of the Borough a plan of study ("POS"). The POS detailed a comprehensive update revision study focused on confirming the severity of the problems with existing sewage disposal systems in the Borough, and identifying an environmentally sound, cost-effective solution to the problems identified.

h. By letter dated August 26, 2002, the Department approved the Borough's POS described in Paragraph G, above.

i. By correspondence dated November 27, 2002, Wilson Fisher submitted on behalf of the Borough, a draft copy of the results of sanitary survey work conducted on

October 17-18, 2002 by Hess & Fisher Engineers, Inc. for the area within the boundaries of the Borough ("Sanitary Survey"). The Sanitary Survey documented and confirmed that at least 50% of the sewage generating structures in the Borough are served either by systems which discharge inadequately treated sewage directly onto the surface of the ground or into waters of the Commonwealth, or by one of four unauthorized "wildcat" sewer systems, which in turn discharge inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth.

j. Based upon its review of the Sanitary Survey results, as described in Paragraph I, and the Official Sewage Facilities Plan dated January 1969, described above in Paragraph F, the Department has determined that the Borough's existing Official Sewage Facilities Plan is outdated and is inadequate to meet the sewage needs of the Borough, its residents and property owners.

k. To date [January 23, 2003] the Borough has failed to submit an Act 537 Update Revision to address the discharges of inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth, as described in Paragraph I, above.

l. Section 5(a) of the Sewage Facilities Act, 35 P.S. § 750.5(a), states that "[e]ach 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..."

m. Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(3), states that "[e]very official plan shall...[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..."

n. Title 25 Pa. Code § 71.11 states in part that "[m]unicipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems...".

o. Title 25 Pa. Code §71.12(a) states that "[m]unicipalities shall 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 portion thereof."

p. Title 25 Pa. Code § 71.13(a) states that "[t]he Department will require a municipality to revise its official plan when it determines that the plan ...is inadequate to meet the sewage needs of the municipality, its residents or property owners..."

q. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states that "... the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth ...shall constitute a nuisance and shall be abatable in the manner provided by law."

r. Section 10(1) of the Sewage Facilities Act, 35 P.S. § 750.10(1), states that "[t]he Department shall have the power and its duty shall be...[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide."

s. Section 10(3) of the Sewage Facilities Act, 35 P.S. § 750.10(3), states that "[t]he Department shall have the power and its duty shall be...[t]o order the implementation of official plans and revisions thereto."

t. Section 5(b)(7) of the Clean Streams Law, 35 P.S. § 691.5(b)(7), provides that "[t]he Department shall have the power and its duty shall be to ...[i]ssue such orders as may be necessary to implement...the rules and regulations of the Department."

11. The January 23, 2003 Enforcement Order required Burnside, *inter alia*, within one hundred and twenty (120) calendar days of receipt of the January 23, 2003 Enforcement Order [by May 24, 2003] to submit an administratively and technically complete, municipally adopted Act 537 Update Revision to the Department. *See* January 23, 2003 Enforcement Order, Paragraph 1, Exhibit B.

12. On May 23, 2003, Burnside submitted to the Department a municipally adopted Act 537 Update Revision ("Revision").

13. Pursuant to the January 23, 2003 Enforcement Order, the final approved municipally adopted Act 537 Update Revision, *the deadlines contained therein*, and the conditions of the approval were incorporated as part of the Enforcement Order for all

purposes. *See* January 23, 2003 Enforcement Order, Paragraph 3, Exhibit B. Emphasis added.

14. The January 23, 2003 Enforcement Order also provided that “Burnside Borough shall completely implement the recommendations of the Act 537 Update Revision *in accordance with the approved implementation schedule*. *See* January 23, 2003 Enforcement Order, Paragraph 3, Exhibit B. Emphasis added.

15. By correspondence dated November 1, 2004, the Department approved the Revision with the condition that the Revision be implemented in accordance with the schedule stated in the correspondence as follows (“Implementation Schedule”):

- a. Design of the system being completed January 2005 through May 2005;
- b. Submission of an NPDES permit application to the Department by February 2005;
- c. Submission of a Water Quality Management Permit application to the Department by May, 2005; and
- d. Construction of the system October 2005 through October 2006.

A copy of the Department’s November 1, 2004 correspondence is attached hereto marked as “Exhibit E”.

16. On September 23, 2005, a Department representative contacted Keller Engineers, Burnsides consultant, and inquired about the status of the design of the

system. Keller Engineers informed the Department representative that the design of the system was not complete.

17. Burnside submitted the NPDES permit application to the Department on March 8, 2005.

18. To date, Burnside has not submitted a Water Quality Management Permit application.

19. One policy of the Commonwealth as declared by the PA SFA is to prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management. 35 P.S. § 750.3(2).

20. The PA SFA charges the Department with the duty to order a local agency to undertake actions deemed by the Department necessary to effectively administer the PA SFA. 35 P.S. § 750.10(7).

21. The Department issued the January 23, 2003 Enforcement Order to prevent and eliminate pollution of waters of the Commonwealth by coordinating Burnside's planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management.

22. Because Burnside has failed to submit a Water Quality Management Permit application by May 2005, Burnside will not be able to meet the schedule for completing construction of the facilities from October 2005 through October 2006.

23. Burnside's anticipated failure to meet the Implementation Schedule for completing construction of the facilities from October 2005 through October 2006 poses a direct and imminent threat of pollution to the waters of the Commonwealth.

24. Burnside's failure to implement the recommendations of the Act 537 Update Revision in accordance with the approved Implementation Schedule poses a direct and imminent threat of pollution to the waters of the Commonwealth.

WHEREFORE, the Department respectfully requests that this Honorable Court:

1. Enter the attached Rule to Show Cause;

2. After hearing, enter an Order requiring Burnside to:

a. Within thirty (30) days, submit a Water Quality Management Permit application for the construction of a sewage treatment plant;

b. Submit revisions necessary to fully address the Department's required modifications, amendments, or additions necessary to the Water Quality Management Permit application, if any, within thirty (30) days of receipt of said written comments from the Department;

c. Within one hundred twenty (120) days of the issuance of the approved Water Quality Management Permit, begin construction of the sewage treatment plant; and

d. Within four hundred eighty-five (485) days of the issuance of the

approved Water Quality Management Permit, complete construction and place into operation the sewage treatment plant in accordance with the approved Water Quality Management Permit.

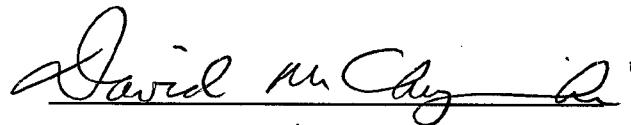
3. In addition, the Department requests that this Honorable Court's Order require that Burnside pay a fine of One Hundred Dollars (\$100.00) per day for each day that Burnside fails to comply with this Order, with the fine to be imposed upon further Petition of the Department and a finding of contempt by this Court.

4. In addition, the Department requests that this Honorable Court find that the facts and violations set forth in the January 23, 2003 Enforcement Order are conclusively established.

5. In addition, the Department requests that this Honorable Court retain continuing jurisdiction of this matter.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION



DATE: 10-12-05

David M. Chuprinski  
Assistant Counsel  
PA Supreme Court I.D. Number 75540  
208 West Third Street - Suite 101  
Williamsport, PA 17701  
Telephone: (570) 321-6568

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Burnside Borough : Violations of the Pennsylvania Sewage  
Facilities Act and Department Regulations  
Burnside Borough, Clearfield County : :

**ORDER**

NOW, this 10<sup>th</sup> day of May, 2002, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), after investigation, has found and determined that:

A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("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. Burnside Borough is a municipality duly organized and existing under the laws of the Commonwealth. Burnside Borough acts and conducts business through its elected Borough Council. Burnside Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

C. Pursuant to Section 8 of the Sewage Facilities Act, Burnside Borough has transferred or delegated the administration of certain provisions of the Sewage Facilities Act to the Clearfield County Sewage Committee ("CCSC").

D. The CCSC is an agency that administers certain sections of the Sewage Facilities Act for its various member municipalities located in Clearfield County, Pennsylvania.

E. CCSC utilizes certified sewage enforcement officers employed by Hess & Fisher Engineers, Inc. and other certified sewage enforcement officers (individually, "SEO" and collectively, "SEO's") to carry out duties of sewage enforcement officers for the member municipalities CCSC represents, including Burnside Borough.

F. On July 30, 2001, the Department received a complaint alleging that sewage was running onto the surface of the ground at the property of Suzanne Koziel located on East Fifth Street in Burnside Borough, Clearfield County ("Koziel Property").

G. By correspondence dated August 6, 2001, the Department forwarded the complaint described in Paragraph F, above, to Burnside Borough. The SEO was copied on the complaint.

EXHIBIT

A

H. By correspondence dated September 7, 2001, the Department requested Burnside Borough's attendance at an administrative conference to discuss the complaint described in Paragraph F above. The Department requested that Burnside Borough confirm a date and time for the administrative conference. Burnside Borough never contacted the Department to confirm a date and time for the requested administrative conference.

I. On February 26, 2002, Department representatives inspected the Koziel Property and found that raw sewage discharges onto the surface of the ground at the Koziel Property. The Department representatives also observed a large diameter hose leading from the basement of a structure on an adjacent property to an alley next to the Koziel Property. It was suggested to the Department that the hose was used to pump sewage from the basement into the alley. By correspondence dated February 26, 2002, the Department wrote to CCSC regarding this complaint and asked CCSC to respond by March 15, 2002 as to the steps that have been taken, or will be taken to resolve this complaint. Burnside Borough and the SEO were copied on this correspondence.

J. To date, neither Burnside Borough, CCSC nor the SEO has resolved the discharge of sewage to the surface of the ground at and next to the Koziel Property as described in Paragraph I above.

K. Title 25 Pa. Code § 71.71 states that "[m]unicipalities are required to assure the proper operation and maintenance of sewage facilities within their borders."

L. Title 25 Pa. Code § 71.73(a) states that "[w]hen sewage facilities are permitted by local agencies, the municipality is responsible for taking actions necessary to assure continued compliance of these sewage facilities with the act, The Clean Streams Law and regulations promulgated thereunder."

M. Title 25 Pa. Code § 73.11 (c) states that "...[a] sewage system may not discharge untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth except as specifically permitted under Sections 202 and 207 of the Clean Streams Law (35 P.S. §§691.202 and 691.207)..."

N. Section 8(b)(7) of the Sewage Facilities Act, 35 P.S. § 750.8(b)(7), provides that "[e]ach local agency in addition to the powers and duties conferred upon it by existing law shall have the power and the duty... [t]o proceed under section 12 of this act to restrain violations of this act and the rules and regulations adopted hereunder."

O. Section 12 of the Sewage Facilities Act, 35 P.S. § 750.12, states that "[a]ny local agency or any municipality which is a member of a local agency shall have the power to institute suits in equity to restrain or prevent violations of section 7 of this act occurring within the jurisdiction or corporate limits of said local agency or municipality."

P. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states, "the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . .shall constitute a nuisance and shall be abatable in the manner provided by law."

Q. Section 201 of the Clean Streams Law, 35 P.S. § 691.201, provides that "[n]o person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereafter provided in this act."

R. Section 202 of the Clean Streams Law, 35 P.S. § 691.202, provides, in part, that "[n]o municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the [D]epartment...A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the [D]epartment is hereby declared to be a nuisance."

S. Section 611 of the Clean Streams Law, 35 P.S. § 691.611, provides, among other things, that "[i]t shall be unlawful to fail to comply with any rule or regulation of the [D]epartment..., to violate any of the provisions of this act or rules and regulations adopted thereunder..., [o]r to cause air or water pollution..."

T. Burnside Borough's failure to effectively administer the Sewage Facilities Act and take measures to correct and abate the sewage discharge described in Paragraph I above constitutes a violation of Section 8(b)(7) of the Sewage Facilities Act, 35 P.S. § 750.8(b)(7); 25 Pa. Code §§ 71.71, 71.73(a), and 73.11(c); and Section 201 of the Clean Streams Law, 35 P.S. § 691.201.

U. The violation described in Paragraph T above, constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611; and a statutory nuisance under Section 202 of the Clean Streams Law, 35 P.S. § 691.202; and Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14.

NOW, THEREFORE, this 10<sup>th</sup> day of May, 2002, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Section 5 of the Clean Streams Law, 35 P.S. § 691.5; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17, it is hereby ordered that Burnside Borough shall:

1. Within fifteen (15) days of receipt of this Order, investigate and identify all of the sources of raw sewage discharging onto the Koziel Property.
2. Within fifteen (15) days of receipt of this Order, conduct an investigation to determine if the hose in the alley adjacent to the Koziel Property is used to intermittently pump sewage from the basement of the neighboring structure onto the ground surface or otherwise determine if any violation exists in regard to sewage generated within the neighboring structure.
3. Within fifteen (15) days of receipt of this Order require all person(s) identified as contributing to the discharge of sewage onto and next to the Koziel Property to, within sixty (60) days of notice: 1) obtain necessary permits and abate the discharge(s), and 2) correct any other violations of the Sewage Facilities Act and rules and regulations of the Department found to exist on their properties.
4. Within eighty (80) days of receipt of this Order, in accordance with Section 12 of the Sewage Facilities Act, 35 P.S. § 750.12, institute a suit in equity to restrain or prevent all violations of the Sewage Facilities Act and the Clean Streams Law against those persons who have failed to correct their unpermitted discharge of sewage onto and next to the Koziel Property.

5. Within twenty (20) days after Burnside Borough conducts the investigation required in Paragraphs 1 and 2, above, Burnside Borough shall submit a report in writing to the Department describing the results of the investigation and detailing the steps Burnside Borough has taken or will take to abate the violation. The report shall be submitted to the Department at the address set forth in Paragraph 6, below.
6. Burnside Borough shall provide copies to the Department of any and all notices, correspondence, pleadings or other documents generated as a result of this Order within fifteen (15) days after their creation. Copies shall be submitted to the Department at:

Environmental Program Manager  
Water Management Program  
Northcentral Regional Office  
208 West Third Street - Suite 101  
Williamsport, PA 17701-6448

7. Nothing set forth in this Order is intended, nor shall it be construed, to relieve or limit Burnside Borough's obligation to comply with any existing or subsequent statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall it be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.
8. This Order of the Department is effective IMMEDIATELY upon receipt.

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



Daniel L. Alters  
Environmental Program Manager Water Quality  
Northcentral Regional Office

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of:

Burnside Borough	:	Failure to Revise Official Sewage Facilities
Burnside Borough, Clearfield County	:	Plan for Burnside Borough

**ORDER**

NOW, this 23<sup>rd</sup> day of January, 2003, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), after investigation, has found and determined that:

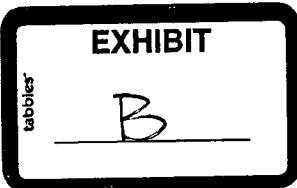
A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("Sewage Facilities Act" or "Act 537"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, 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. Burnside Borough is a municipality located in Clearfield County, duly organized and existing under the laws of the Commonwealth (the "Borough"). The Borough acts and conducts business through its elected Borough Council. The Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

C. On May 10, 2002, the Department issued an Order to the Borough directing the Borough to investigate and abate the discharge of raw sewage onto the surface of the ground at and next to the residence of Suzanne Koziel located on East Fifth Street in the Borough ("Koziel Property").

D. On June 12, 2002, the Department met with Borough Council members and others to discuss the Borough's investigation into resolving the discharge of sewage onto the surface of the ground at and next to the Koziel Property. The Borough preliminarily indicated that a Borough-wide approach to correcting sewage system problems might be more appropriate than an approach limited to the Koziel Property.

E. Previously, a comprehensive plan dated January 1969 for water and wastewater programs for the County of Clearfield had been developed to serve as the Official Sewage Facilities Plan for the Borough, as well as other areas within Clearfield County. The Official Sewage Facilities Plan identified the Borough to be in need of a sewage collection system and a central treatment plant. The recommended plan called for a collection system and secondary treatment works with a capacity of 0.04 million gallons per day to serve the area of the Borough. The implementation schedule was to have the collection system and primary treatment completed by 1970 and achieve secondary treatment by 1980. The Borough never implemented these recommendations.



F. On June 19, 2002, the secretary of the Borough Council informed the Department that the Borough had retained Hess & Fisher Engineers, Inc. to develop a Borough-wide plan for adequate sewage treatment facilities through the preparation and submission of an Act 537 update revision to the Official Sewage Facilities Plan ("Act 537 Update Revision") in accordance with Section 5 of the Sewage Facilities Act, 35 P. S. § 750.5.

G. Under cover letter dated July 26, 2002, Hess & Fisher Engineers, Inc. submitted on behalf of the Borough a plan of study (POS). The POS detailed a comprehensive update revision study focused on confirming the severity of the problems with existing sewage disposal systems in the Borough, and identifying an environmentally sound, cost-effective solution to the problems identified.

H. By letter dated August 26, 2002, the Department approved the Borough's POS described in Paragraph G, above.

I. By correspondence dated November 27, 2002, Wilson Fisher submitted on behalf of the Borough, a draft copy of the results of sanitary survey work conducted on October 17-18, 2002 by Hess & Fisher Engineers, Inc. for the area within the boundaries of the Borough ("Sanitary Survey"). The Sanitary Survey documented and confirmed that at least 50% of the sewage generating structures in the Borough are served either by systems which discharge inadequately treated sewage directly onto the surface of the ground or into waters of the Commonwealth, or by one of four unauthorized "wildcat" sewer systems, which in turn discharge inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth.

J. Based upon its review of the Sanitary Survey results, as described in Paragraph I, and the Official Sewage Facilities Plan dated January 1969, described above in Paragraph F, the Department has determined that the Borough's existing Official Sewage Facilities Plan is outdated and is inadequate to meet the sewage needs of the Borough, its residents and property owners.

K. To date the Borough has failed to submit an Act 537 Update Revision to address the discharges of inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth, as described in Paragraph I, above.

L. Section 5(a) of the Sewage Facilities Act, 35 P.S. § 750.5(a), states that "[e]ach 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..."

M. Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(3), states that "[e]very official plan shall...[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..."

N. Title 25 Pa. Code § 71.11 states in part that "[m]unicipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems..."

O. Title 25 Pa. Code §71.12(a) states that “[m]unicipalities shall 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 portion thereof.”

P. Title 25 Pa. Code § 71.13(a) states that “[t]he Department will require a municipality to revise its official plan when it determines that the plan ...is inadequate to meet the sewage needs of the municipality, its residents or property owners...”

Q. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states that "... the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . .shall constitute a nuisance and shall be abatable in the manner provided by law."

R. Section 10(1) of the Sewage Facilities Act, 35 P.S. § 750.10(1), states that "[t]he Department shall have the power and its duty shall be...[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide."

S. Section 10(3) of the Sewage Facilities Act, 35 P.S. § 750.10(3), states that "[t]he Department shall have the power and its duty shall be...[t]o order the implementation of official plans and revisions thereto."

T. Section 5(b)(7) of the Clean Streams Law, 35 P.S. § 691.5(b)(7), provides that "[t]he Department shall have the power and its duty shall be to ...[i]ssue such orders as may be necessary to implement...the rules and regulations of the Department."

NOW, THEREFORE, this 23<sup>rd</sup> day of January, 2003, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Section 5 of the Clean Streams Law, 35 P.S. §691.5; and Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, it is hereby ordered that:

1. Within one hundred and twenty (120) calendar days of receipt of this Order, Burnside Borough shall submit an administratively and technically complete, municipally adopted Act 537 Update Revision to the Department.
2. The municipally adopted Act 537 Update Revision may be approved, rejected, or approved with conditions by the Department. If the Department determines that the municipally adopted Act 537 Update Revision does not comply fully with the requirements of Act 537, the Department may require Burnside Borough to make changes and/or submit additional information. Burnside Borough shall submit such changes and/or information within forty-five (45) calendar days of receipt of the Department's written request.
3. The final approved municipally adopted Act 537 Update Revision and the deadlines contained therein shall be incorporated as part of this Order for all purposes, and Burnside Borough shall completely implement the recommendations of the Act 537 Update Revision in accordance with the approved implementation schedule.

4. Nothing set forth in this Order is intended, nor shall be construed, to relieve or limit Burnside Borough's obligation to comply with any existing or subsequent statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.
5. This Order of the Department is effective IMMEDIATELY upon receipt.

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, PO 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.

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FOR THE COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Daniel L. Alters  
Environmental Program Manager Water Quality  
Northcentral Regional Office

<b>SENDER:</b> <ul style="list-style-type: none"> <li>■ Complete items 1 and/or 2 for additional services.</li> <li>■ Complete items 3, 4a, and 4b.</li> <li>■ Print your name and address on the reverse of this form so that we can return this card to you.</li> <li>■ Attach this form to the front of the mailpiece, or on the back if space does not permit.</li> <li>■ Write "Return Receipt Requested" on the mailpiece below the article number.</li> <li>■ The Return Receipt will show to whom the article was delivered and the date delivered.</li> </ul>		I also wish to receive the following services (for an extra fee): 1. <input type="checkbox"/> Addressee's Address 2. <input type="checkbox"/> Restricted Delivery Consult postmaster for fee.
3. Article Addressed to: <p>Burn side Borough PO Box 208 Burnside, PA 15721</p>		4a. Article Number <p>7000 0600 0034 1096 6375</p>
		4b. Service Type <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Certified <input type="checkbox"/> Express Mail <input type="checkbox"/> Insured <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> COD
		7. Date of Delivery <p>1-24-03</p>
5. Received By: (Print Name) <p>John H. Siford</p>		8. Addressee's Address (Only if requested and fee is paid)
6. Signature: (Addressee or Agent) <p>X John H. Siford</p>		

PS Form 3811, December 1994

102595-98-B-0229 Domestic Return Receipt

EXHIBIT

tabloid

C



(717) 787-3483  
TELECOPIER (717) 783-4738  
<http://ehb.courtapps.com>

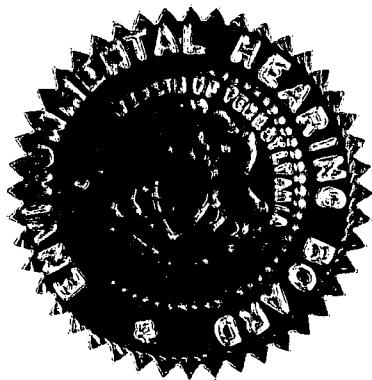
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

### CERTIFICATION OF OFFICIAL RECORDS

I, William T. Philliply IV, Secretary of the Environmental Hearing Board of the Commonwealth of Pennsylvania, appointed pursuant to Section 3(f) of the Environmental Hearing Board Act, 35 P.S. §7513(b), DO HEREBY CERTIFY in accordance with the provisions of 42 Pa.C.S.A. §6103(a) and (b), that, I am legal custodian of the records and documents maintained by the Environmental Hearing Board (the Board). After having caused to be made a thorough examination of the records, I further certify that no appeal of any administrative order issued by the Pennsylvania Department of Environmental Protection on or after January 23, 2003 to Burnside Borough, Clearfield County, regarding sewerage facilities in the Borough has been filed with the Board by the Borough.

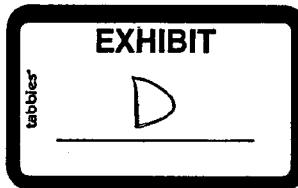
IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Environmental Hearing Board to be affixed.

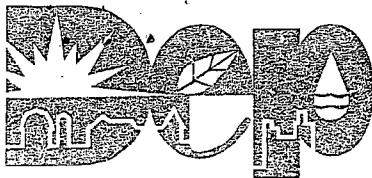


A handwritten signature of William T. Philliply IV, followed by a horizontal line for a signature.

WILLIAM T. PHILLIPY, IV  
Secretary to the Board

DATED: January 31, 2005





Pennsylvania Department of Environmental Protection

208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

NOV 01 2004

Northcentral Regional Office

Fax 570-327-3565

**CERTIFIED MAIL NO. 7004 1160 0002 2580 7661**

Burnside Borough Council  
c/o Twila Sunderlin, Secretary  
General Delivery  
Burnside, PA 15721

Re: Act 537 Update  
APS# 488303  
Burnside Borough, Clearfield County

Dear Borough Council:

We have completed review of an Act 537 Sewage Facilities Plan Update completed by Hess & Fisher Engineers, Inc. for Burnside Borough. This plan is hereby approved by this Department as a revision to Burnside Borough's Act 537 Official Sewage Facilities Plan. As provided by the Pennsylvania Sewage Facilities Act and Chapter 71, Administration of Sewage Facilities Planning Program, this Department will hold Burnside Borough responsible for the complete and timely implementation of this plan. In addition, Section 2 of the Administrative Order of January 23, 2003 issued by this Department allows the Department to approve the municipally adopted Act 537 Update Revision with conditions. The conditions we approve this revision with are that the plan be implemented in accordance with the following schedule:

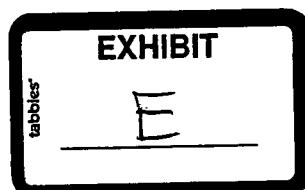
Design of system - January, 2005 through May, 2005.

Submit NPDES permit application to the Department - February, 2005. *3/8/05*

Submit Water Quality Management permit application to the Department - May, 2005.

Construction of system - October, 2005 through October, 2006.

The approved plan calls for approximately 2,000 feet of low pressure sewer and eight grinder pumps to serve the southern end of the borough, with a gravity collection system consisting of approximately 21,200 feet of sewers, to serve the rest of the borough. Treatment will be provided by a proposed 40,000 gallon per day bio-wheel reactor type sewage treatment plant which will discharge to the West Branch Susquehanna River.



NOV 01 2004

Burnside Borough Council will be responsible for operation and maintenance of the sewage facilities. This includes the grinder pumps. The Borough will be required to maintain at least one spare grinder pump and parts in order to complete timely repair/replacement of faulty pumps.

Permits will be required for these facilities. Information and applications can be obtained by calling our Water Quality Management permitting section at 570-321-6560. Permits will also be required for River Crossings and any wetland encroachments. Information for these permits can be obtained by calling our Soils and Waterways Section at 570-327-3700.

Enclosed is a form which you can use to apply for 50% reimbursement of your planning costs from this Department. Please complete the form, attach required documentation and send to the address indicated on the form.

If you have any questions, please call William Bailey at 570-327-3688.

Sincerely,



Daniel L. Alters  
Environmental Program Manager  
Water Management

Enclosure

cc: Hess and Fisher Engineers, Inc.  
Clearfield County Planning Commission  
Gary Metzger  
Al Sever  
Rich Adams  
Curt White  
William Bailey  
File

WB/rjh

VERIFICATION

I, Robert H. Boos, Environmental Protection Compliance Specialist for the Commonwealth of Pennsylvania, Department of Environmental Protection's Water Management Program in the Northcentral Region, hereby certify that I am authorized to make this verification on behalf of the Department of Environmental Protection and that the facts recited in the foregoing Complaint for Compliance with Department Enforcement Order are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Robert H. Boos  
Environmental Protection Compliance  
Specialist  
Water Management Program  
Department of Environmental Protection  
Northcentral Regional Office

DATE: 10-12-05

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. 2005-1593-CD  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION, : Type of Case: Civil Action in Law  
Petitioner : and Equity  
v. : Type of Pleading: Answer to Rule to  
BURNSIDE BOROUGH, : Show Cause by Burnside  
Respondent : Borough  
: Filed on Behalf of: Respondent  
: Counsel of Record for this Party:  
: Kim C. Kesner, Esquire  
: Supreme Ct. I.D. #28307  
: 23 North Second Street  
: Clearfield, PA 16830  
: 814-765-1706  
: Opposing Counsel of Record:  
: David M. Chuprinski, Assistant Counsel  
: PA Dept. of Environmental Protection  
: 208 West Third Street – Suite 101  
: Williamsport, PA 17701  
: 570-321-6568

FILED 3CC  
01/2/2006 Atty Kesner  
NOV 16 2005

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. 2005-1593-CD
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION,	:	
Petitioner	:	
	:	
v.	:	
	:	
BURNSIDE BOROUGH,	:	
Respondent	:	

**ANSWER TO RULE TO SHOW CAUSE**  
**BY BURNSIDE BOROUGH**

TO: The Honorable Fredric J. Ammerman, President Judge

AND NOW COMES, Burnside Borough, by its Solicitor Kim C. Kesner, Esquire, and files the following Answer to the Rule to Show Cause issued by this Court to Burnside Borough by its Order dated October 19, 2005:

1. The Commonwealth of Pennsylvania Department of Environmental Protection (DEP) commenced this action against Burnside Borough by filing a “Complaint” in “Civil Action in Law and Equity”.

2. Upon filing its Complaint and without the filing of a separate petition, DEP obtained from this Court an Order dated October 19, 2005 issuing a Rule to Show Cause under Pa.R.Civ.P. No. 206.6.

3. This Court's Order directs that "(t)he Complaint shall be decided under Pa.R.Civ.P No. 206.7"

4. This Court's Order also directs Burnside Borough to file "an answer to the Complaint..."

5. The procedures for responding to a complaint in a civil action in law and equity are governed by Rules of Civil Procedure other than Pa.R.Civ.P No. 206.7.

6. The issuance of a Rule to Show Cause upon DEP's Complaint was contrary to the Rules of Civil Procedure.

7. Limiting Burnside Borough to the filing of an answer to DEP's Complaint is contrary to the Rules of Civil Procedure.

8. Burnside Borough has separately filed Preliminary Objections to DEP's Complaint.

9. However, Burnside Borough has been directed by this Court's Order of October 19, 2005 to file an answer to DEP's Complaint with the matter to be decided under Pa.R.Civ.P. No. 206.7 after argument to be held on December 14, 2005 before this Court.

10. To comply with this Order of Court but at the same time intending to retain to itself full and effective ability to object to improper process in this case in violation of the Pennsylvania Rules of Civil Procedure and the local rules of this Court, Burnside Borough files the following answers to the averments contained in DEP's Complaint.

11. It is admitted that DEP entered an Enforcement Order dated May 10, 2002 against Burnside Borough directing Burnside Borough within 80 days from receipt of the Order to abate or cause the abatement of the discharge of "gray water" from residents in Burnside Borough onto property of Suzanne Koziel ("Koziel Property").

12. It is averred that after DEP concluded that there was no practical or effective manner to abate the discharge without enjoining residents' occupation of their homes, DEP entered its subsequent Enforcement Order of January 23, 2003 directing Burnside Borough to submit within 120 calendar days a plan under the Pennsylvania Sewage Facilities Act for the construction of a community sewage system. Upon entry of that Order, DEP dropped pursuit of immediate abatement of the discharge which led to its involvement in this case, even though it was and continues to be the "pollution" and/or

violation of the Sewage Facilities Act used as justification for both Enforcement Orders. There is presently no different or greater threat supporting DEP's allegation in Paragraphs 23 and 24 of its Complaint of "a direct and imminent threat of pollution to the waters of the Commonwealth."

13. It is admitted that Burnside submitted the ordered plan on May 23, 2003 within the required 120 calendar days.

14. It is averred however that DEP did not approve the submitted plan until November 1, 2004.

15. It is admitted that with its Notice of Approval dated November 1, 2004, DEP directed an Implementation Schedule requiring:

- a. Design of the system being completed January 2005 – May 2005;
- b. Submission of an NPDES Permit Application to the Department by February 2005;
- c. Submission of a Water Quality Management Permit Application to the Department by May 2005;
- d. Construction of the system October 2005 – October 2006.

16. It is averred however that between November 1, 2004 and January 26, 2005, DEP concluded that the approved Plan was unfeasible, unworkable and/or unfinancable.

17. DEP thereafter accepted a Plan resubmission from Burnside Borough on January 26, 2005 addressing the deficiencies.

18. Despite the necessary and appropriate Plan Revision, DEP did not alter the Implementation Schedule dictated in its November 1, 2004 correspondence. However, DEP did not approve the Plan Revision until October 12, 2005.

19. In the interim, Burnside Borough submitted its NPDES Permit Application to DEP on March 7, 2005.

20. DEP communicated no objection to the submission of the NPDES Permit Application two days later than the requirement under the Implementation Schedule.

21. DEP did not issue the NPDES Permit until June 3, 2005.

22. The submission of a Water Quality Management Permit Application could not be done until DEP approved the Plan Revision which it did not do until October 12, 2005. A requirement of the WQM Permit Application is a copy of DEP's letter approving the Plan Revision. With out this, the Application would have been deemed administratively incomplete. Prior to October 12, 2005, DEP expressed no objection to the failure of Burnside Borough to submit a Water Quality Management Permit by May 2005. However, DEP filed its Complaint concurrent with its October 12, 2005 Plan Revision approval.

23. It is specifically denied as averred by DEP that "(b)ecause Burnside has failed to submit a water quality management permit application by May 2005, Burnside will not be able to meet the schedule for completing construction of the facilities from October 2005 through October 2006." To the contrary, subject to the availability of funding and assuming prompt action by DEP, construction could occur prior to October 2006.

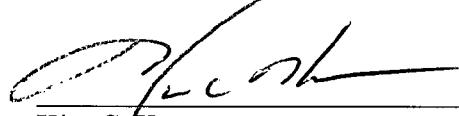
24. DEP's failure to act more promptly on Burnside Borough's Plan Revision prevented Burnside Borough from complying with the Implementation Schedule dictated by DEP's letter of November 1, 2004. Prior to the filing of DEP's Complaint, Burnside Borough was not actually aware and had no reasonable apprehension that DEP was dissatisfied with the Borough's progress.

25. DEP's action in ordering Burnside Borough to design and construct a community sewage system serving all residents of the Borough (not merely the residents discharging "gray water" to the Koziel Property) has been taken without consideration of Burnside Borough's relative ability to fund a community sewage system. The present estimated cost of the construction of the system approved by DEP on October 12, 2005 is \$2,450,000.00. According to the 2000 U.S. Census,

Burnside Borough has a total population of 283, 67.7% of which are low to moderate income. In 2004, Burnside Borough had total tax revenues of \$21,042.00 and total revenues from all sources of \$34,943.00. For the purposes of a borrowing in 2005, Burnside Borough's debt limit is \$98,588.00 and the Borough has an outstanding water loan to the United States Department of Agriculture with a balance due of approximately \$68,000.00. Because of the Borough's limited borrowing base and credit-worthiness, it was unable to borrow the sum of \$400,000.00 in 2005 for engineering design fees for the community sewage system project.

26. Burnside Borough's ability to comply with any Implementation Schedule – whether ordered by DEP or this Court – is dependent upon the availability of financing. Unless long term financing is available – a matter outside of Burnside Borough's control – this Court would be required to order Burnside Borough to levy taxes and/or assessments to an extreme level.

Respectfully submitted:



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Kim C. Kesner  
Solicitor – Burnside Borough  
Supreme Ct. I.D. #28307  
23 North Second Street  
Clearfield, PA 16830  
814-765-1706

VERIFICATION

The undersigned verifies that he is the attorney for Burnside Borough, that as such attorney he is authorized to make this verification, and that the statements made in the foregoing Answer are true and correct, based upon the information supplied to him and that this Verification is filed by him for the purposes of expediting this litigation, and in the event a Verification from Burnside Borough, is required, same will be supplied. The undersigned understands that false statements made herein are subject to the penalties of 18 PA. C.S. 4904 relating to unsworn falsification to authorities.

Date: 11-16-05

  
Kim C. Kesner, Esquire  
Attorney for Burnside Borough

**CERTIFICATE OF SERVICE**

AND NOW, I do hereby certify that on the 16<sup>th</sup> day of November, 2005, I caused to be served a true and correct copy of the Answer to Rule to Show Cause by Burnside Borough by U.S. First Class Mail, Postage Prepaid upon the following:

David M. Chuprinski, Assistant Counsel  
PA Department of Environmental Protection  
208 West Third Street – Suite 101  
Williamsport, PA 17701

Date: 11-16-05

  
\_\_\_\_\_  
Kim C. Kesner  
Solicitor, Burnside Borough

**FILED**

**NOV 16 2005**

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 100916  
NO: 05-1593-CD  
SERVICE # 1 OF 1  
COMPLAINT TO COMPEL COMPLIANCE WITH

ORDER OF DEPT.

PLAINTIFF: COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION  
vs.  
DEFENDANT: BURNSIDE BOROUGH

SHERIFF RETURN

NOW, October 28, 2005 AT 10:16 AM SERVED THE WITHIN COMPLAINT TO COMPEL COMPLIANCE WITH ORDER OF DEPT. ON BURNSIDE BOROUGH DEFENDANT AT 67 WEST SECOND ST., BURNSIDE, CLEARFIELD COUNTY, PENNSYLVANIA, BY HANDING TO MR. SIFORD, V.P. OF BORO COUNCIL A TRUE AND ATTESTED COPY OF THE ORIGINAL COMPLAINT TO COMPEL COMPLIANCE WITH ORDER OF DEPT. AND MADE KNOWN THE CONTENTS THEREOF.

SERVED BY: DAVIS / MORGILLO

FILED

NOV 23 2005  
012-255-12  
William A. Shaw  
Prothonotary/Clerk of Courts

PURPOSE	VENDOR	CHECK #	AMOUNT
SURCHARGE	COMM.OF PA.	8937	10.00
SHERIFF HAWKINS	COMM. OF PA.	8937	47.47

Sworn to Before Me This

So Answers,

\_\_\_\_ Day of \_\_\_\_\_ 2005

*Chester A. Hawkins*  
*My Mainly Yours*  
Chester A. Hawkins  
Sheriff

IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

I hereby certify this to be a true  
and attested copy of the original  
statement filed in this case.

OCT 14 2005

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Attest.

*Lee A. H.*  
Prothonotary/  
Clerk of Courts

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January 23,  
: 2003 Order of Department  
: No. 1005-1593-CO  
v. :  
BURNSIDE BOROUGH, :  
Respondent. :  
:

Complaint

AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931, who files this Complaint to Compel Compliance with Order of Department. In support thereof, the Department respectfully represents as follows:

1. Your Petitioner, the Department, is the Administrative agency with the authority and responsibility to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* ("PA SFA"); 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.

2. Respondent Burnside Borough ("Burnside") is a local agency as that term is defined in Section 2 of the PA SFA, 35 P.S. § 750.2. Burnside's mailing address is P.O. Box 208, Burnside, PA 15721.

3. This Court has jurisdiction over this proceeding pursuant to Sections 761 and 931 of the Judicial Code, 42 Pa. C.S.A. §§ 761(b) and 931.

4. Pursuant to the PA SFA at 35 P.S. § 750.10, on May 10, 2002 the Department issued an Enforcement Order against Burnside (hereinafter "May 10, 2002 Enforcement Order"). The May 10, 2002 Enforcement Order involved Burnside's inaction in addressing the discharge of raw sewage on private property within the Borough. The May 10, 2002 Enforcement Order is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit A".

5. Following an appeal of the May 10, 2002 Enforcement Order filed by Burnside, and pursuant to the PA SFA at 35 P.S. § 750.10, on January 23, 2003 the Department issued another Enforcement Order against Burnside (hereinafter "January 23, 2003 Enforcement Order"). The January 23, 2003 Enforcement Order is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit B".

6. The Department served via Certified Mail, Return Receipt Requested, the January 23, 2003 Enforcement Order which was received by a John H. Siford at Burnside's mailing address of P.O. Box 208, Burnside, PA 15721 on January 24, 2003. The Domestic Return Receipt is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit C".

7. Pursuant to 25 Code § 1021.52(a)(1), Burnside had thirty (30) days in which to file with the Environmental Hearing Board (“EHB”) an appeal of the January 23, 2003 Enforcement Order, or by February 24, 2003.

8. As documented in an EHB Certification of Official Records dated January 31, 2005, Burnside did not file an appeal of the January 23, 2003 Enforcement Order by February 24, 2003. *See* Certification of Official Records attached hereto marked as “Exhibit D” and incorporated herein by reference as though fully set forth.

9. Because Burnside did not appeal the January 23, 2003 Enforcement Order, it is precluded from contesting its content or validity in this proceeding. *DER v. Wheeling-Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320 (1977); *DER v. Williams*, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981).

10. The following facts and violations are conclusively established by the January 23, 2003 Enforcement Order:

a. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. (“Sewage Facilities Act” or “Act 537”); 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. Burnside Borough is a municipality located in Clearfield County, duly organized and existing under the laws of the Commonwealth (the “Borough”). The Borough acts and conducts business through its elected Borough Council. The Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

c. On May 10, 2002, the Department issued an Order to the Borough directing the Borough to investigate and abate the discharge of raw sewage onto the surface of the ground at and next to the residence of Suzanne Koziel located on East Fifth Street in the Borough ("Koziel Property").

d. On June 12, 2002, the Department met with Borough Council members and others to discuss the Borough's investigation into resolving the discharge of sewage onto the surface of the ground at and next to the Koziel Property. The Borough preliminarily indicated that a Borough-wide approach to correcting sewage system problems might be more appropriate than an approach limited to the Koziel Property.

e. Previously, a comprehensive plan dated January 1969 for water and wastewater programs for the County of Clearfield had been developed to serve as the Official Sewage Facilities Plan for the Borough, as well as other areas within Clearfield County. The Official Sewage Facilities Plan identified the Borough to be in need of a sewage collection system and a central treatment plant. The recommended plan called for a collection system and secondary treatment works with a capacity of 0.04 million gallons per day to serve the area of the Borough. The implementation schedule was to have the collection system and primary treatment completed by 1970 and achieve secondary treatment by 1980. The Borough never implemented these recommendations.

f. On June 19, 2002, the secretary of the Borough Council informed the Department that the Borough had retained Hess & Fisher Engineers, Inc. to develop a Borough-wide plan for adequate sewage treatment facilities through the preparation and submission of an Act 537 update revision to the Official Sewage Facilities Plan ("Act 537 Update Revision") in accordance with Section 5 of the Sewage Facilities Act, 35 P. S. § 750.5.

g. Under cover letter dated July 26, 2002, Hess & Fisher Engineers, Inc. submitted on behalf of the Borough a plan of study ("POS"). The POS detailed a comprehensive update revision study focused on confirming the severity of the problems with existing sewage disposal systems in the Borough, and identifying an environmentally sound, cost-effective solution to the problems identified.

h. By letter dated August 26, 2002, the Department approved the Borough's POS described in Paragraph G, above.

i. By correspondence dated November 27, 2002, Wilson Fisher submitted on behalf of the Borough, a draft copy of the results of sanitary survey work conducted on

October 17-18, 2002 by Hess & Fisher Engineers, Inc. for the area within the boundaries of the Borough ("Sanitary Survey"). The Sanitary Survey documented and confirmed that at least 50% of the sewage generating structures in the Borough are served either by systems which discharge inadequately treated sewage directly onto the surface of the ground or into waters of the Commonwealth, or by one of four unauthorized "wildcat" sewer systems, which in turn discharge inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth.

j. Based upon its review of the Sanitary Survey results, as described in Paragraph I, and the Official Sewage Facilities Plan dated January 1969, described above in Paragraph F, the Department has determined that the Borough's existing Official Sewage Facilities Plan is outdated and is inadequate to meet the sewage needs of the Borough, its residents and property owners.

k. To date [January 23, 2003] the Borough has failed to submit an Act 537 Update Revision to address the discharges of inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth, as described in Paragraph I, above.

l. Section 5(a) of the Sewage Facilities Act, 35 P.S. § 750.5(a), states that "[e]ach 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..."

m. Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(3), states that "[e]very official plan shall...[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..."

n. Title 25 Pa. Code § 71.11 states in part that "[m]unicipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems..."

o. Title 25 Pa. Code §71.12(a) states that "[m]unicipalities shall 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 portion thereof."

p. Title 25 Pa. Code § 71.13(a) states that "[t]he Department will require a municipality to revise its official plan when it determines that the plan ...is inadequate to meet the sewage needs of the municipality, its residents or property owners..."

q. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states that "... the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . .shall constitute a nuisance and shall be abatable in the manner provided by law."

r. Section 10(1) of the Sewage Facilities Act, 35 P.S. § 750.10(1), states that "[t]he Department shall have the power and its duty shall be...[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide."

s. Section 10(3) of the Sewage Facilities Act, 35 P.S. § 750.10(3), states that "[t]he Department shall have the power and its duty shall be...[t]o order the implementation of official plans and revisions thereto."

t. Section 5(b)(7) of the Clean Streams Law, 35 P.S. § 691.5(b)(7), provides that "[t]he Department shall have the power and its duty shall be to ...[i]ssue such orders as may be necessary to implement...the rules and regulations of the Department."

11. The January 23, 2003 Enforcement Order required Burnside, *inter alia*, within one hundred and twenty (120) calendar days of receipt of the January 23, 2003 Enforcement Order [by May 24, 2003] to submit an administratively and technically complete, municipally adopted Act 537 Update Revision to the Department. *See* January 23, 2003 Enforcement Order, Paragraph 1, Exhibit B.

12. On May 23, 2003, Burnside submitted to the Department a municipally adopted Act 537 Update Revision ("Revision").

13. Pursuant to the January 23, 2003 Enforcement Order, the final approved municipally adopted Act 537 Update Revision, *the deadlines contained therein*, and the conditions of the approval were incorporated as part of the Enforcement Order for all

purposes. *See* January 23, 2003 Enforcement Order, Paragraph 3, Exhibit B. Emphasis added.

14. The January 23, 2003 Enforcement Order also provided that “Burnside Borough shall completely implement the recommendations of the Act 537 Update Revision *in accordance with the approved implementation schedule*. *See* January 23, 2003 Enforcement Order, Paragraph 3, Exhibit B. Emphasis added.

15. By correspondence dated November 1, 2004, the Department approved the Revision with the condition that the Revision be implemented in accordance with the schedule stated in the correspondence as follows (“Implementation Schedule”):

- a. Design of the system being completed January 2005 through May 2005;
- b. Submission of an NPDES permit application to the Department by February 2005;
- c. Submission of a Water Quality Management Permit application to the Department by May, 2005; and
- d. Construction of the system October 2005 through October 2006.

A copy of the Department’s November 1, 2004 correspondence is attached hereto marked as “Exhibit E”.

16. On September 23, 2005, a Department representative contacted Keller Engineers, Burnsides consultant, and inquired about the status of the design of the

system. Keller Engineers informed the Department representative that the design of the system was not complete.

17. Burnside submitted the NPDES permit application to the Department on March 8, 2005.

18. To date, Burnside has not submitted a Water Quality Management Permit application.

19. One policy of the Commonwealth as declared by the PA SFA is to prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management. 35 P.S. § 750.3(2).

20. The PA SFA charges the Department with the duty to order a local agency to undertake actions deemed by the Department necessary to effectively administer the PA SFA. 35 P.S. § 750.10(7).

21. The Department issued the January 23, 2003 Enforcement Order to prevent and eliminate pollution of waters of the Commonwealth by coordinating Burnside's planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management.

22. Because Burnside has failed to submit a Water Quality Management Permit application by May 2005, Burnside will not be able to meet the schedule for completing construction of the facilities from October 2005 through October 2006.

23. Burnside's anticipated failure to meet the Implementation Schedule for completing construction of the facilities from October 2005 through October 2006 poses a direct and imminent threat of pollution to the waters of the Commonwealth.

24. Burnside's failure to implement the recommendations of the Act 537 Update Revision in accordance with the approved Implementation Schedule poses a direct and imminent threat of pollution to the waters of the Commonwealth.

WHEREFORE, the Department respectfully requests that this Honorable Court:

1. Enter the attached Rule to Show Cause;

2. After hearing, enter an Order requiring Burnside to:

a. Within thirty (30) days, submit a Water Quality Management Permit application for the construction of a sewage treatment plant;

b. Submit revisions necessary to fully address the Department's required modifications, amendments, or additions necessary to the Water Quality Management Permit application, if any, within thirty (30) days of receipt of said written comments from the Department;

c. Within one hundred twenty (120) days of the issuance of the approved Water Quality Management Permit, begin construction of the sewage treatment plant; and

d. Within four hundred eighty-five (485) days of the issuance of the

approved Water Quality Management Permit, complete construction and place into operation the sewage treatment plant in accordance with the approved Water Quality Management Permit.

3. In addition, the Department requests that this Honorable Court's Order require that Burnside pay a fine of One Hundred Dollars (\$100.00) per day for each day that Burnside fails to comply with this Order, with the fine to be imposed upon further Petition of the Department and a finding of contempt by this Court.

4. In addition, the Department requests that this Honorable Court find that the facts and violations set forth in the January 23, 2003 Enforcement Order are conclusively established.

5. In addition, the Department requests that this Honorable Court retain continuing jurisdiction of this matter.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION



DATE: 10-12-05

David M. Chuprinski  
Assistant Counsel  
PA Supreme Court I.D. Number 75540  
208 West Third Street - Suite 101  
Williamsport, PA 17701  
Telephone: (570) 321-6568

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Burnside Borough	:	Violations of the Pennsylvania Sewage
	:	Facilities Act and Department Regulations
Burnside Borough, Clearfield County	:	

**ORDER**

NOW, this 10<sup>th</sup> day of May, 2002, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), after investigation, has found and determined that:

A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("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. Burnside Borough is a municipality duly organized and existing under the laws of the Commonwealth. Burnside Borough acts and conducts business through its elected Borough Council. Burnside Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

C. Pursuant to Section 8 of the Sewage Facilities Act, Burnside Borough has transferred or delegated the administration of certain provisions of the Sewage Facilities Act to the Clearfield County Sewage Committee ("CCSC").

D. The CCSC is an agency that administers certain sections of the Sewage Facilities Act for its various member municipalities located in Clearfield County, Pennsylvania.

E. CCSC utilizes certified sewage enforcement officers employed by Hess & Fisher Engineers, Inc. and other certified sewage enforcement officers (individually, "SEO" and collectively, "SEO's") to carry out duties of sewage enforcement officers for the member municipalities CCSC represents, including Burnside Borough.

F. On July 30, 2001, the Department received a complaint alleging that sewage was running onto the surface of the ground at the property of Suzanne Koziel located on East Fifth Street in Burnside Borough, Clearfield County ("Koziel Property").

G. By correspondence dated August 6, 2001, the Department forwarded the complaint described in Paragraph F, above, to Burnside Borough. The SEO was copied on the complaint.

EXHIBIT

A

H. By correspondence dated September 7, 2001, the Department requested Burnside Borough's attendance at an administrative conference to discuss the complaint described in Paragraph F above. The Department requested that Burnside Borough confirm a date and time for the administrative conference. Burnside Borough never contacted the Department to confirm a date and time for the requested administrative conference.

I. On February 26, 2002, Department representatives inspected the Koziel Property and found that raw sewage discharges onto the surface of the ground at the Koziel Property. The Department representatives also observed a large diameter hose leading from the basement of a structure on an adjacent property to an alley next to the Koziel Property. It was suggested to the Department that the hose was used to pump sewage from the basement into the alley. By correspondence dated February 26, 2002, the Department wrote to CCSC regarding this complaint and asked CCSC to respond by March 15, 2002 as to the steps that have been taken, or will be taken to resolve this complaint. Burnside Borough and the SEO were copied on this correspondence.

J. To date, neither Burnside Borough, CCSC nor the SEO has resolved the discharge of sewage to the surface of the ground at and next to the Koziel Property as described in Paragraph I above.

K. Title 25 Pa. Code § 71.71 states that "[m]unicipalities are required to assure the proper operation and maintenance of sewage facilities within their borders."

L. Title 25 Pa. Code § 71.73(a) states that "[w]hen sewage facilities are permitted by local agencies, the municipality is responsible for taking actions necessary to assure continued compliance of these sewage facilities with the act, The Clean Streams Law and regulations promulgated thereunder."

M. Title 25 Pa. Code § 73.11 (c) states that "...[a] sewage system may not discharge untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth except as specifically permitted under Sections 202 and 207 of the Clean Streams Law (35 P.S. §§691.202 and 691.207)..."

N. Section 8(b)(7) of the Sewage Facilities Act, 35 P.S. § 750.8(b)(7), provides that "[e]ach local agency in addition to the powers and duties conferred upon it by existing law shall have the power and the duty... [t]o proceed under section 12 of this act to restrain violations of this act and the rules and regulations adopted hereunder."

O. Section 12 of the Sewage Facilities Act, 35 P.S. § 750.12, states that "[a]ny local agency or any municipality which is a member of a local agency shall have the power to institute suits in equity to restrain or prevent violations of section 7 of this act occurring within the jurisdiction or corporate limits of said local agency or municipality."

P. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states, "the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . .shall constitute a nuisance and shall be abatable in the manner provided by law."

Q. Section 201 of the Clean Streams Law, 35 P.S. § 691.201, provides that "[n]o person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereafter provided in this act."

R. Section 202 of the Clean Streams Law, 35 P.S. § 691.202, provides, in part, that "[n]o municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the [D]epartment...A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the [D]epartment is hereby declared to be a nuisance."

S. Section 611 of the Clean Streams Law, 35 P.S. § 691.611, provides, among other things, that "[i]t shall be unlawful to fail to comply with any rule or regulation of the [D]epartment..., to violate any of the provisions of this act or rules and regulations adopted thereunder..., [o]r to cause air or water pollution..."

T. Burnside Borough's failure to effectively administer the Sewage Facilities Act and take measures to correct and abate the sewage discharge described in Paragraph I above constitutes a violation of Section 8(b)(7) of the Sewage Facilities Act, 35 P.S. § 750.8(b)(7); 25 Pa. Code §§ 71.71, 71.73(a), and 73.11(c); and Section 201 of the Clean Streams Law, 35 P.S. § 691.201.

U. The violation described in Paragraph T above, constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611; and a statutory nuisance under Section 202 of the Clean Streams Law, 35 P.S. § 691.202; and Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14.

NOW, THEREFORE, this 10<sup>th</sup> day of May, 2002, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Section 5 of the Clean Streams Law, 35 P.S. § 691.5; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17, it is hereby ordered that Burnside Borough shall:

1. Within fifteen (15) days of receipt of this Order, investigate and identify all of the sources of raw sewage discharging onto the Koziel Property.
2. Within fifteen (15) days of receipt of this Order, conduct an investigation to determine if the hose in the alley adjacent to the Koziel Property is used to intermittently pump sewage from the basement of the neighboring structure onto the ground surface or otherwise determine if any violation exists in regard to sewage generated within the neighboring structure.
3. Within fifteen (15) days of receipt of this Order require all person(s) identified as contributing to the discharge of sewage onto and next to the Koziel Property to, within sixty (60) days of notice: 1) obtain necessary permits and abate the discharge(s), and 2) correct any other violations of the Sewage Facilities Act and rules and regulations of the Department found to exist on their properties.
4. Within eighty (80) days of receipt of this Order, in accordance with Section 12 of the Sewage Facilities Act, 35 P.S. § 750.12, institute a suit in equity to restrain or prevent all violations of the Sewage Facilities Act and the Clean Streams Law against those persons who have failed to correct their unpermitted discharge of sewage onto and next to the Koziel Property.

5. Within twenty (20) days after Burnside Borough conducts the investigation required in Paragraphs 1 and 2, above, Burnside Borough shall submit a report in writing to the Department describing the results of the investigation and detailing the steps Burnside Borough has taken or will take to abate the violation. The report shall be submitted to the Department at the address set forth in Paragraph 6, below.
6. Burnside Borough shall provide copies to the Department of any and all notices, correspondence, pleadings or other documents generated as a result of this Order within fifteen (15) days after their creation. Copies shall be submitted to the Department at:

Environmental Program Manager  
Water Management Program  
Northcentral Regional Office  
208 West Third Street - Suite 101  
Williamsport, PA 17701-6448

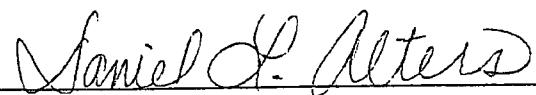
7. Nothing set forth in this Order is intended, nor shall it be construed, to relieve or limit Burnside Borough's obligation to comply with any existing or subsequent statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall it be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.
8. This Order of the Department is effective IMMEDIATELY upon receipt.

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



Daniel L. Alters  
Daniel L. Alters  
Environmental Program Manager Water Quality  
Northcentral Regional Office

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Burnside Borough : Failure to Revise Official Sewage Facilities  
Burnside Borough, Clearfield County : Plan for Burnside Borough

**ORDER**

NOW, this 23<sup>rd</sup> day of January, 2003, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), after investigation, has found and determined that:

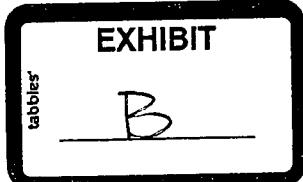
A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("Sewage Facilities Act" or "Act 537"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, 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. Burnside Borough is a municipality located in Clearfield County, duly organized and existing under the laws of the Commonwealth (the "Borough"). The Borough acts and conducts business through its elected Borough Council. The Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

C. On May 10, 2002, the Department issued an Order to the Borough directing the Borough to investigate and abate the discharge of raw sewage onto the surface of the ground at and next to the residence of Suzanne Koziel located on East Fifth Street in the Borough ("Koziel Property").

D. On June 12, 2002, the Department met with Borough Council members and others to discuss the Borough's investigation into resolving the discharge of sewage onto the surface of the ground at and next to the Koziel Property. The Borough preliminarily indicated that a Borough-wide approach to correcting sewage system problems might be more appropriate than an approach limited to the Koziel Property.

E. Previously, a comprehensive plan dated January 1969 for water and wastewater programs for the County of Clearfield had been developed to serve as the Official Sewage Facilities Plan for the Borough, as well as other areas within Clearfield County. The Official Sewage Facilities Plan identified the Borough to be in need of a sewage collection system and a central treatment plant. The recommended plan called for a collection system and secondary treatment works with a capacity of 0.04 million gallons per day to serve the area of the Borough. The implementation schedule was to have the collection system and primary treatment completed by 1970 and achieve secondary treatment by 1980. The Borough never implemented these recommendations.



F. On June 19, 2002, the secretary of the Borough Council informed the Department that the Borough had retained Hess & Fisher Engineers, Inc. to develop a Borough-wide plan for adequate sewage treatment facilities through the preparation and submission of an Act 537 update revision to the Official Sewage Facilities Plan ("Act 537 Update Revision") in accordance with Section 5 of the Sewage Facilities Act, 35 P. S. § 750.5.

G. Under cover letter dated July 26, 2002, Hess & Fisher Engineers, Inc. submitted on behalf of the Borough a plan of study (POS). The POS detailed a comprehensive update revision study focused on confirming the severity of the problems with existing sewage disposal systems in the Borough, and identifying an environmentally sound, cost-effective solution to the problems identified.

H. By letter dated August 26, 2002, the Department approved the Borough's POS described in Paragraph G, above.

I. By correspondence dated November 27, 2002, Wilson Fisher submitted on behalf of the Borough, a draft copy of the results of sanitary survey work conducted on October 17-18, 2002 by Hess & Fisher Engineers, Inc. for the area within the boundaries of the Borough ("Sanitary Survey"). The Sanitary Survey documented and confirmed that at least 50% of the sewage generating structures in the Borough are served either by systems which discharge inadequately treated sewage directly onto the surface of the ground or into waters of the Commonwealth, or by one of four unauthorized "wildcat" sewer systems, which in turn discharge inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth.

J. Based upon its review of the Sanitary Survey results, as described in Paragraph I, and the Official Sewage Facilities Plan dated January 1969, described above in Paragraph F, the Department has determined that the Borough's existing Official Sewage Facilities Plan is outdated and is inadequate to meet the sewage needs of the Borough, its residents and property owners.

K. To date the Borough has failed to submit an Act 537 Update Revision to address the discharges of inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth, as described in Paragraph I, above.

L. Section 5(a) of the Sewage Facilities Act, 35 P.S. § 750.5(a), states that "[e]ach 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..."

M. Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(3), states that "[e]very official plan shall...[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..."

N. Title 25 Pa. Code § 71.11 states in part that "[m]unicipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems..."

O. Title 25 Pa. Code §71.12(a) states that “[m]unicipalities shall 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 portion thereof.”

P. Title 25 Pa. Code § 71.13(a) states that “[t]he Department will require a municipality to revise its official plan when it determines that the plan ...is inadequate to meet the sewage needs of the municipality, its residents or property owners...”

Q. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states that "... the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth ...shall constitute a nuisance and shall be abatable in the manner provided by law."

R. Section 10(1) of the Sewage Facilities Act, 35 P.S. § 750.10(1), states that "[t]he Department shall have the power and its duty shall be...[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide."

S. Section 10(3) of the Sewage Facilities Act, 35 P.S. § 750.10(3), states that "[t]he Department shall have the power and its duty shall be...[t]o order the implementation of official plans and revisions thereto."

T. Section 5(b)(7) of the Clean Streams Law, 35 P.S. § 691.5(b)(7), provides that "[t]he Department shall have the power and its duty shall be to ...[i]ssue such orders as may be necessary to implement...the rules and regulations of the Department."

NOW, THEREFORE, this 23<sup>rd</sup> day of January, 2003, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Section 5 of the Clean Streams Law, 35 P.S. §691.5; and Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, it is hereby ordered that:

1. Within one hundred and twenty (120) calendar days of receipt of this Order, Burnside Borough shall submit an administratively and technically complete, municipally adopted Act 537 Update Revision to the Department.
2. The municipally adopted Act 537 Update Revision may be approved, rejected, or approved with conditions by the Department. If the Department determines that the municipally adopted Act 537 Update Revision does not comply fully with the requirements of Act 537, the Department may require Burnside Borough to make changes and/or submit additional information. Burnside Borough shall submit such changes and/or information within forty-five (45) calendar days of receipt of the Department's written request.
3. The final approved municipally adopted Act 537 Update Revision and the deadlines contained therein shall be incorporated as part of this Order for all purposes, and Burnside Borough shall completely implement the recommendations of the Act 537 Update Revision in accordance with the approved implementation schedule.

4. Nothing set forth in this Order is intended, nor shall be construed, to relieve or limit Burnside Borough's obligation to comply with any existing or subsequent statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.
5. This Order of the Department is effective IMMEDIATELY upon receipt.

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, PO 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.

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FOR THE COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Daniel L. Alters  
Environmental Program Manager Water Quality  
Northcentral Regional Office

<b>SENDER:</b> <ul style="list-style-type: none"> <li>■ Complete items 1 and/or 2 for additional services.</li> <li>■ Complete items 3, 4a, and 4b.</li> <li>■ Print your name and address on the reverse of this form so that we can return this card to you.</li> <li>■ Attach this form to the front of the mailpiece, or on the back if space does not permit.</li> <li>■ Write "Return Receipt Requested" on the mailpiece below the article number.</li> <li>■ The Return Receipt will show to whom the article was delivered and the date delivered.</li> </ul>		I also wish to receive the following services (for an extra fee): 1. <input type="checkbox"/> Addressee's Address 2. <input type="checkbox"/> Restricted Delivery Consult postmaster for fee.
Is your RETURN ADDRESS completed on the reverse side?	3. Article Addressed to: <p>Burn side Borough PO Box 208 Burnside, PA 15721</p>	4a. Article Number 7000 0600 0034 1096 6375
	5. Received By: (Print Name) <p>Jeffrey H Siford</p>	4b. Service Type <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Certified <input type="checkbox"/> Express Mail <input type="checkbox"/> Insured <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> COD
6. Signature: (Addressee or Agent) <p>X John H Siford</p>		7. Date of Delivery 1-24-03
		8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994

102595-98-B-0229 Domestic Return Receipt

EXHIBIT

C



(717) 787-3483  
TELECOPIER (717) 783-4738  
<http://ehb.courtapps.com>

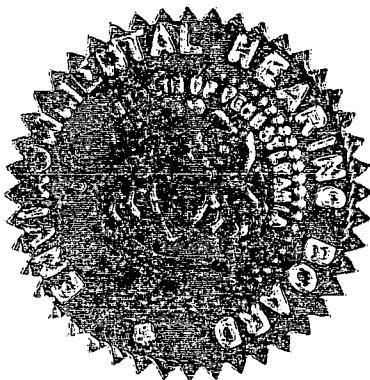
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

### CERTIFICATION OF OFFICIAL RECORDS

I, William T. Philliply IV, Secretary of the Environmental Hearing Board of the Commonwealth of Pennsylvania, appointed pursuant to Section 3(f) of the Environmental Hearing Board Act, 35 P.S. §7513(b), DO HEREBY CERTIFY in accordance with the provisions of 42 Pa.C.S.A. §6103(a) and (b), that, I am legal custodian of the records and documents maintained by the Environmental Hearing Board (the Board). After having caused to be made a thorough examination of the records, I further certify that no appeal of any administrative order issued by the Pennsylvania Department of Environmental Protection on or after January 23, 2003 to Burnside Borough, Clearfield County, regarding sewerage facilities in the Borough has been filed with the Board by the Borough.

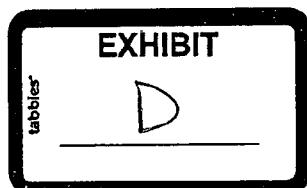
IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Environmental Hearing Board to be affixed.

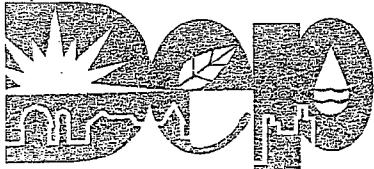


A handwritten signature of William T. Philliply IV, followed by an equals sign (=) and a horizontal line.

WILLIAM T. PHILLIPY, IV  
Secretary to the Board

DATED: January 31, 2005





Pennsylvania Department of Environmental Protection

208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

NOV 01 2004

Northcentral Regional Office

Fax 570-327-3565

**CERTIFIED MAIL NO. 7004 1160 0002 2580 7661**

Burnside Borough Council  
c/o Twila Sunderlin, Secretary  
General Delivery  
Burnside, PA 15721

Re: Act 537 Update  
APS# 488303  
Burnside Borough, Clearfield County

Dear Borough Council:

We have completed review of an Act 537 Sewage Facilities Plan Update completed by Hess & Fisher Engineers, Inc. for Burnside Borough. This plan is hereby approved by this Department as a revision to Burnside Borough's Act 537 Official Sewage Facilities Plan. As provided by the Pennsylvania Sewage Facilities Act and Chapter 71, Administration of Sewage Facilities Planning Program, this Department will hold Burnside Borough responsible for the complete and timely implementation of this plan. In addition, Section 2 of the Administrative Order of January 23, 2003 issued by this Department allows the Department to approve the municipally adopted Act 537 Update Revision with conditions. The conditions we approve this revision with are that the plan be implemented in accordance with the following schedule:

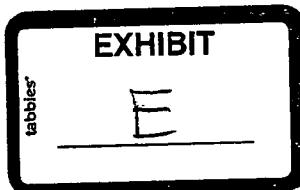
Design of system - January, 2005 through May, 2005.

Submit NPDES permit application to the Department - February, 2005. *3/8/05*

Submit Water Quality Management permit application to the Department - May, 2005.

Construction of system - October, 2005 through October, 2006.

The approved plan calls for approximately 2,000 feet of low pressure sewer and eight grinder pumps to serve the southern end of the borough, with a gravity collection system consisting of approximately 21,200 feet of sewers, to serve the rest of the borough. Treatment will be provided by a proposed 40,000 gallon per day bio-wheel reactor type sewage treatment plant which will discharge to the West Branch Susquehanna River.



[www.dep.state.pa.us](http://www.dep.state.pa.us)



NOV 01 2004

Burnside Borough Council will be responsible for operation and maintenance of the sewage facilities. This includes the grinder pumps. The Borough will be required to maintain at least one spare grinder pump and parts in order to complete timely repair/replacement of faulty pumps.

Permits will be required for these facilities. Information and applications can be obtained by calling our Water Quality Management permitting section at 570-321-6560. Permits will also be required for River Crossings and any wetland encroachments. Information for these permits can be obtained by calling our Soils and Waterways Section at 570-327-3700.

Enclosed is a form which you can use to apply for 50% reimbursement of your planning costs from this Department. Please complete the form, attach required documentation and send to the address indicated on the form.

If you have any questions, please call William Bailey at 570-327-3688.

Sincerely,



Daniel L. Alters  
Environmental Program Manager  
Water Management

Enclosure

cc: Hess and Fisher Engineers, Inc.  
Clearfield County Planning Commission  
Gary Metzger  
Al Sever  
Rich Adams  
Curt White  
William Bailey  
File

WB/rjh

VERIFICATION

I, Robert H. Boos, Environmental Protection Compliance Specialist for the Commonwealth of Pennsylvania, Department of Environmental Protection's Water Management Program in the Northcentral Region, hereby certify that I am authorized to make this verification on behalf of the Department of Environmental Protection and that the facts recited in the foregoing Complaint for Compliance with Department Enforcement Order are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



\_\_\_\_\_  
Robert H. Boos  
Environmental Protection Compliance  
Specialist  
Water Management Program  
Department of Environmental Protection  
Northcentral Regional Office

DATE: 10-12-05

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 05-1593-CD  
v. :  
: I hereby certify this to be a true  
: and attested copy of the original  
: statement filed in this case.  
BURNSIDE BOROUGH, : OCT 21 2005  
Respondent. : Attest.

ORDER

*Wm. L. Ammerman*  
Prothonotary  
Clerk of Court

AND NOW, this 19<sup>th</sup> day of October, 2005, upon consideration of the foregoing Complaint, it is hereby ordered that:

1. A RULE is issued upon the Respondent to show cause why the Petitioner is not entitled to the relief requested;
2. The Respondent shall file an answer to the Complaint within 30 days of this date;
3. The Complaint shall be decided under Pa. R.C.P. No. 206.7;
4. Argument shall be held on Dec. 14, 2005, @ 2:00 pm in Courtroom Number 1 of the Clearfield County Courthouse; and
5. Notice of the entry of this Order shall be provided to all parties by the Petitioner.

By the Court  
/s/ Fredric J. Ammerman

, J.

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No.

v.

BURNSIDE BOROUGH,  
Respondent.

**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.**

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

MidPenn Legal Services  
211 ½ E. Locust Street  
Clearfield, PA 16830  
(814) 326-9177

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

FILED NO CC  
m/13/04  
DEC 09 2003  
S

William A. Shaw  
Prothonotary/Clerk of Courts

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
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v. :  
BURNSIDE BOROUGH,  
Respondent. :

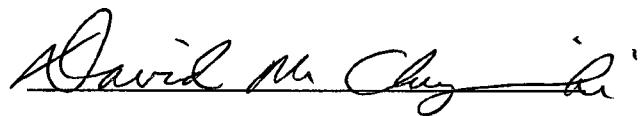
PRAECIPE

To the Prothonotary:

Please file of record in the above captioned matter the enclosed Amended Petition, filed pursuant to Pa.R.C.P. No. 1028(c)(1), 42 Pa.C.S.A. A copy has been served on Respondent's counsel of record via overnight mail on this date.

Also file of record in the above captioned matter the enclosed Answer to New Matter Raised in Respondent's Answer, Answer to Respondent's Preliminary Objections and Brief filed in opposition to Respondent's Preliminary Objections. Copies have been served on Respondent's counsel of record via overnight mail on this date.

Respectfully submitted,  
COMMONWEALTH OF  
PENNSYLVANIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION



DATE: 12-8-05

Telephone: (570) 321-6568

David M. Chuprinski  
Assistant Counsel  
PA Supreme Court I.D. Number 75540  
208 West Third Street - Suite 101  
Williamsport, PA 17701

c: Via Overnight Mail

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

FILED

DEC 09 2005

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

FILED <sup>2cc</sup>  
m 11:30 AM <sup>Atty</sup>  
DEC 09 2005 Chupinski  
GK  
William A. Shaw  
Prothonotary/Clerk of Courts

Petitioner, : Civil Action in Law and Equity  
: :  
: Compel Compliance with January 23,  
: 2003 Order of Department  
: :  
: No. 2005-1593-CD  
: :  
: :  
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Respondent. :  
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AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931, who files this **Petition** to Compel Compliance with Order of Department. In support thereof, the Department respectfully represents as follows:

1. Your Petitioner, the Department, is the Administrative agency with the authority and responsibility to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* ("PA SFA"); 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.

2. Respondent Burnside Borough (“Burnside”) is a local agency as that term is defined in Section 2 of the PA SFA, 35 P.S. § 750.2. Burnside’s mailing address is P.O. Box 208, Burnside, PA 15721.

3. This Court has jurisdiction over this proceeding pursuant to Sections 761 and 931 of the Judicial Code, 42 Pa. C.S.A. §§ 761(b) and 931.

4. Pursuant to the PA SFA at 35 P.S. § 750.10, on May 10, 2002 the Department issued an Enforcement Order against Burnside (hereinafter “May 10, 2002 Enforcement Order”). The May 10, 2002 Enforcement Order involved Burnside’s inaction in addressing the discharge of raw sewage on private property within the Borough. The May 10, 2002 Enforcement Order is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as “Exhibit A”.

5. Following an appeal of the May 10, 2002 Enforcement Order filed by Burnside, and pursuant to the PA SFA at 35 P.S. § 750.10, on January 23, 2003 the Department issued another Enforcement Order against Burnside (hereinafter “January 23, 2003 Enforcement Order”). The January 23, 2003 Enforcement Order is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as “Exhibit B”.

6. The Department served via Certified Mail, Return Receipt Requested, the January 23, 2003 Enforcement Order which was received by a John H. Siford at Burnside’s mailing address of P.O. Box 208, Burnside, PA 15721 on January 24, 2003.

The Domestic Return Receipt is incorporated herein by reference as though fully set forth, and a copy is attached hereto marked as "Exhibit C".

7. Pursuant to 25 Code § 1021.52(a)(1), Burnside had thirty (30) days in which to file with the Environmental Hearing Board ("EHB") an appeal of the January 23, 2003 Enforcement Order, or by February 24, 2003.

8. As documented in an EHB Certification of Official Records dated January 31, 2005, Burnside did not file an appeal of the January 23, 2003 Enforcement Order by February 24, 2003. *See* Certification of Official Records attached hereto marked as "Exhibit D" and incorporated herein by reference as though fully set forth.

9. Because Burnside did not appeal the January 23, 2003 Enforcement Order, it is precluded from contesting its content or validity in this proceeding. *DER v. Wheeling-Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320 (1977); *DER v. Williams*, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981).

10. The following facts and violations are conclusively established by the January 23, 2003 Enforcement Order:

a. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("Sewage Facilities Act" or "Act 537"); 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. Burnside Borough is a municipality located in Clearfield County, duly organized and existing under the laws of the Commonwealth (the "Borough"). The

Borough acts and conducts business through its elected Borough Council. The Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

c. On May 10, 2002, the Department issued an Order to the Borough directing the Borough to investigate and abate the discharge of raw sewage onto the surface of the ground at and next to the residence of Suzanne Koziel located on East Fifth Street in the Borough ("Koziel Property").

d. On June 12, 2002, the Department met with Borough Council members and others to discuss the Borough's investigation into resolving the discharge of sewage onto the surface of the ground at and next to the Koziel Property. The Borough preliminarily indicated that a Borough-wide approach to correcting sewage system problems might be more appropriate than an approach limited to the Koziel Property.

e. Previously, a comprehensive plan dated January 1969 for water and wastewater programs for the County of Clearfield had been developed to serve as the Official Sewage Facilities Plan for the Borough, as well as other areas within Clearfield County. The Official Sewage Facilities Plan identified the Borough to be in need of a sewage collection system and a central treatment plant. The recommended plan called for a collection system and secondary treatment works with a capacity of 0.04 million gallons per day to serve the area of the Borough. The implementation schedule was to have the collection system and primary treatment completed by 1970 and achieve secondary treatment by 1980. The Borough never implemented these recommendations.

f. On June 19, 2002, the secretary of the Borough Council informed the Department that the Borough had retained Hess & Fisher Engineers, Inc. to develop a Borough-wide plan for adequate sewage treatment facilities through the preparation and submission of an Act 537 update revision to the Official Sewage Facilities Plan ("Act 537 Update Revision") in accordance with Section 5 of the Sewage Facilities Act, 35 P. S. § 750.5.

g. Under cover letter dated July 26, 2002, Hess & Fisher Engineers, Inc. submitted on behalf of the Borough a plan of study ("POS"). The POS detailed a comprehensive update revision study focused on confirming the severity of the problems with existing sewage disposal systems in the Borough, and identifying an environmentally sound, cost-effective solution to the problems identified.

h. By letter dated August 26, 2002, the Department approved the Borough's POS described in Paragraph G, above.

i. By correspondence dated November 27, 2002, Wilson Fisher submitted on behalf of the Borough, a draft copy of the results of sanitary survey work conducted on October 17-18, 2002 by Hess & Fisher Engineers, Inc. for the area within the boundaries of the Borough ("Sanitary Survey"). The Sanitary Survey documented and confirmed that at least 50% of the sewage generating structures in the Borough are served either by systems which discharge inadequately treated sewage directly onto the surface of the ground or into waters of the Commonwealth, or by one of four unauthorized "wildcat" sewer systems, which in turn discharge inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth.

j. Based upon its review of the Sanitary Survey results, as described in Paragraph I, and the Official Sewage Facilities Plan dated January 1969, described above in Paragraph F, the Department has determined that the Borough's existing Official Sewage Facilities Plan is outdated and is inadequate to meet the sewage needs of the Borough, its residents and property owners.

k. To date [January 23, 2003] the Borough has failed to submit an Act 537 Update Revision to address the discharges of inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth, as described in Paragraph I, above.

l. Section 5(a) of the Sewage Facilities Act, 35 P.S. § 750.5(a), states that "[e]ach 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..."

m. Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(3), states that "[e]very official plan shall...[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..."

n. Title 25 Pa. Code § 71.11 states in part that "[m]unicipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems...".

o. Title 25 Pa. Code §71.12(a) states that "[m]unicipalities shall 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 portion thereof."

p. Title 25 Pa. Code § 71.13(a) states that "[t]he Department will require a municipality to revise its official plan when it determines that the plan ...is inadequate to meet the sewage needs of the municipality, its residents or property owners..."

q. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states that "... the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . .shall constitute a nuisance and shall be abatable in the manner provided by law."

r. Section 10(1) of the Sewage Facilities Act, 35 P.S. § 750.10(1), states that "[t]he Department shall have the power and its duty shall be...[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide."

s. Section 10(3) of the Sewage Facilities Act, 35 P.S. § 750.10(3), states that "[t]he Department shall have the power and its duty shall be...[t]o order the implementation of official plans and revisions thereto."

t. Section 5(b)(7) of the Clean Streams Law, 35 P.S. § 691.5(b)(7), provides that "[t]he Department shall have the power and its duty shall be to ...[i]ssue such orders as may be necessary to implement...the rules and regulations of the Department."

11. The January 23, 2003 Enforcement Order required Burnside, *inter alia*, within one hundred and twenty (120) calendar days of receipt of the January 23, 2003 Enforcement Order [by May 24, 2003] to submit an administratively and technically complete, municipally adopted Act 537 Update Revision to the Department. *See* January 23, 2003 Enforcement Order, Paragraph 1, Exhibit B.

12. On May 23, 2003, Burnside submitted to the Department a municipally adopted Act 537 Update Revision ("Revision").

13. Pursuant to the January 23, 2003 Enforcement Order, the final approved

municipally adopted Act 537 Update Revision, *the deadlines contained therein*, and the conditions of the approval were incorporated as part of the Enforcement Order for all purposes. *See January 23, 2003 Enforcement Order, Paragraph 3, Exhibit B. Emphasis added.*

14. The January 23, 2003 Enforcement Order also provided that “Burnside Borough shall completely implement the recommendations of the Act 537 Update Revision *in accordance with the approved implementation schedule*. *See January 23, 2003 Enforcement Order, Paragraph 3, Exhibit B. Emphasis added.*

15. By correspondence dated November 1, 2004, the Department approved the Revision with the condition that the Revision be implemented in accordance with the schedule stated in the correspondence as follows (“Implementation Schedule”):

- a. Design of the system being completed January 2005 through May 2005;
- b. Submission of an NPDES permit application to the Department by February 2005;
- c. Submission of a Water Quality Management Permit application to the Department by May, 2005; and
- d. Construction of the system October 2005 through October 2006.

A copy of the Department’s November 1, 2004 correspondence is attached hereto marked as “Exhibit E”.

16. On September 23, 2005, a Department representative contacted Keller Engineers, Burnsides consultant, and inquired about the status of the design of the system. Keller Engineers informed the Department representative that the design of the system was not complete.

17. Burnside submitted the NPDES permit application to the Department on March 8, 2005.

18. To date, Burnside has not submitted a Water Quality Management Permit application.

19. One policy of the Commonwealth as declared by the PA SFA is to prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management. 35 P.S. § 750.3(2).

20. The PA SFA charges the Department with the duty to order a local agency to undertake actions deemed by the Department necessary to effectively administer the PA SFA. 35 P.S. § 750.10(7).

21. The Department issued the January 23, 2003 Enforcement Order to prevent and eliminate pollution of waters of the Commonwealth by coordinating Burnside's planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management.

22. Because Burnside has failed to submit a Water Quality Management Permit application by May 2005, Burnside will not be able to meet the schedule for completing construction of the facilities from October 2005 through October 2006.

23. Burnside's anticipated failure to meet the Implementation Schedule for completing construction of the facilities from October 2005 through October 2006 poses a direct and imminent threat of pollution to the waters of the Commonwealth.

24. Burnside's failure to implement the recommendations of the Act 537 Update Revision in accordance with the approved Implementation Schedule poses a direct and imminent threat of pollution to the waters of the Commonwealth.

25. The Department does not have an adequate remedy at law to compel Burnside to perform its obligations under the January 23, 2003 Enforcement Order. The only legal action to be taken with respect to the Order is enforcement. *DER v. Landmark*, 570 A.2d 140, 142 (Pa. Commonwealth 1989).

WHEREFORE, the Department respectfully requests that this Honorable Court:

1. Enter the attached Rule to Show Cause;
2. After hearing, enter an Order requiring Burnside to:
  - a. Within thirty (30) days, submit a Water Quality Management Permit application for the construction of a sewage treatment plant;

c. Within one hundred twenty (120) days of the issuance of the approved Water Quality Management Permit, begin construction of the sewage treatment plant; and

d. Within four hundred eighty-five (485) days of the issuance of the approved Water Quality Management Permit, complete construction and place into operation the sewage treatment plant in accordance with the approved Water Quality Management Permit.

3. In addition, the Department requests that this Honorable Court's Order require that Burnside pay a fine of One Hundred Dollars (\$100.00) per day for each day that Burnside fails to comply with this Order, with the fine to be imposed upon further Petition of the Department and a finding of contempt by this Court.

4. In addition, the Department requests that this Honorable Court find that the facts and violations set forth in the January 23, 2003 Enforcement Order are conclusively established.

5. In addition, the Department requests that this Honorable Court retain continuing jurisdiction of this matter.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 12-8-05



David M. Chuprinski  
Assistant Counsel  
PA Supreme Court I.D. Number 75540  
208 West Third Street - Suite 101  
Williamsport, PA 17701  
Telephone: (570) 321-6568

IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v.  
BURNSIDE BOROUGH,  
Respondent. :

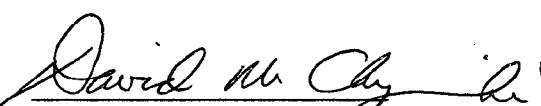
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date noted below the foregoing Amended Petition to Compel Compliance with Order of Department has been sent to the following via Overnight Mail:

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 12-8-05

  
David M. Chuprinski  
Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

FILED

DEC 09 2005

William A. Shaw  
Prothonotary/Clerk of Courts

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IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

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William A. Shaw  
Prothonotary/Clerk of Courts

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v.  
BURNSIDE BOROUGH,  
Respondent. :

Petitioner Department of Environmental Protection's  
Answer to Respondent's  
Preliminary Objections

AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), who files this Answer to Respondent's Preliminary Objections to the above captioned action.

I. Improper Process under Pa.R.C.P. Rule 206.7

1. It is admitted that the captioned action was commenced by the Department pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931 and titled as "Complaint". The Department's filing, as a written document speaks for itself.

2. Admitted. By way of further answer, the Department is Petitioner in the above captioned action and Burnside Borough is the Respondent.
3. It is specifically denied that the Department has improperly referred to itself as Petitioner and Burnside Borough as Respondent in the above captioned matter.
4. It is admitted that this Court issued its October 19, 2005 Order upon the Department's filing of a *de facto* Petition to Compel Compliance with an Order of Department, to be answered under Pa.R.C.P. No. 206, 42 Pa.C.S.A., erroneously titled a "Complaint". The Department is filing an amended Petition contemporaneously with this Answer to Respondent's Preliminary Objections to accurately title the action before this Court.
5. Admitted.
6. Denied as stated. Pa.R.C.P. No. 206.1, 42 Pa.C.S.A., provides a definition of "Petition".
7. Denied as stated. Rule 206 of the Court of Common Pleas of Clearfield County, Commonwealth of Pennsylvania, Rules of Civil Procedure, provides that a Petition and Rule to Show Cause "may be used to bring before the Court any proper matter for which no other *specific* procedure is authorized ..." 46 J.D.R.C.P. 206, emphasis added. By way of further answer, the Court of Common Pleas of Clearfield County, Commonwealth of Pennsylvania, Rules of Civil Procedure do not provide for any other specific procedure by which the Department can compel compliance with an Order of Department.
8. Legal conclusion to which no response is required.

9. Admitted that this Court's Rule to Show cause directs Burnside to file an Answer to the filed action, erroneously titled "Complaint".
10. Admitted that the procedures for answering a Civil Complaint are governed by PA Rules of Civil Procedure other than Rule 206.7. By way of further answer, the Department's filed action, erroneously titled "Complaint", is a Petition properly administered by the Court under Pa.R.C.P. No. 206.1 *et seq.*, 42 Pa.C.S.A. and 46 J.D.R.C.P. 206 *et seq.*
11. Legal conclusion to which no response is required.

WHEREFORE, the Court should deny the Preliminary Objection of the Respondent.

## II. Adequate Legal Remedy

12. Denied as stated. The Department's action seeks relief from this Court in enforcing of January 23, 2003 Order, duly issued against the Borough, with the Borough not having perfected any appeal thereof.
13. Admitted.
14. The Department's January 23, 2003 Enforcement Order, as a written document, speaks for itself. It is admitted that Sections 13 and 13.1 of the Sewage Facilities Act, 35 P.S. § 750.13, 35 P.S. §§ 750.13 and 750.13.3, authorize the Department to seek the imposition of fines and civil penalties for the violation of the Act. By way of further answer, in the instant action the Department is seeking compliance with the Department's January 23, 2003 Order, upon the pain of a finding of contempt by this Court after further hearing, if necessary.

15. Denied as stated. By way of further answer, the relief the Department is seeking - compliance with the Department's January 23, 2003 Order, upon the pain of a finding of contempt by this Court after further hearing, if necessary - is not available to the Department under the Sewage Facilities Act.
16. Pursuant to Pa.R.C.P. No. 1028(c)(1), 42 Pa.C.S.A., the Department is filing an amended Petition contemporaneously with this Answer to Respondent's Preliminary Objections to state a basis for the Department's resorting to the instant action.
17. Denied that the Department has a full, complete and adequate statutory remedy providing the relief it seeks.

WHEREFORE, the Court should deny the Preliminary Objection of the Respondent.

### III. Legal Insufficiency of a Pleading

18. Legal conclusion to which no response is required.
19. Legal conclusion to which no response is required. By way of further answer, in the instant action, the Department is not seeking a present finding of contempt by this Court.
20. Legal conclusion to which no response is required. By way of further answer, in the instant action, the Department is not seeking the present imposition of a fine by this Court.

WHEREFORE, the Court should deny the Preliminary Objection of the Respondent.

Respectfully submitted,

COMMONWEALTH OF  
PENNSYLVANIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION



DATE: 12-8-05

David M. Chuprinski  
Assistant Counsel  
PA Supreme Court I.D. Number 75540  
208 West Third Street - Suite 101  
Williamsport, PA 17701

Telephone: (570) 321-6568

IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
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: No. 2005-1593-CD  
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BURNSIDE BOROUGH,  
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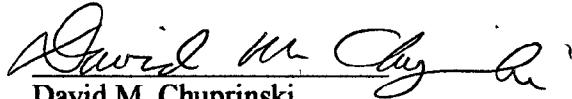
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date noted below the foregoing Answer to Respondent's Preliminary Objections has been sent to the following via Overnight Mail:

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 12-8-05

  
David M. Chuprinski  
Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

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William A. Shaw  
Prothonotary/Clerk of Courts

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## Wing, John and (John) (1710-1786) (John, 1710-1786)

## ANSWER TO THE PARLIAMENTARY QUESTION ASKED BY MR. G. J. DUFFY.

CIT-1001-003-07

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IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

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William A. Shaw  
Prothonotary/Clerk of Courts  
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COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v. :  
BURNSIDE BOROUGH,  
Respondent. :  
:

Petitioner Department of Environmental Protection's  
Answer to New Matter Raised in Respondent's  
Answer

AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), who files this Answer to New Matter raised in Respondent's Answer to the above captioned action.

1. It is admitted that the captioned action was commenced by the Department pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931 and titled as "Complaint". The Department's filing, as a written document speaks for itself.
2. It is admitted that the captioned action was commenced by the Department pursuant to 35 P.S. § 750.10 and 42 Pa.C.S.A. §§ 761(b) and 931. It is admitted that no other actions or filing have been made before this Court to date in the

captioned matter. The Court's October 19, 2005 Rule to Show Cause, as a written document, speaks for itself.

3. Admitted.

4. Admitted.

5. It is admitted that the PA Rules of Civil Procedure govern the procedure for responding to a Complaint in Law and Equity. By way of further answer, the filing presently before this Court, erroneously titled a "Complaint" as filed, is a Petition to Compel Compliance with an Order of Department, to be answered under Pa.R.C.P. No. 206, 42 Pa.C.S.A. The Department is filing an amended Petition contemporaneously with its Answer to Respondent's Preliminary Objections to accurately title the action before this Court.

6. It is denied that the Court's issuance of the October 19, 2005 Rule to Show Cause was contrary to the PA Rules of Civil Procedure.

7. It is denied that limiting Burnside to the filing of an answer to the captioned action is contrary to the PA Rules of Civil Procedure.

8. Admitted.

9. Admitted. By way of further answer, the filing presently before this Court, erroneously titled a "Complaint" as filed, is a Petition to Compel Compliance with an Order of Department, to be answered under Pa.R.C.P. No. 206, 42 Pa.C.S.A.

10. No response required.

11. No response required.

12. The Department neither confirms nor denies the averment. By way of further answer, Burnside did not appeal the January 23, 2003 Enforcement Order, and therefore is precluded from contesting its content or validity in this proceeding. *DER v. Wheeling-Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320 (1977); *DER v. Williams*, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981).

13. No response required.

14. It is admitted that the Department approved the Borough's Act 537 Update Revision ("Revision") on November 1, 2004. By way of further answer, the Department numerous times was required to request the Borough to resubmit information pertaining to the Revision submission. The following are the notations of said dates and events from the Department's file:

5-27-03 Plan submitted by Hess & Fisher Engineers, Inc. was received

6-16-03 An Administratively incomplete letter was sent.

8-11-03 An administratively complete submission was received.

9-25-03 Acknowledgement of complete submission was sent.

10-30-03 Letter sent requesting additional information was sent.

12-3-03 No response to above was received. A 60 day extension letter was sent.

12-17-03 Additional information was partly received. Wetlands and PHMC concerns were not addressed.

During Jan. & Feb. 2004 phone calls and e-mails were made trying to resolve the 2 remaining issues.

2-4-04 PHMC & Wetlands issues not resolved and plan was disapproved.

5-7-04 Hess & Fisher Engineers submitted a revised plan.

8-31-04 Letter was sent requesting more information.

8-31-04 Letter was sent indicating a 60 extension was needed.

10-15-04 Received a response addressing some of the additional requested info.

Several phone calls between 10-15-04 & 10-28-04 with Wilson Fisher of Hess & Fisher Engineers, Inc.

10-28-04 Received the final information requested above.

11-1-04 Approved the Plan

15. No response required.

16. It is denied that the Department concluded the Act 537 Plan was unfeasible, unworkable and/or "unfinancable". Burnside hired Keller Engineers to design the system as approved on 11-1-04. On 12-29-04, DEP received a letter from Burnside that they hired Keller Engineers to design the system that Hess & Fisher had submitted the planning for, and which the Department approved on 11-1-04. Keller Engineers called the Department and reported that they could not build the system that was approved on 11-1-04, and asked if they could submit a revised plan. The Department agreed to allow the Borough to submit a revised plan, but the Department warned the Borough and their consultant that the project schedule in the January 23, 2003 Order would still have to be met. The consultant assured the Department that that would not be a problem.

17. Denied as stated. On 1-28-05, the Department received a DRAFT plan revision (not adopted by Burnside). On 3-3-05 the Department responded to the draft submission with a letter listing several deficiencies/additions that would have to be made to the document before it was adopted and submitted. On 6-20-05 the Department received the ADOPTED plan revision. On 7-7-05 Burnside and Keller Eng. were advised orally during a Pennvest consultation that the plan would not be accepted as "administratively complete" until additional, more detailed maps were received. On 7-19-05 those maps were received.

18. Admitted that the Revision was approved on Oct. 12, 2005. In Keller's DRAFT submission of 1-28-05, the Borough proposed a more expeditious implementation schedule. The Department recommended in its 3-3-05 response that the Borough keep the schedule as listed in the original approval of 11-1-04. In the ADOPTED plan (Received 6-20-05) the original schedule was submitted. The Borough did not submit an ADOPTED planning submission until 6-20-05, well after the May 2005 deadline in the January 23, 2003 Order for submitting a Water Quality Management Permit Application.

19. The NPDES Permit Application was received on 3/8/05.

20. Admitted.

21. It is specifically denied that the NPDES permit was issued on June 3, 2005. The NPDES permit was issued May 31, 2005.

22. It is denied that the Water Quality Management Permit application could not be done until the Department approved the Revision. By way of further answer, the Department occasionally makes exceptions to the requirement that Water Quality Management Permit applications cannot be accepted until Act 537 planning has been approved, especially in cases where enforcement schedules make project progress time sensitive. In the case of Burnside Borough, the basic Act 537 planning for the Borough sewerage system had previously been approved. Only the replanning for the project changes desired by the Borough's new engineer were still pending. The Department would certainly have accepted the Water Quality Management Permit application once the initial review of the replanning submission indicated that the revised project concept was not fatally flawed. The Borough did not make such a request.

23. Denied as stated. By way of further answer, Burnside Borough may well still be able to meet the final construction completion deadline in the Department's January 23, 2003 Order. However, the Department's experience with projects of this size has been that the financing, bidding and construction phases, in the aggregate, take more time than remained when the instant Petition was filed with this Court. The Petition was filed to gain the Court's enforcement to avoid additional deviation from the Implementation Schedule.

24. Denied as stated. By way of further answer, the Department received a formal submission of the revised plan from the Borough on 6/20/05. That plan was determined to be administratively incomplete and a supplemental submission from the Borough completing its plan was submitted to the Department on 7/19/05. By statute, the Department has 120 days to complete its review of a complete submission of this type, with the option of taking one 60-day review extension. In this case, the review of Burnside's complete submission was accomplished and the plan was formally approved within 85 days of receipt of a complete submission. This period of review did not unduly prevent the Borough from meeting its schedule deadlines. The Borough had to assume that the Department would need a reasonable period to review the Borough's revised plan when it voluntarily made its decision to revise the originally approved plan.

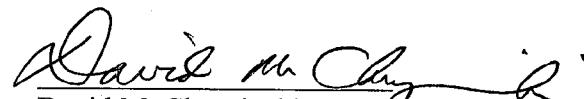
25. Denied as stated. By way of further answer, the statutes under which the Department's administrative order was issued, The Pennsylvania Sewage Facilities Act (Act 537) and The Clean Streams Law of Pennsylvania (CSL) do not provide an exception to the requirements of the statutes on the basis of ability to pay. Act 537 requires municipalities to plan for and to develop facilities to meet the needs of its residents for adequate sewage facilities. The Act 537 plans developed by the Borough and their consultants clearly documented that the on-

site sewage facilities presently serving Borough residents are inadequate and that they present a hazard to the health and well being of the community. The plans recommend construction of a public sewerage system to bring the Borough into compliance with Act 537 and with the CSL. Furthermore, those plans present a financing plan for the new system, which indicates that the project costs are affordable for Borough residents. Burnside Borough Council formally adopted those plans and committed to construction of the recommended project. It should be noted that both engineering firms employed by the Borough determined that a similar sewerage project was necessary and technically and financially feasible. The Department's staff critically reviewed the plans' recommended project and financing plans and agreed that the recommended projects were technically and financially feasible, and the Department subsequently approved the plans.

26. Denied as stated. By way of further answer, any potential delays by the Borough in implementing the Revision as required by the January 23, 2003 Order due to financing concerns will necessarily be heard by this Court upon a further Petition for Contempt of its Order. In that proceeding the Borough can present any testimony of mitigating circumstances. Such issues are not presently before this Court for consideration.

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 12-8-05

  
David M. Chuprinski  
Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF :  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
Petitioner, : Civil Action in Law and Equity  
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BURNSIDE BOROUGH, :  
Respondent. :  
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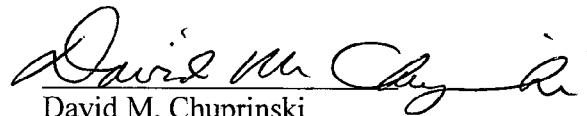
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date noted below the foregoing Answer to New Matter Raised in Respondent's Answer has been sent to the following via Overnight Mail:

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 12-8-05

  
David M. Chuprinski  
Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

**FILED**

**DEC 09 2005**

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA:  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

-VS-

No. 05-1593-CD

BURNSIDE BOROUGH

O R D E R

NOW, this 14th day of December, 2005, this being the date set for Rule Returnable at the request of the Petitioner, Commonwealth of Pennsylvania, Department of Environmental Protection; the Court believing that the Rule Returnable, which, in essence, is on the Petition filed for compliance, is premature, it is the ORDER of this Court that the Rule be and is hereby dismissed. The Respondent, Burnside Borough, shall proceed in a manner consistent with the Rules of Civil Procedure by filing either preliminary objections or an appropriate responsive pleading.

BY THE COURT,

  
\_\_\_\_\_  
President Judge

FILED

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DEC 15 2005

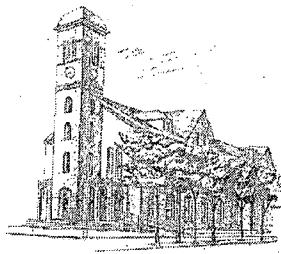
2cc  
Amy Chuprinski  
Kesner

William A. Shaw  
Prothonotary/Clerk of Courts

**FILED**

**DEC 15 2005**

William A. Shaw  
Prothonotary/Clerk of Courts



## Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw  
Prothonotary/Clerk of Courts

David S. Ammerman  
Solicitor

Jacki Kendrick  
Deputy Prothonotary

Bonnie Hudson  
Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

Date: September 19, 2005

Over the past several weeks, it has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw  
Prothonotary

You are responsible for serving all appropriate parties.

12/15/05  The Prothonotary's office has provided service to the following parties:

Plaintiff(s)/Attorney(s)

Defendant(s)/Attorney(s)

Other

Special Instructions:

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. 2005-1593-CD  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION, : Type of Case: Civil Action in Law  
Petitioner : and Equity  
v. : Type of Pleading: Preliminary Objections  
To Complaint By Burnside  
Borough  
BURNSIDE BOROUGH, : Filed on Behalf of: Respondent  
Respondent : Counsel of Record for this Party:  
Kim C. Kesner, Esquire  
Supreme Ct. I.D. #28307  
23 North Second Street  
Clearfield, PA 16830  
814-765-1706  
Opposing Counsel of Record:  
David M. Chuprinski, Assistant Counsel  
PA Dept. of Environmental Protection  
208 West Third Street – Suite 101  
Williamsport, PA 17701  
570-321-6568

FILED 3 BCC  
11/16/2005 Atty Kesner  
NOV 16 2005  
6W

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. 2005-1593-CD  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION, :  
Petitioner :  
: :  
v. :  
: :  
BURNSIDE BOROUGH, :  
Respondent :  
:

**PRELIMINARY OBJECTIONS TO**  
**COMPLAINT BY BURNSIDE BOROUGH**

TO: The Honorable Fredric J. Ammerman, President Judge

AND NOW COMES, Burnside Borough, by its Solicitor Kim C. Kesner, Esquire, and files the following Preliminary Objections in accordance with Pa.R.Civ.P. Rule 1028:

**I. Failure of Pleading to Conform to Law or Rule of Court: Improper process under Pa.R.Civ.P. Rule 206.7.**

1. The Commonwealth of Pennsylvania Department of Environmental Protection (DEP) commenced this action against Burnside Borough by filing a "Complaint" in "Civil Action in Law and Equity".

2. The initiating party in an action in law and equity is a "Plaintiff". The responding party is a "Defendant". See Pa.R.Civ.P. Rule 1018.

3. DEP improperly refers to itself as "Petitioner" and Burnside Borough as "Respondent" in its Complaint and other filed documents.

4. Upon filing its Complaint and without the filing of a separate petition, DEP obtained from this Court an Order dated October 19, 2005 issuing a Rule to Show Cause under Pa.R.Civ.P. No. 206.6.

5. This Court's Order directs that "(t)he Complaint shall be decided under Pa.R.C.P. No. 206.7".

6. Under Pa. R.Civ.P. Rule 206.1, a "Petition" for the issuance of a Rule to Show Cause may be filed when provided for by local rule.

7. Clearfield County Local Rules provide for use of a Petition for Rule to Show Cause only where no other form of proceeding is available.

8. The issuance of a Rule to Show Cause upon DEP's Complaint was contrary to the Rules of Civil Procedure.

9. This Court's Order directs Burnside Borough to file an Answer to the Complaint.

10. The procedures for answering and determining a Complaint are governed by Rules of Civil Procedure other than Pa.R.Civ.P Rule 206.7.

11. Limiting Burnside Borough to the filing of an Answer to DEP's Complaint is contrary to the Rules of Civil Procedure.

WHEREFORE, this Honorable Court should dismiss DEP's Complaint and vacate its Order dated October 19, 2005.

**II. Adequate Legal Remedy.**

12. DEP's Action in Equity requests special relief including this Court's supervision of Burnside Borough's compliance with certain deadlines for construction of a community sewage system.

13. As recited in DEP's Complaint, DEP has statutory authority under 35 P.S. §750.10(7) "(t)o order a local agency to undertake actions deemed by the Department necessary to effectively administer this Act in conformity with the rules and regulations of the Department."

14. It is by the exercise of this statutory power that DEP entered its enforcement Orders of May 10, 2002 and January 23, 2003 recited in its Complaint whereby it set certain deadlines for the

design and construction of a community sewage system and established its Implementation Schedule set forth in Paragraph 15 of its Complaint. DEP has expansive powers to impose fines, civil penalties and fees for "...violation of any...order...issued by the Department..." under 35 P.S. §750.13.

15. All of the relief requested by DEP in its Complaint is available through DEP's exercise of its powers under the Pennsylvania Sewage Facilities Act.

16. DEP's Complaint sets forth no basis for a finding that its statutory remedies are inadequate.

17. DEP has a full, complete and adequate statutory remedy.

WHEREFORE, this Honorable Court should dismiss DEP's Complaint.

**III. Legal Insufficiency of a Pleading.**

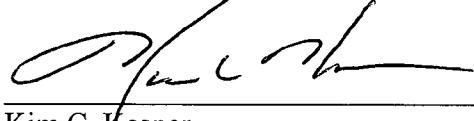
18. DEP has failed to state a claim or cause of action upon which the relief requested of imposition of fines against Burnside Borough may be granted.

19. While this Court has contempt powers, any relief for a finding of contempt should be determined under the circumstances at that time.

20. The imposition of a fine is not otherwise available to this Court at law or equity.

WHEREAS, DEP's Complaint generally and specifically Paragraph 3 of its prayer for relief should be dismissed.

Respectfully submitted:



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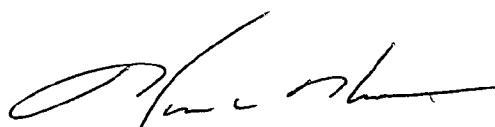
Kim C. Kesner  
Solicitor – Burnside Borough  
Supreme Ct. I.D. #28307  
23 North Second Street  
Clearfield, PA 16830  
814-765-1706

**CERTIFICATE OF SERVICE**

AND NOW, I do hereby certify that on the 16<sup>th</sup> day of November, 2005, I caused to be served a true and correct copy of the Preliminary Objection by Burnside Borough by U.S. First Class Mail, Postage Prepaid upon the following:

David M. Chuprinski, Assistant Counsel  
PA Department of Environmental Protection  
208 West Third Street – Suite 101  
Williamsport, PA 17701

Date: 11-16-05



Kim C. Kesner  
Solicitor – Burnside Borough

**FILED**

**NOV 16 2005**

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
vs. : No. 05-1593-CD  
BURNSIDE BOROUGH :  
:

**ORDER**

AND NOW, this 12 day of January, 2006, it is the Order of the Court that argument on Defendant Burnside Borough's Preliminary Objections filed in the above-captioned matter has been scheduled for the 3<sup>rd</sup> day of February, 2006, at 11:30 A.M, in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

BY THE COURT:

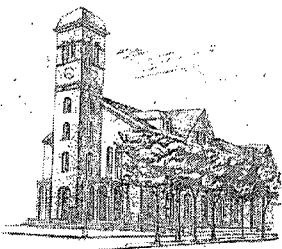
  
FREDRIC J. AMMERMAN  
President Judge

FILED *cc*  
01/05/2006 Atty Kesner  
JAN 13 2006  
ICCA Atty  
William A. Shaw Chupinski  
Prothonotary/Clerk of Courts  
*bx*

FILED

JAN 13 2006

William A. Shaw  
Prothonotary/Clerk of Courts



## Clearfield County Office of the Prothonotary and Clerk of Courts

**William A. Shaw**  
Prothonotary/Clerk of Courts

**David S. Ammerman**  
Solicitor

**Jacki Kendrick**  
Deputy Prothonotary

**Bonnie Hudson**  
Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw  
Prothonotary

DATE: 11/13/04

You are responsible for serving all appropriate parties.

The Prothonotary's office has provided service to the following parties:

Plaintiff(s)/Attorney(s)

Defendant(s)/Attorney(s)

Other

Special Instructions:

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. 2005-1593-CD  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION, : Type of Case: Civil Action in Law  
Petitioner : and Equity  
Petition for Enforcement of January 23,  
2003 Administrative Order of Department  
v. :  
Type of Pleading: Answer by  
Burnside Borough to Department's  
Petition for Enforcement of  
Administrative Order  
BURNSIDE BOROUGH, : Filed on Behalf of: Respondent  
Respondent : Counsel of Record for this Party:  
Kim C. Kesner, Esquire  
Supreme Ct. I.D. #28307  
23 North Second Street  
Clearfield, PA 16830  
814-765-1706  
Opposing Counsel of Record:  
David M. Chuprinski, Assistant Counsel  
PA Dept. of Environmental Protection  
208 West Third Street – Suite 101  
Williamsport, PA 17701  
570-321-6568

FILED 3cc  
01/24/06 Atty Kesner  
DEC 28 2006 LM

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. 2005-1593-CD  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION, : Petition for Enforcement January 23, 2003  
Petitioner : Enforcement Order of Department  
v. :  
BURNSIDE BOROUGH, :  
Respondent :  
:

**ANSWER BY BURNSIDE BOROUGH TO  
DEPARTMENT'S PETITION FOR ENFORCEMENT  
OF ADMINISTRATIVE ORDER**

TO: The Honorable Fredric J. Ammerman, President Judge

AND NOW COMES, Respondent, Burnside Borough, by its Solicitor Kim C. Kesner, Esquire, and files the following Answer to the Department's Petition for Enforcement of Administrative Order in accordance with this Court's Order of December 14, 2005:

1. The averments contained in Paragraph 1 of the Department's Petition constitute contentions or conclusions of law to which no response is required. To the extent that responses are required, the averments are admitted.

2. The averments contained in Paragraph 2 of the Department's Petition constitute contentions or conclusions of law to which no response is required. To the extent that responses are required, the averments are admitted.

3. The averments contained in Paragraph 3 of the Department's Petition are contentions or conclusions of law to which no response is required. To the extent that responses are required, the averments are specifically denied.

4. It is admitted that DEP entered an Enforcement Order dated May 10, 2002 against Respondent directing Respondent within 80 days from receipt of the Order to abate or cause the

abatement of a discharge of "gray water" from several residences in Burnside Borough onto the property of Suzanne Koziel.

5. It is admitted that after DEP concluded that there was no practical or effective manner to abate the discharge without enjoining residents' occupation of their homes, DEP entered its subsequent Enforcement Order of January 23, 2003 directing Respondent to submit within 120 calendar days a Plan under the Pennsylvania Sewage Facilities Act for the construction of a community sewage system.

6. The averments contained in Paragraph 6 of the Department's Petition are admitted.

7. The averments contained in Paragraph 7 of the Department's Petition constitute contentions or conclusions of law to which no responses are required.

8. It is admitted that Respondent did not appeal the January 23, 2003 Enforcement Order.

9. The averments contained in Paragraph 9 of the Department's Petition constitute contentions or conclusions of law to which no responses are required.

10. The averments contained in Paragraph 10 of the Department's Petition constitute contentions or conclusions of law to which no responses are required.

11. The averments contained in Paragraph 11 of the Department's Petition are admitted.

12. The averments contained in Paragraph 12 of the Department's Petition are admitted.

13. The averments contained in Paragraph 13 of the Department's Petition constitute contentions or conclusions of law and/or issues of construction of the Enforcement Order to which no responses are required.

14. The averments contained in Paragraph 14 of the Department's Petition constitute contentions or conclusions of law and/or issues of construction of the Enforcement Order to which no responses are required.

15. The averments contained in Paragraph 15 of the Department's Petition are admitted.

16. It is admitted that after November 1, 2004 and before January 26, 2005, because of delays in performance and questions regarding the feasibility and workability of the Plan Revision prepared by Hess & Fisher Engineers, Respondent replaced Hess & Fisher Engineers with Keller Engineers. It is admitted that upon retention and prior to January 26, 2005, Keller Engineers contacted DEP regarding the need for a Plan resubmission. On January 26, 2005, DEP accepted a Plan Revision from Respondent which provided for a new construction plan. The Department did not approve the Plan Revision until October 12, 2005. In the interim, Respondent submitted its NPDES Permit application to DEP on March 7, 2005, but could not submit a Water Quality Management Permit application because a requirement of the Water Quality Management Permit application is a copy of the Department's letter approving the Plan Revision. Without this, Respondent believed that the application would have been deemed administratively incomplete. After May, 2005 and prior to October 12, 2005, the Department expressed no complaint or concern on the failure of Burnside Borough to submit an application for a Water Quality Management Permit by May, 2005. To the contrary, it is averred that the failure to submit the application under the circumstance of this case was not a material deviation of the Respondent's duties under the January 23, 2003 Enforcement Order.

17. The averments contained in Paragraph 17 of the Department's Petition are admitted.

18. It is specifically denied that to the date of the Department's filing of its Court amended Petition on December 8, 2005, that a Water Quality Management Permit application had not been filed by Respondent. To the contrary, an application for Water Quality Management Permit was filed by Respondent with the Department on December 5, 2005, received by the Department on December 6, 2005.

19. The averments contained in Paragraph 19 of the Department's Petition constitute contentions or conclusions of law to which no response is required.

20. The averments contained in Paragraph 20 of the Department's Petition constitute contentions or conclusions of law to which no response is required.

21. Respondent is without sufficient knowledge or information to form a belief as to the motivations of the Department in issuing its Enforcement Order. By way of further answer, Respondent avers that the relief requested in this Action by the Department because of Respondent's failure to meet one submission date is excessive and unwarranted.

22. It is specifically denied that because the application for Water Quality Management Permit was submitted to the Department after May 2005 that Respondent is precluded from complying with the requirement that it construct facilities prior to October 2006. While there are certain variables beyond Respondent's control, Respondent believes and therefore avers that it can meet this schedule if matters develop favorably, including availability of financing and prompt action by the Department. However, Respondent is not adverse to an enlargement of time to perform.

23. It is specifically denied that any failure by Respondent to construct a community sewage system by October 2006 will cause a substantial material event of pollution to the waters of the Commonwealth. The Department's contentions of a direct and imminent threat are conclusory and unsupportable.

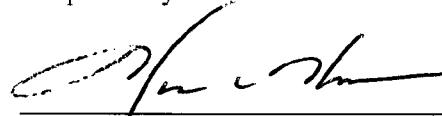
24. While Respondent intends good faith action in completing its Act 537 Update Revision, it is specifically denied that any failure by Respondent to construct a community sewage system by October 2006 will cause a substantial material event of pollution to the waters of the Commonwealth. The Department's contentions of a direct and imminent threat are conclusory and unsupportable.

25. The averments contained in Paragraph 25 of the Department's Petition constitute contentions or conclusions of law to which no response is required. To the extent that a response is required, it is specifically denied that the Department does not have relief or remedies under the

Pennsylvania Sewage Facilities Act or Clean Streams Law. To the contrary, the Department has chosen the alternative of pursuing relief in this Court.

WHEREFORE, Respondent respectfully request this Honorable Court to dismiss the Department's Petition.

Respectfully submitted:



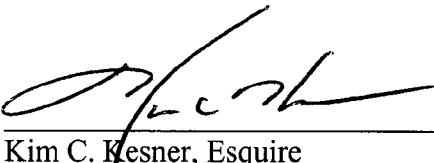
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Kim C. Kesner  
Solicitor – Burnside Borough  
Supreme Ct. I.D. #28307  
23 North Second Street  
Clearfield, PA 16830  
814-765-1706

VERIFICATION

The undersigned verifies that he is the attorney for Burnside Borough, that as such attorney he is authorized to make this verification, and that the statements made in the foregoing Answer are true and correct, based upon the information supplied to him and that this Verification is filed by him for the purposes of expediting this litigation, and in the event a Verification from Burnside Borough, is required, same will be supplied. The undersigned understands that false statements made herein are subject to the penalties of 18 PA. C.S. 4904 relating to unsworn falsification to authorities.

Date: 12/28/05

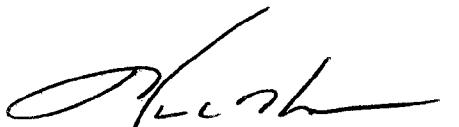
  
\_\_\_\_\_  
Kim C. Kesner, Esquire  
Attorney for Burnside Borough

**CERTIFICATE OF SERVICE**

AND NOW, I do hereby certify that on the 28<sup>th</sup> day of December, 2005, I caused to be served a true and correct copy of the Answer to Rule to Show Cause by Burnside Borough by U.S. First Class Mail, Postage Prepaid upon the following:

David M. Chuprinski, Assistant Counsel  
PA Department of Environmental Protection  
208 West Third Street – Suite 101  
Williamsport, PA 17701

Date: 12/28/05

  
Kim C. Kesner  
Solicitor – Burnside Borough

**FILED**

**DEC 28 2005**

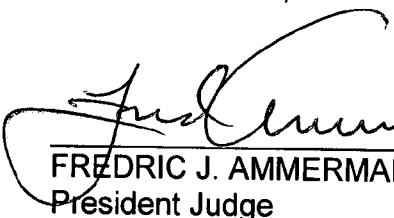
William A. Shaw  
Prothonotary Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION  
COMMONWEALTH OF PENNSYLVANIA \*  
DEPARTMENT OF ENVIRONMENTAL \*  
PROTECTION, \*  
Plaintiff \*  
\*  
\* vs. \* NO. 05-1593-CD  
\*  
\*  
BURNSIDE BOROUGH, \*  
Defendant \*

**ORDER**

NOW, this 18<sup>th</sup> day of January, 2006, the Court hereby rescinds the Order of January 12, 2006 scheduling argument on Defendant's Preliminary Objections on February 3, 2006; the filing of an Amended Complaint by the Plaintiff renders the Preliminary Objections moot.

BY THE COURT,

  
FREDRIC J. AMMERMAN

President Judge

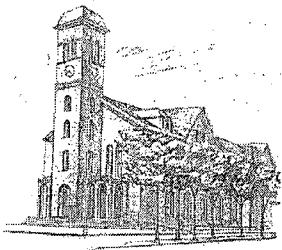
FILED  
01/20/07  
JAN 19 2006  
WAS  
William A. Shaw  
Prothonotary/Clerk of Courts

cc: Atlys:  
Chuprinski  
Kesner

**FILED**

**JAN 19 2006**

William A. Shaw  
Prothonotary/Clerk of Courts



## Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw  
Prothonotary/Clerk of Courts

David S. Ammerman  
Solicitor

Jacki Kendrick  
Deputy Prothonotary

Bonnie Hudson  
Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw  
Prothonotary

DATE: 11/19/06

       You are responsible for serving all appropriate parties.

The Prothonotary's office has provided service to the following parties:

Plaintiff(s)/Attorney(s)

Defendant(s)/Attorney(s)

Other

       Special Instructions:

NOT part of official record  
and not filed. Save for Judge's  
future reference.

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

RECEIVED

FJA

DEC 09 2005

COURT ADMINISTRATOR'S  
OFFICE

COMMONWEALTH OF  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January 23,  
: 2003 Order of Department  
: No. 2005-1593-CD  
v.  
BURNSIDE BOROUGH, :  
Respondent. :

DEPARTMENT'S BRIEF IN SUPPORT OF ITS  
PETITION TO COMPEL COMPLIANCE WITH  
ENFORCEMENT ORDER AND IN OPPOSITION TO PRELIMINARY  
OBJECTIONS FILED BY RESPONDENT

The Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), has filed a "Complaint" to Compel Compliance with Order of Department. This Brief is filed in support of the "Complaint" and in opposition to Preliminary Objections filed thereto by Respondent on November 16, 2005.

**I. Parties**

The Department is the administrative agency of the Commonwealth that has the authority to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* ("PA SFA"); 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.

The Respondent, the Borough of Burnside, Clearfield County, is a “local agency” as that term is defined in the PA SFA at 35 P.S. § 750.1 and a “municipality” as that term is defined in the Clean Streams Law at 35 P.S. § 691.1.

## **II. Jurisdiction**

This Court has jurisdiction over this proceeding pursuant to Sections 761 and 931 of the Judicial Code, 42 Pa. C.S.A. §§ 761 and 931.

## **III. Factual Background**

This case involves the continued discharge of raw sewage on private property within the Borough, dating to at least July of 2001. After the Department’s efforts to achieve the Borough’s voluntary compliance with the PA SFA and the Clean Streams Law failed, the Department issued a May 10, 2002 Enforcement Order. The Order required the Borough to address the discharge as mandated by the PA SFA at 35 P.S. § 750.8(a). The Borough appealed the May 10, 2002 Enforcement Order to the Environmental Hearing Board (EHB), only to have its appeal dismissed on a summary judgment motion of the Department. In substance, the EHB affirmed that the Borough is charged with abatement of PA SFA violations. (A copy of the EHB’s March 27, 2003 Order is attached hereto for reference.)

During the pendency of the Borough’s appeal of the May 10, 2002 Enforcement Order, the Borough advised the Department that it would address the immediate PA SFA violations via a Borough-wide approach with the submission of an “Official Plan” under the PA SFA at 35 P.S. § 750.5 (“Act 537 Update Revision”). The January 23, 2003 Enforcement Order was issued after no Act 537 Update Revision was received by the Department. Burnside received the January 23, 2003 Enforcement Order on January 24,

2003. The violations of the PA SFA continue, and the Department now seeks to enforce the January 23, 2003 Order.

#### **IV. Requirements of the Order**

The January 23, 2003 Enforcement Order requires Burnside to adopt an Act 537 Update Revision and, upon the Department's approval thereof, meet an Implementation Schedule. The Borough failed to submit a Water Quality Management Permit application to the Department by May 2005, as required under the Implementation Schedule.

#### **V. Argument in Support of Granting the Petition to Enforce**

The issues to be decided by the Court in this Petition to Enforce proceeding are very limited. They are whether the Department had the authority to issue the January 23, 2003 Enforcement Order under the environmental statutes and regulations; whether the 2003 Order was received by the Burnside; and whether Burnside has complied with the 2003 Order.

In this case, the Department had the authority to issue the January 23, 2003 Enforcement Order, and it was received by Burnside. There has not been compliance with the January 23, 2003 Enforcement Order. The Department's request for relief should be granted.

##### **A. The Department has the authority to issue administrative orders to prevent pollution and public nuisances.**

A Petition to Enforce is authorized under many of Pennsylvania's environmental statutes. *See* Section 13 of the Safe Drinking Water Act, 35 P.S. §721.13; Section 20(e) of the DSEA, *as amended*, 32 P.S. §693.20(e); Section 12 of the Pennsylvania Sewage Facilities Act, *as amended*, 35 P.S. §750.12; Section 610 of the CSL, 35 P.S. §691.610, and Section 603 of the SWMA, 35 P.S. §6018.603. Some statutes authorize the Department to request that the Court order the abatement of a public nuisance, while

others authorize the Department to apply to the Court to seek an order from the Court requiring compliance with an Administrative Order.

One of the statutes authorizing the issuance of the January 23, 2003 Enforcement Order in this case is the PA SFA (*See Paragraph 1 of the Order*). Section 602 of the PA SFA, provides:

The department shall have the power and its duty shall be: To order municipalities to submit official plans and revisions thereto within such time and under such conditions as the [Administration of Sewage Facilities Planning Program Regulations, 25 Pa.Code § 71.1 *et seq.*] may provide.

35 P.S. § 750.10(1)

The Administration of Sewage Facilities Planning Program Regulations charge the Department with requiring a municipality to revise its official plan when the Department determines that the plan is inadequate to meet the sewage needs of the municipality. 25 Pa.Code § 71.13.

Section 610 of the CSL provides in relevant part as follows:

The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act . . . Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, . . . The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act. An order issued under this section shall take effect upon notice, unless the order specifies otherwise.

35 P.S. § 691.610.

The January 23, 2003 Enforcement Order was issued pursuant to the PA SFA, 35 P.S. § 750.10(1), 25 Pa.Code § 71.13 and 35 P.S. § 691.610. *See January 23, 2003*

Enforcement Order, Paragraphs P, R and T. The relief sought by the Department is that the Court enforce the Department's Order.

**B. Burnside received the January 23, 2003 Order.**

Burnside received the January 23, 2003 Order on January 24, 2003. *See* Exhibit C to Petitioner's filed action.

**C. The Court's inquiry is limited to whether Burnside has complied with the January 23, 2003 Order.**

The only legal action to be taken with respect to an unappealed order of the Department is enforcement. *Com. of Pa., DER v. Landmark*, 570 A.2d 140, 142 (Pa. Commw. Ct. 1990). If the Court determines that Burnside has not complied with the January 23, 2003 Enforcement Order, then it is proper for the Court to issue a court order directing that it comply with the Order.

**D. The issue of whether there is any justification for non-compliance is not ripe for this proceeding.**

Burnside Borough may attempt to raise defenses about why it should not have to comply with the January 23, 2003 Enforcement Order. Evidence about failure to comply is not relevant for this proceeding, and *only* comes into play should the Department have to petition for contempt after obtaining an order from this Court. *Com. DER v. Pennsylvania Power Company*, 461 Pa. 675, 337 A.2d 823, 829 (1975). It is only at a contempt hearing that the Borough can "raise all defenses, legal and equitable," and introduce all relevant evidence in [their] defense. . . . *Com. of PA DER v. Sabia*, 512 A.2d 1297, 1301 (Pa. Commw. Ct. 1986).

**VI. Process under Pa.R.C.P. Rule 206.7**

*The filing in the Instant Action is Proper Process under Pa.R.C.P. Rule 206.7.*

**The January 23, 2003 Enforcement Order was issued by the Department, *inter alia*, on authority of the Clean Streams Law at 35 P.S. § 691.5(b)(7). See**

**January 23, 2003 Enforcement Order, Paragraph T.** This matter is analogous to the issues considered in *Com. of Pa., DER v. Landmark, supra*. While the enforcement proceeding in *Landmark* concerned enforcement of a consent order and agreement, the analysis in this matter is the same. The court found that even in the absence of express authorization under the Clean Streams Law, it had jurisdiction over the enforcement of a consent order and agreement. The Department's Petition before this Court of Common Pleas is the proper procedural mechanism for pursuing enforcement of the Department's orders as provided by the Clean Streams Law and applicable case law. *See Commonwealth of Pa., DER v. Derry Township*, 466 Pa. 31, 351 A.2d 606 (1976) ("*Derry Township*") (Commonwealth Court has jurisdiction over petitions to enforce administrative orders filed by DER); *Commonwealth of Pa., DER v. Landmark Int'l Ltd.*, 131 Pa. Cmwlth. 333, 337, 570 A.2d 140, 142 (1990) citing *Department of Environmental Resources v. Leechburg Mining Co.*, 9 Pa. Cmwlth. 297, 305 A.2d 764 (1973) (Commonwealth Court must be available for enforcement of orders entered into by DER and private parties). While the Department has traditionally sought enforcement in the Commonwealth Court, it is unquestioned that the Courts of Common Pleas, sitting as a court in equity, has similar jurisdiction under Section 601 of the Clean Streams Law, 35 P.S. § 691.601, to enforce orders of the Department to restrain violations. *See Commonwealth of Pa., DER v. Williams*, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1980) (Appeal of denial of motion for judgment on the pleadings quashed as interlocutory in appeal of proceeding before Court of Common Pleas for Cambria County seeking enforcement of DER order issued pursuant to the Water Obstructions Act).

Burnside's violation of the January 23, 2003 Enforcement Order occurred and is occurring in Clearfield County, where the instant action has been brought and is pending.

Rule 206(a) of the Court of Common Pleas of Clearfield County, Commonwealth of Pennsylvania, Rules of Civil Procedure ("Clearfield Rules of Civil Procedure"), provides that a Petition and Rule to Show Cause "may be used to bring before the Court

any proper matter for which no other *specific* procedure is authorized ..." 46 J.D.R.C.P. 206(a), emphasis added. Nowhere in the Clearfield Rules of Civil Procedure is there provision for an action to compel compliance with an order of the Department. As the *Landmark* court noted, where the statutory law does not make specific provisions for enforcement of Department orders, a court of law must be available to entertain an action in proceedings to enforce such orders. *Landmark*, 570 A.2d at 142-143.

## **VII. Adequate Legal Remedy**

*The Department does not have adequate legal remedy to compel Burnside's compliance with the January 23, 2003 Enforcement Order.*

The PA SFA and the Clean Streams Law do not confer any powers of contempt upon the Department for violation or non-compliance with its orders. The Department does not have an adequate remedy at law to compel Burnside to perform its obligations under the January 23, 2003 Enforcement Order. The only legal action to be taken with respect to the Order is enforcement. *DER v. Landmark*, 570 A.2d 140, 142 (Pa. Commonwealth 1989).

## **VIII. Legal Insufficiency of a Pleading**

*In the instant action, the Department is not seeking a present finding of contempt or imposition of a fine by this Court.*

Evidence about failure to comply is not relevant for this proceeding, and *only* comes into play should the Department have to petition for contempt after obtaining an order from this Court. *Com. DER v. Pennsylvania Power Company*, 461 Pa. 675, 337 A.2d 823, 829 (1975). It is only at a contempt hearing that the Borough can "raise all defenses, legal and equitable," and introduce all relevant evidence in [their] defense. . . ". *Com. of PA DER v. Sabia*, 512 A.2d 1297, 1301 (Pa. Commw. Ct. 1986).

## IX. Conclusion

The Court has jurisdiction over this proceeding. The Department had the authority to issue the January 23, 2003 Enforcement Order; the Borough received a copy of the Order; and the Order has not been complied with. The Court is justified in issuing an order for compliance with Order. WHEREFORE, the Department respectfully requests that this Honorable Court grant the relief requested in the Petition to Compel Compliance with the Enforcement Order, and order such other relief that the Court deems just and proper.

The Department properly brought this action to be heard under Pa.R.C.P. Rule 206.7, to invoke the contempt powers of this Honorable Court in the event of the Borough's future noncompliance. WHEREFORE, the Department respectfully requests that this Honorable Court deny the Borough's Preliminary Objections.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION



DATE: 12-8-05

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IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

COMMONWEALTH OF :  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
:

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD

v.

BURNSIDE BOROUGH, :  
Respondent. :  
:

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date noted below the foregoing Brief filed in opposition to Respondent's Preliminary Objections has been sent to the following via Overnight Mail:

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 12-8-05

  
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*be do p*  
WILLIAM T. PHILLIP IV  
SECRETARY TO THE BOARD

**BURNSIDE BOROUGH**

v. : **EHB Docket No. 2002-138-C**  
: **Issued: March 27, 2003**  
**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** :

**OPINION AND ORDER GRANTING  
A MOTION FOR SUMMARY JUDGMENT**

MAR 31 2003

By: **Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

The Department's motion for summary judgment is granted and the Board sustains a Department order directing Appellant to take specific actions to abate continuing violations of the Sewage Facilities Act. The Department met its burden of proving the material facts supporting its order, including the existence of an ongoing unpermitted discharge of raw sewage within the Borough and a failure by Appellant to take any action to abate the discharge for nearly ten months prior to issuance of the order. The Department's order was authorized by applicable law, and the order was a reasonable and appropriate exercise of the agency's discretion.

**OPINION**

This matter involves an administrative order issued by the Department of Environmental Protection (DEP) to Appellant Burnside Borough (the Borough) directing that certain actions be taken by the Borough to abate violations of the Pennsylvania Sewage Facilities Act (SFA),<sup>1</sup> the

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<sup>1</sup> Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. § 750.1 *et seq.*

Clean Streams Law (CSL),<sup>2</sup> and implementing regulations, occurring within the Borough. The Department initially received a complaint in July 2001 that raw sewage was being discharged onto the ground at property located in the Borough. After DEP requested the Borough to address the complaint, conducted its own inspection of the ongoing discharge, and made further requests for action, DEP ultimately issued an order to the Borough nearly ten months later on May 10, 2002 (the 2002 Order). The 2002 Order determined that Appellant had violated its statutory and regulatory duties by, *inter alia*, failing to take any action to abate the ongoing violations. DEP ordered the Borough to investigate the sources of the discharge and require those sources to obtain permits and abate the discharge; the Borough was also directed to institute suits in equity to restrain and prevent further violations in the event of noncompliance.

The Borough appealed the 2002 Order and subsequently filed an amended Notice of Appeal which generally did not contest the factual findings in the 2002 Order; rather, Appellant objected to the order on legal grounds. Appellant conceded that its failure to resolve the described discharge justified a DEP order directing the Borough to take actions which DEP deemed necessary for the Borough to properly administer the SFA. Nevertheless, Appellant objected that the facts do not constitute a sufficient basis for DEP's determination that the Borough violated the SFA because Appellant's duty to take action to address the ongoing discharge is discretionary, not mandatory. Alternatively, the Borough implied that it was not responsible for taking action to abate the discharge because it had allegedly transferred its administration of the SFA to the Clearfield County Sewage Committee (CCSC) and was therefore dependent upon the CCSC to address the SFA violations occurring in the Borough.

Presently before the Board is a motion for summary judgment, filed by DEP on December 12, 2002, seeking dismissal of the appeal. The Motion is supported by several

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<sup>2</sup> Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.*

affidavits and attached exhibits, as well as by a set of Requests for Admissions served on Appellant during discovery proceedings.<sup>3</sup> The Borough filed opposition on January 13, 2003. In its response, the Borough reiterates the legal contentions raised in its amended Notice of Appeal, but does not contest or offer evidence controverting the basic material facts supporting DEP's Motion.<sup>4</sup> DEP timely filed a Reply in further support of its Motion. We find that there are no genuine issues of material fact and that DEP is entitled to judgment as a matter of law; we will accordingly grant the motion and dismiss this appeal.

## **I. Factual Background**

Appellant is a Pennsylvania borough located in Clearfield County. Between May 1, 2001 and July 31, 2002, the Borough was a member of the CCSC—a local agency that participates in the administration of certain aspects of the SFA for its member municipalities in Clearfield County. (Affidavit of R. Curt White, at ¶ 6; Request for Admission No. 1).<sup>5</sup>

The CCSC provides several limited administrative functions for its members: (1) reviews the qualified sewage enforcement officers (SEO) available in the area and negotiates a fee

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<sup>3</sup> The Borough admits in its opposition to the Motion that it never served any response to DEP's Requests for Admissions, see Appellant's Memorandum in Opposition, at page 6, and discovery proceeding have been closed since September 2002. The assertions set forth in the Requests for Admissions are therefore deemed admitted pursuant to Pa.R.Civ.P. 4014(a) and Board Rule 1021.102(a). See 25 Pa. Code § 1021.102(a) (discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure); Pa.R.Civ.P. 4014(b) ("Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney").

<sup>4</sup> The only exception is the submission of an affidavit by the Borough Council President concerning the alleged transfer by the Borough to CCSC of the Borough's responsibility to administer the SFA. As discussed below, this belated attempt by the Borough to create an ostensible issue of material fact is not convincing—given its prior admission to the contrary when it failed to respond to DEP's Requests for Admissions; the conceded lack of the statutorily-required concomitant acceptance by CCSC of the attempted delegation of responsibility by the Borough; and, the SFA's prohibition on the voluntary transfer by a municipality of its responsibility for administering the SFA, thus rendering the Borough's unilateral attempt to delegate responsibility legally ineffective.

<sup>5</sup> A "local agency" is defined by the SFA as "a municipality, or any combination thereof acting cooperatively or jointly under the laws of the Commonwealth, county, county department of health or joint county department of health." 35 P.S. § 750.2. "Municipality" means "a city, town, township, borough or home rule municipality other than a county." *Id.*

schedule with these SEOs; (2) keeps records of sewage applications submitted to the SEO chosen by the municipality to do application work; (3) receives invoices for work performed by SEOs on applications; and, (4) files for reimbursement from DEP, pursuant to Section 6 of the SFA, 35 P.S. § 750.6, for the work done by the SEOs for the member municipalities. (Req. Adm. Nos. 2-7; Exhs. B-1, B-2). The CCSC is not involved in the administration of sewage complaints by its member municipalities. Sewage complaints are handled exclusively by the member municipality and the particular SEO that the member has selected to assist with its SFA administration. When the member municipality receives a complaint regarding an SFA violation, the municipality is responsible for submitting its own complaint form directly to its SEO in order to engage his services. The SEO then investigates and addresses the complaint, and sends invoices for all complaint work directly to the municipality. (Req. Adm. Nos. 2-8; Exhs. B-1, B-2).

During the relevant period, the Borough was aware that the CCSC does not participate in, or take any responsibility for, the investigation and resolution of complaints for alleged SFA violations. (Req. Adm. 8, Exh. B-2). Between May 1, 2001 and July 31, 2002, the Borough had not transferred or delegated to the CCSC the administration of the Borough's responsibilities under the SFA to investigate and resolve complaints related to alleged unlawful discharges of sewage. (Req. Adm. No. 9). During the same period, the CCSC had not accepted the transfer or delegation of the Borough's responsibilities under the SFA to investigate and resolve complaints related to alleged unlawful discharges of sewage in the Borough. (Req. Adm. No. 10).

On July 30, 2001, DEP received a complaint alleging that raw sewage was running onto the ground at the residence of Suzanne Koziel, located on East Fifth Street in the Borough. DEP Sewage Planning Advisor Curt White subsequently spoke with the complainant on several occasions in order to verify the facts of the complaint. By correspondence to the Burnside

Borough Council, dated August 6, 2001, DEP then forwarded the complaint to the Borough. In its accompanying letter, DEP indicated that the matter came within the Borough's jurisdiction, and requested the Borough to investigate the complaint and advise DEP of the results of the investigation. (White Affidavit, at ¶¶ 1-3; Exh. A-1).

Having learned that the unpermitted discharge had still not been abated, DEP sent a letter to the Borough, dated September 7, 2002, regarding its failure to properly address the complaint, and requested the Borough to attend an administrative conference in early October to discuss the matter. (White Affidavit, at ¶ 4; Exh. A-2). The Borough did not attend the proposed administrative conference. (Affidavit of Richard L. Hoover, at ¶ 14).

Acting in his capacity as DEP Sewage Planning Advisor, Mr. White inspected the Koziel property on February 26, 2002. During his inspection, Mr. White confirmed that raw sewage was continuing to discharge onto the surface of the ground at the property. He then drafted and sent a letter that same day to the Borough and the CCSC advising them that the sewage discharge at the Koziel property had still not been corrected, and that raw sewage was continuing to discharge from numerous homes in the Borough onto the Koziel property more than six months after DEP had forwarded the Koziel complaint to the Borough for action. DEP's letter of February 26th also requested the Borough to respond in writing by March 15, 2002 providing details of the steps taken to resolve the Koziel complaint. (White Affidavit, at ¶¶ 6-7, Exh. A-3).

After determining that the Borough had still not taken action to restrain or prevent the ongoing unpermitted discharge at the Koziel property, DEP issued the 2002 Order to the Borough on May 10, 2002. (White Affidavit, at ¶ 8, Exh. A-4). The 2002 Order recited the facts concerning the unpermitted discharge of sewage at the Koziel property and that, as of the date of the 2002 Order, the Borough had still not abated the discharge or taken sufficient steps to resolve

the complaint. Noting that the discharge of sewage onto the ground or into the waters is a violation of the SFA and the CSL, the 2002 Order cited the Borough's statutory and regulatory duty to assure the proper operation of sewage facilities within its borders, as well as its responsibility to take action necessary to assure continued compliance with the SFA, the CSL and implementing regulations. DEP concluded that the Borough's "failure to effectively administer the [SFA] and take measures to correct and abate the sewage discharge [at the Koziel property] constitutes a violation of . . . 35 P.S. § 750.8(b)(7); 25 Pa. Code §§ 71.71, 71.73(a), and 73.11(c); and . . . 35 P.S. § 691.201." In addition, DEP determined that the Borough's failure to abate the discharge "constitutes unlawful conduct under . . . 35 P.S. § 691.611; and a statutory nuisance under . . . 35 P.S. § 691.202 [and] 35 P.S. § 750.14." *See* 2002 Order, at ¶¶ T, U.

Consequently, pursuant to, *inter alia*, Section 10 of the SFA, 35 P.S. § 750.10, DEP ordered the Borough within fifteen days to: (1), investigate and identify all of the sources of raw sewage discharging onto the Koziel property; (2) conduct an investigation to determine if the hose in the alley adjacent to the Koziel property is used to intermittently pump sewage from the basement of the neighboring structure onto the ground surface or otherwise ascertain whether any violation existed with respect to sewage generated in the neighboring structure; and, (3) require all persons identified as contributing to the discharge of sewage at the Koziel property to, within sixty days, obtain necessary permits, abate the discharges, and correct any other violations of the SFA found to exist at their properties. The 2002 Order further directed the Borough to, within eighty days, institute a suit in equity, pursuant to Section 12 of the SFA, 35 P.S. § 750.12, to restrain or prevent all violations of the SFA and the CSL against those persons who had failed to correct their unpermitted discharge of sewage onto the Koziel property. Finally, DEP ordered the Borough to submit a report to DEP within twenty days of conducting the required

investigations which described the results of the investigation and detailed the steps the Borough had taken or would be taking to abate the discharge violations. *See* 2002 Order, at ¶¶ 1-5.

The Borough has admitted that it failed to abate the discharge at the Koziel property. (Req. Adm. No. 11; Affidavit of Gary L. Metzger, at ¶¶ 1-6, Exhs. C-1, C-2). Indeed, in its response to the Motion, the Borough concedes that “it is uncontestable that Burnside Borough didn’t stop the discharge.” (App. Memo, at page 7). Subsequent to issuance of the 2002 Order, the Borough acknowledged its responsibility to undertake action to abate the discharge. In June 2002, DEP representatives met with the Borough Council to discuss the discharge at the Koziel property, as well as the functional status of sewage disposal systems throughout the Borough. (Metzger Affidavit, at ¶¶ 1-2). In late June 2002, the Borough Secretary informed DEP that the Borough Council had decided to address the Borough’s sewage problems in a comprehensive fashion, and the Borough had hired an engineering firm to prepare an update revision to the Borough’s Act 537 Official Sewage Facilities Plan. (Metzger Affidavit, at ¶ 3).<sup>6</sup>

## **II. Discussion**

### *A. Standard of Review*

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796, 807-08. When deciding

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<sup>6</sup> The Borough’s engineering firm submitted a plan of study for preparation of an update to the Borough’s Act 537 Plan, which was reviewed and approved by DEP in late August 2002. The Borough’s engineering firm, along with a member of the Borough Council, performed a sanitary survey of the Borough in October 2002. The Borough’s engineering consultant then submitted a draft report of the sanitary survey to DEP in November 2002. Notably, the results of the survey indicate the existence of four unpermitted wildcat sewer systems that discharge inadequately treated sewage onto the ground or into the waters. The survey specifically indicates that one of the identified community wildcat sewer systems is discharging onto the Koziel property. (Metzger Affidavit, at ¶¶ 4-5, Exh. C-2).

motions for summary judgment, we view the record in the light most favorable to the nonmoving party. *See, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

DEP bears the burden of proving the order was properly issued. 25 Pa. Code § 1021.122(b)(4). Specifically, DEP must prove the existence of the facts supporting the order, demonstrate that the order was authorized by applicable law, and show that it is a reasonable and appropriate exercise of the agency's discretion. *See, e.g., Tire Jockey Services, Inc. v. DEP*, No. 2001-155-K, 2002 Pa. Envirn. LEXIS 78, at \*42 (EHB, Dec. 23, 2002); *Goetz v. DEP*, No. 99-168-C, 2002 Pa. Envirn. LEXIS 60, at \*15-\*16 (EHB, Oct. 11, 2002); *Board of Supervisors of Middle Paxton Tp. v. DER*, 1991 EHB 546, 556.

*B. The 2002 Order Was Properly Issued*

The basic facts underlying the 2002 Order are undisputed. Neither in its Notice of Appeal, nor in its response to DEP's Motion, does the Borough contest that during the relevant period there was an ongoing unpermitted discharge of untreated sewage onto the ground at the Koziel property from a wildcat sewer system. There is no dispute that DEP advised the Borough of its duty to restrain and prevent the sewage discharge. Finally, the Borough has admitted that, from the time it received the complaint regarding the discharge in August 2001 until issuance of the 2002 Order ten months later in May 2002, it took no action to effectively abate the ongoing sewage discharge, the discharge remained unabated, and the complaint unresolved.

Section 7 of the SFA forbids persons from installing or constructing an individual sewage system without first obtaining a permit indicating that the system is in compliance with the SFA. 35 P.S. § 750.7(a)(1). The statute declares that "the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth," except as specifically approved by DEP under the CSL or by the local agency pursuant to section 7.3 of the SFA, "shall constitute a nuisance and shall be abatable in the manner provided by law." 35 P.S. §

740.14. *See also* 25 Pa. Code § 73.11(c) (a “sewage system may not discharge untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth” except as specifically permitted under the CSL).<sup>7</sup> The ongoing unpermitted discharge of sewage at the Koziel property was clearly a violation of various provisions of the SFA and the CSL.

The 2002 Order was issued pursuant to the authority granted to DEP by the SFA and the CSL. According to Section 10 of the SFA, DEP has the power to “review the performance of local agencies in the administration” of the SFA, 35 P.S. § 750.10(5), and, to “order a local agency to undertake actions deemed by the department necessary to effectively administer [the SFA] in conformance with the rules and regulations of the department.” 35 P.S. § 750.10(7). Section 5 of the CSL authorizes DEP to “issue such orders as may be necessary to implement the provisions of [the CSL] or the rules and regulations of the department.” 35 P.S. § 691.5(b)(7).<sup>8</sup>

Moreover, each local agency administering the SFA has “the *duty*” to “restrain violations” of the SFA and the regulations adopted thereunder. 35 P.S. § 750.8(b)(7) (emphasis added). The implementing regulations specifically state that the local agency has “the power and the *duty*” to “proceed under sections 7, 8, 12, 13, 13.1, 13.2(b), 14, 15, and 16 of the [SFA] to restrain violations of the [SFA and implementing regulations], and to abate nuisances in accordance with existing statutes, or as defined in the [SFA].” 25 Pa. Code § 72.42(a)(13)

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<sup>7</sup> Further, the CSL states: ‘No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.’ 35 P.S. § 691.202; *see also* 35 P.S. § 691.201 (“No person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereinafter provided in this act.”).

<sup>8</sup> *See also* 25 Pa. Code § 72.43(a) (DEP “is empowered to review the performance of local agencies and their sewage enforcement officers in the administration of sections 7, 8, 12, 13, 13.1, 13.2(b), 14, 15 and 16” of the SFA); § 72.43(b) (DEP may “require the submission of papers, books and records by the local agency or its sewage enforcement officer”); § 72.43(c) (“If the Department finds that a local agency has failed to effectively administer section 7, 8, 12, 13, 13.1, 13.2(b), 14, 15 or 16 of the [SFA], the Department, in addition to other remedies it may seek at law or in equity, may order the local agency to take actions the Department deems necessary to obtain effective administration.”).

(emphasis added). *See also* 25 Pa. Code § 71.71 (“Municipalities are required to assure the proper operation and maintenance of sewage facilities within their borders.”); 25 Pa. Code § 71.73(a) (“When sewage facilities are permitted by local agencies, the municipality is responsible for taking actions necessary to assure continued compliance of these sewage facilities with the [SFA], the [CSL], and regulations promulgated thereunder.”). *See generally* 25 Pa. Code § 72.42(a).

It is evident from a review of these provisions that DEP was authorized by applicable law to issue the 2002 Order. Having verified the existence of the ongoing violations of the SFA and CSL occurring within the Borough at the Koziel property, and having repeatedly advised the Borough of its statutory responsibility to undertake sufficient action to abate the discharge and resolve the complaint, DEP allowed ten months to pass while the Borough was given an opportunity to meet its legal responsibilities. After ten months of inaction by the Borough, DEP’s determination that the Borough had failed to perform its legal duties to restrain the ongoing violations of the SFA and assure the proper operation and maintenance of sewage facilities within its borders was undoubtedly reasonable and correct. DEP rightly concluded that the Borough had failed to properly administer the SFA; DEP then simply exercised the agency’s statutory authority to order the Borough “to undertake actions deemed by the department necessary to effectively administer” the SFA. 35 P.S. § 750.10(7).

Appellant has conceded that its failure to abate the discharge at the Koziel property justified the issuance of a DEP order commanding the Borough take actions deemed by DEP necessary for the proper administration of the SFA. *See* Notice of Appeal, at ¶ 5; App. Memo, at pages 3-4. Notwithstanding this concession, the Borough raised two relevant points in its opposition to the Motion. First, Appellant suggested, without explicitly stating, that it did not

have legal responsibility to take action to abate the discharge because the Borough had allegedly transferred all aspects of the Borough's administration of the SFA to the CCSC. Second, the Borough contended that the facts underlying the 2002 Order do not support DEP's determination that the Borough committed a violation of the SFA.

The Borough's contention that it had no responsibility for the discharge because of an alleged transfer of its administration to the CCSC is flawed in several respects. By its failure to serve any response to DEP's Requests for Admissions, the Borough specifically admitted that it "had not transferred or delegated to the CCSC the administration of its responsibilities under the Sewage Facilities Act to investigate and resolve complaints related to alleged unlawful discharges of sewage for the period May 1, 2001 through July 31, 2002." Req. Adm. No. 9. *See* Pa.R.Civ.P. 4014(b). Any matter admitted under Rule 4014 "is conclusively established" unless the Board "on motion permits withdrawal or amendment of the admission." Pa.R.Civ.P. 4014(d). Appellant has not made a motion seeking the withdrawal or amendment of any of its admissions pursuant to Rule 4014(d). Consequently, the Borough's admission has conclusively established, for purposes of this appeal, the fact that the Borough did not transfer its responsibility for taking action to investigate and resolve the complaint concerning the discharge at the Koziel property. In the absence of any motion seeking withdrawal of its admission, the Borough's belated attempt to introduce evidence pertinent to an alleged transfer is not effective.

Moreover, even accepting the contention in the affidavit submitted by the Borough at face value would not enable the Borough to evade its responsibility for addressing the discharge. The SFA provides that "sections 7, 8, 12, 13, 13.1, 14, 15, and 16 of this act shall be administered by each municipality unless said municipality has transferred or delegated the administration of [such sections] to another local agency . . . and said other local agency has

*accepted administration of sections 7, 8, 12, 13, 13.1, 14, 15, and 16 of this act.”* 35 P.S. § 750.8(a) (emphasis added). Before any attempted transfer by the Borough to the CCSC of administration for addressing sewage discharge violations could be effective, the CCSC was required to formally accept such transfer or delegation. There is no evidence of such acceptance. The Borough has specifically admitted that the “CCSC had not accepted transfer or delegation of Appellant’s responsibilities under the Sewage Facilities Act to handle complaints related to alleged unlawful discharges of sewage for the period May 1, 2001 through July 31, 2002.” Req. Adm. No. 10. Further, Appellant has not asserted in its response to the Motion that the CCSC ever accepted any attempted transfer of responsibility for addressing sewage complaints and, the Borough has not introduced any evidence in support of such an assertion. The evidence of record is to the contrary. Indeed, the Borough’s unilateral attempt to transfer its relevant responsibilities under the SFA, without the concomitant formal acceptance of such transfer by the CCSC, would appear to violate the statute. Section 8 of the SFA states: “No local agency shall voluntarily surrender administration of the provisions of this act except to another local agency pursuant to this section.” 35 P.S. § 750.8(a).

In sum, the Borough has not created a *genuine* issue of material fact with respect to its obligation to administer those provisions of the SFA relevant to this proceeding. Pa.R.Civ.P. 1035.2, 1035.3; *see Note*, Pa.R.Civ.P.1035.2 (“the adverse party must come forth with evidence showing the existence of the facts essential to the . . . defense”); *Goetz v. DEP*, No. 2002-069-K, 2003 Pa. Envirn. LEXIS 1, at \*4-\*8 (EHB, Jan. 16, 2003).

We also disagree with the Borough’s argument that the underlying facts of the 2002 Order did not justify DEP’s determination that the Borough had committed a violation of the SFA. The Borough’s assertion strikes us as a semantic distinction without a difference, given its

concession that DEP was justified in issuing an order to the Borough to undertake those actions which DEP deemed necessary for a proper administration of the SFA. The Borough does not explain how DEP would be justified in issuing an order to the Borough for its failure to take action if DEP had not correctly determined that the Borough had been derelict in its duty. Given DEP's oversight role, such a determination is a fundamental premise, a condition precedent, of an order issued to a local agency directing actions DEP deems necessary for administration of the SFA in conformity with applicable law. By conceding that DEP was justified in issuing an order to the Borough to take specific actions with respect to the discharge, Appellant is necessarily conceding that DEP correctly concluded that the Borough had neglected its statutory and regulatory duties pursuant to the SFA and implementing regulations.

Appellant argues that its duty to administer the SFA in relation to the abatement of the discharge at the Koziel property was discretionary. However, again it is not apparent why the Borough believes DEP was justified in issuing an *order* to the Borough to take actions with respect to the ongoing discharge (as opposed to merely making recommendations) if the Borough's duty to effectively administer the SFA is discretionary. Moreover, the Borough responds to DEP's assertion that a municipality has a mandatory duty to properly administer the SFA by stating: "Certainly, the general duty is mandatory." Appellant's Memorandum, at 4. The Borough then tries to draw a distinction between a general duty to administer the SFA and specific decisions on how to enforce regulations applicable to a wildcat sewer system.

We discern no distinction in the statute or regulations between a "general" and a specific duty with respect to a municipality's enforcement of the SFA, and the Borough does not provide any authority for such a distinction. The SFA granted the Borough the power, and imposed upon it the corresponding duty, to properly administer the SFA in relation to sewage discharge

violations occurring within its borders. 35 P.S. § 750.8(b). We believe DEP was justified in reaching a conclusion that Appellant was derelict in its duty after the Borough failed, for ten months, to take any action to abate the discharge at the Koziel property.

Finally, the 2002 Order was a reasonable and appropriate exercise of DEP's discretion under the circumstances. After giving the Borough ample time to take some effective action, DEP ordered the Borough to thoroughly investigate the sources of the discharge and report on its investigation. DEP also directed the Borough to require those contributing to the discharge to obtain necessary permits and abate the discharges within sixty days. If the Borough could not obtain voluntary compliance, the 2002 Order directed the Borough to institute a suit in equity within eighty days to restrain or prevent all violations of the SFA against those persons who had failed to correct their unpermitted discharge of sewage onto the Koziel property. We find nothing arbitrary about the manner in which the 2002 Order directed the Borough to address the discharge at the Koziel property. All of the actions are expressly authorized by the SFA, see 35 P.S. §§ 750.8, 750.12. The statute specifically imposes a duty on the local agency to undertake investigations necessary to carry out the provisions of the act, 35 P.S. § 750.8(b)(5); to submit such reports to DEP as it may require by order, 35 P.S. § 750.8(b)(8); to maintain standards for permits identical to those of DEP, 35 P.S. § 750.8(b)(9); and to institute suits in equity to prevent or restrain violations, 35 P.S. § 750.8(b)(7). Thus, DEP ordered the Borough only to take actions which the SFA already imposes as duties upon the local agency. Moreover, the standard manner of proceeding prescribed by the 2002 Order is neither particularly harsh nor has it been shown to be inappropriate for the circumstances.

Appellant argues that there was actually no practical solution for the discharge problem at the Koziel property because the only choices it had to resolve the violations were: (1) obtain an

injunction which ejected those engaging in the unpermitted discharge from their homes; or, (2) construct a sewage system that would adequately address sewage problems existing throughout the Borough. Appellant does not explain why it believes these two methods were its only possible means to address the discharge at the Koziel property.

The SFA actually provides a variety of enforcement tools for obtaining compliance with its provisions, including the power to enter upon lands for the purpose of conducting inspections necessary to carry out the provisions of the statute, 35 P.S. § 750.8(b)(5); to institute suits in equity to restrain or prevent violations, 35 P.S. § 750.12; to initiate criminal proceedings against property owners violating the SFA, 35 P.S. § 750.13; and to assess civil penalties for such violations, 35 P.S. § 750.13a. In reality, the Borough had many legal options short of seeking to eject persons from their homes.

In addition, while we applaud the Borough's recent efforts to develop a comprehensive solution to what appear to be extensive sewage discharge problems in the Borough, the 2002 Order was a response to the Borough's failure to take any effective action to address the Koziel complaint. There is nothing in the record showing that the Borough was precluded from taking direct actions to abate the discharge at the Koziel property while simultaneously engaging in the lengthier process of developing a Borough-wide solution to sewage discharge problems. Even if the Borough was contemplating the future construction of a sewage system, that does not excuse the Borough's ten-month failure to take any action to properly address the complaint.

In short, the question is whether the directives in the 2002 Order prescribed a reasonable and appropriate means of addressing the discharge at the Koziel property. The Borough has not demonstrated why such means were an arbitrary exercise of DEP's discretion to "order a local agency to undertake actions deemed by the department necessary to effectively administer" the

SFA in conformance with applicable regulations. 35 P.S. § 750.10(7).

DEP has proven the facts underlying the 2002 Order, that its order was authorized by applicable law, and that the order constitutes a reasonable exercise of the agency's discretion under the circumstances. Appellant has failed to demonstrate that it is entitled to any defense. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

BURNSIDE BOROUGH

:

v.

EHB Docket No. 2002-138-C

:

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

:

:

ORDER

AND NOW, this 27th day of March, 2003, it is hereby ORDERED as follows:

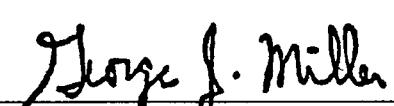
1. The Department of Environmental Protection's Motion for Summary Judgment is granted, the appeal at EHB Docket No. 2002-138-C is dismissed, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD



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MICHAEL L. KRANCER  
Administrative Law Judge  
Chairman



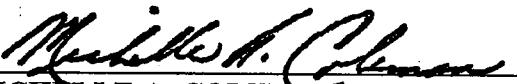
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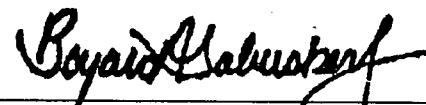
GEORGE J. MILLER  
Administrative Law Judge  
Member



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THOMAS W. RENWAND  
Administrative Law Judge  
Member

  
MICHELLE A. COLEMAN  
Administrative Law Judge  
Member

  
BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member

**Dated: March 27, 2003**

c: **DEP Bureau of Litigation**  
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**  
Nels J. Taber, Esquire  
Regional Counsel  
Northcentral Regional Office

**For Appellant:**  
Kim C. Kesner, Esquire  
Solicitor for Burnside Borough  
23 North Second Street  
Clearfield, PA 16830

**KIM C. KESNER**

23 NORTH SECOND STREET, CLEARFIELD, PA 16830

**ATTORNEY AT LAW**  
[attykesner@atlanticbbn.net](mailto:attykesner@atlanticbbn.net)  
[kzurat@atlanticbbn.net](mailto:kzurat@atlanticbbn.net)(814) 765-1706  
FAX (814) 765-7006

December 12, 2005

David M. Chuprinski, Asst. Counsel  
PA Department of Environmental Protection  
208 West Third Street – Suite 101  
Williamsport, PA 17701

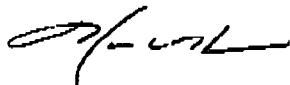
**RE: DEP vs. Burnside Borough  
No. 2005-1593-CD (Clearfield County)**

Dear Mr. Chuprinski:

This is with reference to your four (4) filings of December 9, 2005, one of which was a purported amendment of your Complaint which your Praecipe sets forth is being filed as a matter of right under Pa.R.Civ.P. Rule 1028(c)(1). As we discussed before I left, I was on vacation last week and became aware of your filings when I returned this morning.

As a consequence of this action, I am entitled to file new Preliminary Objections or an Answer to the Amended Petition within twenty (20) days (unless the Court fixes some other time). I would respectfully suggest that this effectively prevents the Court from conducting a hearing on December 14, 2005 on the Rule it issued upon your original complaint, which Rule was dated October 19, 2005. I am aware that at the hearing you intend to present testimony and evidence in support of your prayer for relief in your original Complaint and amended pleading that the Court "...(a)fter hearing, enter an order requiring Burnside to....complete construction and place into operation (a) sewage treatment plant..." Entertaining this request on December 14, 2005 would be grossly premature particularly in light of your filings last week. As it is your Rule, and as you elected to amend your original pleading, I will defer to you as to whether we appear as scheduled. However, I intend to argue to the Court that it lacks jurisdiction to conduct a hearing until I am afforded the opportunity to file a responsive pleading to your amended pleading. Also, I intend to submit a Brief in response to yours arguing: 1) your purported Amendment was filed late, therefore it can be filed only with leave of Court; and 2) this Court lacks jurisdiction to enforce DEP's Administrative Order from a Petition for Rule to Show Cause which relief is only available if at all in an Action in Equity.

Sincerely yours,



Kim C. Kesner

KCK/klz

cc: President Judge Fredric Ammerman  
David Meholick, Court Administrator  
Burnside Borough

**VIA FACSIMILE ONLY**

**Kim C. Kesner, Esquire  
23 North Second Street  
Clearfield, PA 16830**

**Recipient:** David Meholic

**Sent By:** Kim C. Kesner, Esquire

**Company:**

**Company:**

**Fax Number:** 765-7649

**Fax Number:** 814-765-7006

**Voice Number:**

**Voice Number:** 814-765-1706

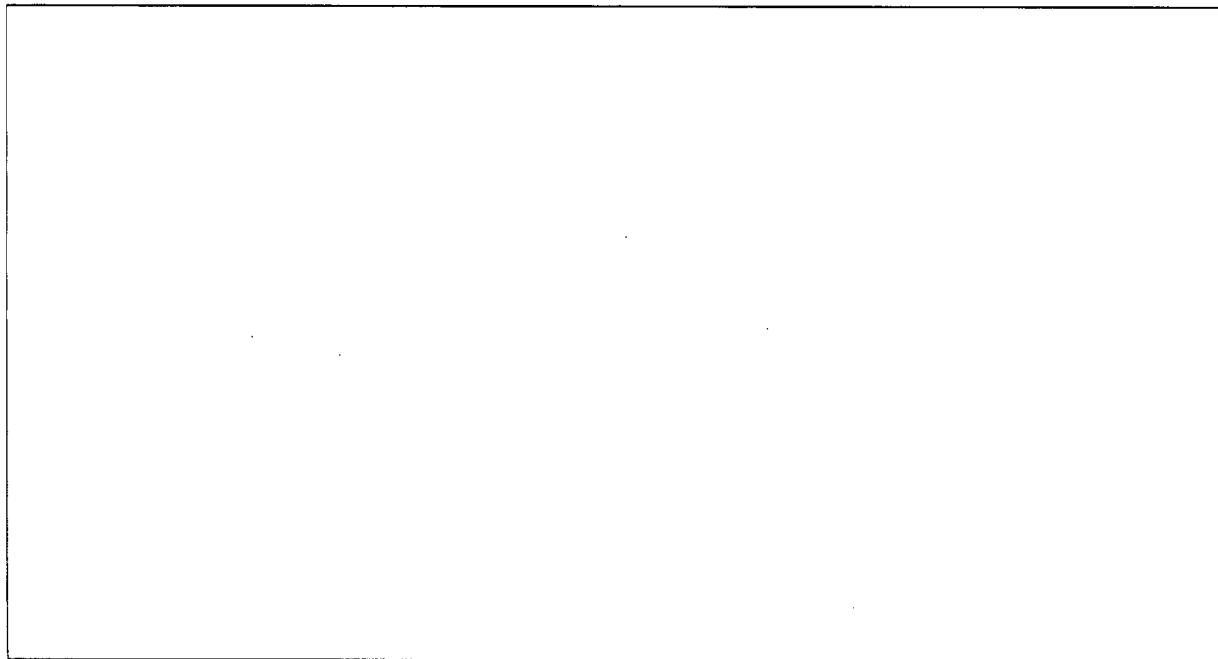
**Date:** 12/12/2005

**Time:** 10:29:30 AM

**Total No. Pages:** 2

**Subject:** DEP vs. Burnside Borough No. 04-1593-CD

**Message:**



IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF :  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v. :  
BURNSIDE BOROUGH, :  
Respondent. :

**ORDER**

AND NOW, this 14th day of December 2005, upon consideration of the  
Department of Environmental Protection's Petition to Compel Compliance with  
Order of Department, it is ORDERED and DIRECTED as follows:

1. The Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") is entitled to enforcement of its Compliance Order issued on January 23, 2003 in this matter. ("January 23, 2003 Compliance Order").
2. The facts and violations set forth in the January 23, 2003 Compliance Order are conclusively established.

3. Burnside Borough shall:

- a. Submit revisions necessary to fully address the Department's required modifications, amendments, or additions necessary to the Water Quality Management Permit application, if any, within thirty (30) days of receipt of said written comments from the Department;
- b. Within one hundred twenty (120) days of the issuance of the approved Water Quality Management Permit, begin construction of the sewage treatment plant; and
- c. Within four hundred eighty-five (485) days of the issuance of the approved Water Quality Management Permit, complete construction and place into operation the sewage treatment plant in accordance with the approved Water Quality Management Permit.

4. Upon further Petition of the Department and a finding of contempt by this Court, Burnside shall pay a fine of One Hundred Dollars (\$100.00) per day for each day that Burnside fails to comply with this Order.

5. This Court retains continuing jurisdiction of this matter.

By the Court,

\_\_\_\_\_, J

IN THE  
**CLEARFIELD COUNTY COURT OF COMMON PLEAS**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v.  
BURNSIDE BOROUGH,  
Respondent. :

PRAECIPE

To the Prothonotary:

Please file of record in the above captioned matter the enclosed Exhibits to the Amended Petition filed with this Court on December 9, 2005. Said Exhibits are identical to those filed with the "Complaint" filed in this matter on October 14, 2005. Respondent's counsel of record will be served personally with the Exhibits on this date.

**FILED**

DEC 14 2005  
073:15 PM  
William A. Shaw  
Prothonotary/Clerk of Courts

1 CENT TO FILE

Respectfully submitted,  
COMMONWEALTH OF  
PENNSYLVANIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION



DATE: December 14, 2005

Telephone: (570) 321-6568

David M. Chuprinski  
Assistant Counsel  
PA Supreme Court I.D. Number 75540  
208 West Third Street - Suite 101  
Williamsport, PA 17701

c: Via Personal Service

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Burnside Borough : Violations of the Pennsylvania Sewage  
Facilities Act and Department Regulations  
Burnside Borough, Clearfield County :

ORDER

NOW, this 10<sup>th</sup> day of May, 2002, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), after investigation, has found and determined that:

A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("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. Burnside Borough is a municipality duly organized and existing under the laws of the Commonwealth. Burnside Borough acts and conducts business through its elected Borough Council. Burnside Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

C. Pursuant to Section 8 of the Sewage Facilities Act, Burnside Borough has transferred or delegated the administration of certain provisions of the Sewage Facilities Act to the Clearfield County Sewage Committee ("CCSC").

D. The CCSC is an agency that administers certain sections of the Sewage Facilities Act for its various member municipalities located in Clearfield County, Pennsylvania.

E. CCSC utilizes certified sewage enforcement officers employed by Hess & Fisher Engineers, Inc. and other certified sewage enforcement officers (individually, "SEO" and collectively, "SEO's") to carry out duties of sewage enforcement officers for the member municipalities CCSC represents, including Burnside Borough.

F. On July 30, 2001, the Department received a complaint alleging that sewage was running onto the surface of the ground at the property of Suzanne Koziel located on East Fifth Street in Burnside Borough, Clearfield County ("Koziel Property").

G. By correspondence dated August 6, 2001, the Department forwarded the complaint described in Paragraph F, above, to Burnside Borough. The SEO was copied on the complaint.

EXHIBIT

A

H. By correspondence dated September 7, 2001, the Department requested Burnside Borough's attendance at an administrative conference to discuss the complaint described in Paragraph F above. The Department requested that Burnside Borough confirm a date and time for the administrative conference. Burnside Borough never contacted the Department to confirm a date and time for the requested administrative conference.

I. On February 26, 2002, Department representatives inspected the Koziel Property and found that raw sewage discharges onto the surface of the ground at the Koziel Property. The Department representatives also observed a large diameter hose leading from the basement of a structure on an adjacent property to an alley next to the Koziel Property. It was suggested to the Department that the hose was used to pump sewage from the basement into the alley. By correspondence dated February 26, 2002, the Department wrote to CCSC regarding this complaint and asked CCSC to respond by March 15, 2002 as to the steps that have been taken, or will be taken to resolve this complaint. Burnside Borough and the SEO were copied on this correspondence.

J. To date, neither Burnside Borough, CCSC nor the SEO has resolved the discharge of sewage to the surface of the ground at and next to the Koziel Property as described in Paragraph I above.

K. Title 25 Pa. Code § 71.71 states that "[m]unicipalities are required to assure the proper operation and maintenance of sewage facilities within their borders."

L. Title 25 Pa. Code § 71.73(a) states that "[w]hen sewage facilities are permitted by local agencies, the municipality is responsible for taking actions necessary to assure continued compliance of these sewage facilities with the act, The Clean Streams Law and regulations promulgated thereunder."

M. Title 25 Pa. Code § 73.11 (c) states that "...[a] sewage system may not discharge untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth except as specifically permitted under Sections 202 and 207 of the Clean Streams Law (35 P.S. §§691.202 and 691.207)..."

N. Section 8(b)(7) of the Sewage Facilities Act, 35 P.S. § 750.8(b)(7), provides that "[e]ach local agency in addition to the powers and duties conferred upon it by existing law shall have the power and the duty... [t]o proceed under section 12 of this act to restrain violations of this act and the rules and regulations adopted hereunder."

O. Section 12 of the Sewage Facilities Act, 35 P.S. § 750.12, states that "[a]ny local agency or any municipality which is a member of a local agency shall have the power to institute suits in equity to restrain or prevent violations of section 7 of this act occurring within the jurisdiction or corporate limits of said local agency or municipality."

P. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states, "the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . .shall constitute a nuisance and shall be abatable in the manner provided by law."

Q. Section 201 of the Clean Streams Law, 35 P.S. § 691.201, provides that "[n]o person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereafter provided in this act."

R. Section 202 of the Clean Streams Law, 35 P.S. § 691.202, provides, in part, that "[n]o municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the [D]epartment...A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the [D]epartment is hereby declared to be a nuisance."

S. Section 611 of the Clean Streams Law, 35 P.S. § 691.611, provides, among other things, that "[i]t shall be unlawful to fail to comply with any rule or regulation of the [D]epartment..., to violate any of the provisions of this act or rules and regulations adopted thereunder..., [o]r to cause air or water pollution..."

T. Burnside Borough's failure to effectively administer the Sewage Facilities Act and take measures to correct and abate the sewage discharge described in Paragraph I above constitutes a violation of Section 8(b)(7) of the Sewage Facilities Act, 35 P.S. § 750.8(b)(7); 25 Pa. Code §§ 71.71, 71.73(a), and 73.11(c); and Section 201 of the Clean Streams Law, 35 P.S. § 691.201.

U. The violation described in Paragraph T above, constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611; and a statutory nuisance under Section 202 of the Clean Streams Law, 35 P.S. § 691.202; and Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14.

NOW, THEREFORE, this 10<sup>th</sup> day of May, 2002, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Section 5 of the Clean Streams Law, 35 P.S. § 691.5; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17, it is hereby ordered that Burnside Borough shall:

1. Within fifteen (15) days of receipt of this Order, investigate and identify all of the sources of raw sewage discharging onto the Koziel Property.
2. Within fifteen (15) days of receipt of this Order, conduct an investigation to determine if the hose in the alley adjacent to the Koziel Property is used to intermittently pump sewage from the basement of the neighboring structure onto the ground surface or otherwise determine if any violation exists in regard to sewage generated within the neighboring structure.
3. Within fifteen (15) days of receipt of this Order require all person(s) identified as contributing to the discharge of sewage onto and next to the Koziel Property to, within sixty (60) days of notice: 1) obtain necessary permits and abate the discharge(s), and 2) correct any other violations of the Sewage Facilities Act and rules and regulations of the Department found to exist on their properties.
4. Within eighty (80) days of receipt of this Order, in accordance with Section 12 of the Sewage Facilities Act, 35 P.S. § 750.12, institute a suit in equity to restrain or prevent all violations of the Sewage Facilities Act and the Clean Streams Law against those persons who have failed to correct their unpermitted discharge of sewage onto and next to the Koziel Property.

5. Within twenty (20) days after Burnside Borough conducts the investigation required in Paragraphs 1 and 2, above, Burnside Borough shall submit a report in writing to the Department describing the results of the investigation and detailing the steps Burnside Borough has taken or will take to abate the violation. The report shall be submitted to the Department at the address set forth in Paragraph 6, below.
6. Burnside Borough shall provide copies to the Department of any and all notices, correspondence, pleadings or other documents generated as a result of this Order within fifteen (15) days after their creation. Copies shall be submitted to the Department at:

Environmental Program Manager  
Water Management Program  
Northcentral Regional Office  
208 West Third Street - Suite 101  
Williamsport, PA 17701-6448

7. Nothing set forth in this Order is intended, nor shall it be construed, to relieve or limit Burnside Borough's obligation to comply with any existing or subsequent statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall it be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.
8. This Order of the Department is effective IMMEDIATELY upon receipt.

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



Daniel L. Alters  
Daniel L. Alters  
Environmental Program Manager Water Quality  
Northcentral Regional Office

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Burnside Borough : Failure to Revise Official Sewage Facilities  
Burnside Borough, Clearfield County : Plan for Burnside Borough

ORDER

NOW, this 23<sup>rd</sup> day of January, 2003, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), after investigation, has found and determined that:

A. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535 as amended, 35 P.S. §§ 750.1, et seq. ("Sewage Facilities Act" or "Act 537"); 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. Burnside Borough is a municipality located in Clearfield County, duly organized and existing under the laws of the Commonwealth (the "Borough"). The Borough acts and conducts business through its elected Borough Council. The Borough maintains a mailing address of P.O. Box 208, Burnside, PA 15721.

C. On May 10, 2002, the Department issued an Order to the Borough directing the Borough to investigate and abate the discharge of raw sewage onto the surface of the ground at and next to the residence of Suzanne Koziel located on East Fifth Street in the Borough ("Koziel Property").

D. On June 12, 2002, the Department met with Borough Council members and others to discuss the Borough's investigation into resolving the discharge of sewage onto the surface of the ground at and next to the Koziel Property. The Borough preliminarily indicated that a Borough-wide approach to correcting sewage system problems might be more appropriate than an approach limited to the Koziel Property.

E. Previously, a comprehensive plan dated January 1969 for water and wastewater programs for the County of Clearfield had been developed to serve as the Official Sewage Facilities Plan for the Borough, as well as other areas within Clearfield County. The Official Sewage Facilities Plan identified the Borough to be in need of a sewage collection system and a central treatment plant. The recommended plan called for a collection system and secondary treatment works with a capacity of 0.04 million gallons per day to serve the area of the Borough. The implementation schedule was to have the collection system and primary treatment completed by 1970 and achieve secondary treatment by 1980. The Borough never implemented these recommendations.

EXHIBIT

B

F. On June 19, 2002, the secretary of the Borough Council informed the Department that the Borough had retained Hess & Fisher Engineers, Inc. to develop a Borough-wide plan for adequate sewage treatment facilities through the preparation and submission of an Act 537 update revision to the Official Sewage Facilities Plan ("Act 537 Update Revision") in accordance with Section 5 of the Sewage Facilities Act, 35 P. S. § 750.5.

G. Under cover letter dated July 26, 2002, Hess & Fisher Engineers, Inc. submitted on behalf of the Borough a plan of study (POS). The POS detailed a comprehensive update revision study focused on confirming the severity of the problems with existing sewage disposal systems in the Borough, and identifying an environmentally sound, cost-effective solution to the problems identified.

H. By letter dated August 26, 2002, the Department approved the Borough's POS described in Paragraph G, above.

I. By correspondence dated November 27, 2002, Wilson Fisher submitted on behalf of the Borough, a draft copy of the results of sanitary survey work conducted on October 17-18, 2002 by Hess & Fisher Engineers, Inc. for the area within the boundaries of the Borough ("Sanitary Survey"). The Sanitary Survey documented and confirmed that at least 50% of the sewage generating structures in the Borough are served either by systems which discharge inadequately treated sewage directly onto the surface of the ground or into waters of the Commonwealth, or by one of four unauthorized "wildcat" sewer systems, which in turn discharge inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth.

J. Based upon its review of the Sanitary Survey results, as described in Paragraph I, and the Official Sewage Facilities Plan dated January 1969, described above in Paragraph F, the Department has determined that the Borough's existing Official Sewage Facilities Plan is outdated and is inadequate to meet the sewage needs of the Borough, its residents and property owners.

K. To date the Borough has failed to submit an Act 537 Update Revision to address the discharges of inadequately treated sewage onto the surface of the ground or into waters of the Commonwealth, as described in Paragraph I, above.

L. Section 5(a) of the Sewage Facilities Act, 35 P.S. § 750.5(a), states that "[e]ach 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..."

M. Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(3), states that "[e]very official plan shall...[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..."

N. Title 25 Pa. Code § 71.11 states in part that "[m]unicipalities are required to develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems...".

O. Title 25 Pa. Code §71.12(a) states that “[m]unicipalities shall 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 portion thereof.”

P. Title 25 Pa. Code § 71.13(a) states that “[t]he Department will require a municipality to revise its official plan when it determines that the plan ...is inadequate to meet the sewage needs of the municipality, its residents or property owners...”

Q. Section 14 of the Sewage Facilities Act, 35 P.S. § 750.14, states that "... the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth . . . shall constitute a nuisance and shall be abatable in the manner provided by law."

R. Section 10(1) of the Sewage Facilities Act, 35 P.S. § 750.10(1), states that "[t]he Department shall have the power and its duty shall be...[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide."

S. Section 10(3) of the Sewage Facilities Act, 35 P.S. § 750.10(3), states that "[t]he Department shall have the power and its duty shall be...[t]o order the implementation of official plans and revisions thereto."

T. Section 5(b)(7) of the Clean Streams Law, 35 P.S. § 691.5(b)(7), provides that "[t]he Department shall have the power and its duty shall be to ... [i]ssue such orders as may be necessary to implement...the rules and regulations of the Department."

NOW, THEREFORE, this 23<sup>rd</sup> day of January, 2003, pursuant to Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10; Section 5 of the Clean Streams Law, 35 P.S. §691.5; and Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, it is hereby ordered that:

1. Within one hundred and twenty (120) calendar days of receipt of this Order, Burnside Borough shall submit an administratively and technically complete, municipally adopted Act 537 Update Revision to the Department.
2. The municipally adopted Act 537 Update Revision may be approved, rejected, or approved with conditions by the Department. If the Department determines that the municipally adopted Act 537 Update Revision does not comply fully with the requirements of Act 537, the Department may require Burnside Borough to make changes and/or submit additional information. Burnside Borough shall submit such changes and/or information within forty-five (45) calendar days of receipt of the Department's written request.
3. The final approved municipally adopted Act 537 Update Revision and the deadlines contained therein shall be incorporated as part of this Order for all purposes, and Burnside Borough shall completely implement the recommendations of the Act 537 Update Revision in accordance with the approved implementation schedule.

4. Nothing set forth in this Order is intended, nor shall be construed, to relieve or limit Burnside Borough's obligation to comply with any existing or subsequent statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.
5. This Order of the Department is effective IMMEDIATELY upon receipt.

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, PO 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



Daniel L. Alters  
Environmental Program Manager Water Quality  
Northcentral Regional Office

<b>SENDER:</b> <ul style="list-style-type: none"> <li>■ Complete items 1 and/or 2 for additional services.</li> <li>■ Complete items 3, 4a, and 4b.</li> <li>■ Print your name and address on the reverse of this form so that we can return this card to you.</li> <li>■ Attach this form to the front of the mailpiece, or on the back if space does not permit.</li> <li>■ Write "Return Receipt Requested" on the mailpiece below the article number.</li> <li>■ The Return Receipt will show to whom the article was delivered and the date delivered.</li> </ul>		I also wish to receive the following services (for an extra fee): <ul style="list-style-type: none"> <li>1. <input type="checkbox"/> Addressee's Address</li> <li>2. <input type="checkbox"/> Restricted Delivery</li> <li>Consult postmaster for fee.</li> </ul>
3. Article Addressed to: <p>Burn side Borough  PO Box 208  Burnside, PA 15721</p>		4a. Article Number <p>7000 0600 0034 1096 6375</p>
5. Received By: (Print Name) <p>J. H. Siford</p>		4b. Service Type <ul style="list-style-type: none"> <li><input type="checkbox"/> Registered</li> <li><input type="checkbox"/> Express Mail</li> <li><input type="checkbox"/> Return Receipt for Merchandise</li> <li><input checked="" type="checkbox"/> Certified</li> <li><input type="checkbox"/> Insured</li> <li><input type="checkbox"/> COD</li> </ul>
6. Signature: (Addressee or Agent) <p>X John H. Siford</p>		7. Date of Delivery <p>1-24-03</p>
		8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994

102595-98-B-0229 Domestic Return Receipt

EXHIBIT

C



(717) 787-3483  
TELECOPIER (717) 783-4738  
<http://ehb.courtapps.com>

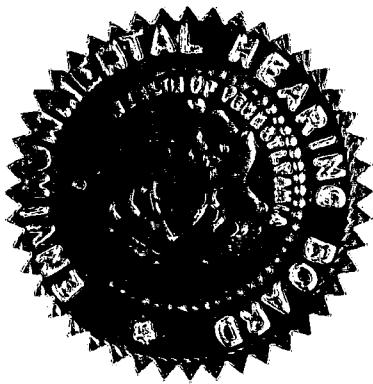
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457

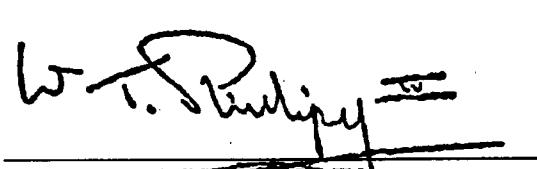
WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

### CERTIFICATION OF OFFICIAL RECORDS

I, William T. Philliply IV, Secretary of the Environmental Hearing Board of the Commonwealth of Pennsylvania, appointed pursuant to Section 3(f) of the Environmental Hearing Board Act, 35 P.S. §7513(b), DO HEREBY CERTIFY in accordance with the provisions of 42 Pa.C.S.A. §6103(a) and (b), that, I am legal custodian of the records and documents maintained by the Environmental Hearing Board (the Board). After having caused to be made a thorough examination of the records, I further certify that no appeal of any administrative order issued by the Pennsylvania Department of Environmental Protection on or after January 23, 2003 to Burnside Borough, Clearfield County, regarding sewerage facilities in the Borough has been filed with the Board by the Borough.

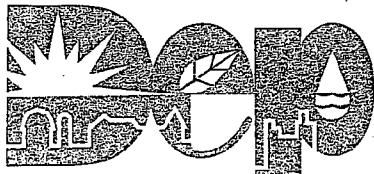
IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Environmental Hearing Board to be affixed.



  
WILLIAM T. PHILLIPY, IV  
Secretary to the Board

DATED: January 31, 2005





Pennsylvania Department of Environmental Protection

208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

NOV 01 2004

Northcentral Regional Office

Fax 570-327-3565

**CERTIFIED MAIL NO. 7004 1160 0002 2580 7661**

Burnside Borough Council  
c/o Twila Sunderlin, Secretary  
General Delivery  
Burnside, PA 15721

Re: Act 537 Update  
APS# 488303  
Burnside Borough, Clearfield County

Dear Borough Council:

We have completed review of an Act 537 Sewage Facilities Plan Update completed by Hess & Fisher Engineers, Inc. for Burnside Borough. This plan is hereby approved by this Department as a revision to Burnside Borough's Act 537 Official Sewage Facilities Plan. As provided by the Pennsylvania Sewage Facilities Act and Chapter 71, Administration of Sewage Facilities Planning Program, this Department will hold Burnside Borough responsible for the complete and timely implementation of this plan. In addition, Section 2 of the Administrative Order of January 23, 2003 issued by this Department allows the Department to approve the municipally adopted Act 537 Update Revision with conditions. The conditions we approve this revision with are that the plan be implemented in accordance with the following schedule:

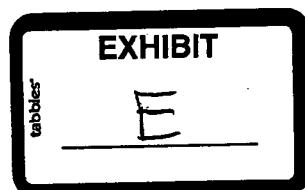
Design of system - January, 2005 through May, 2005.

Submit NPDES permit application to the Department - February, 2005. *3/3/05*

Submit Water Quality Management permit application to the Department - May, 2005.

Construction of system - October, 2005 through October, 2006.

The approved plan calls for approximately 2,000 feet of low pressure sewer and eight grinder pumps to serve the southern end of the borough, with a gravity collection system consisting of approximately 21,200 feet of sewers, to serve the rest of the borough. Treatment will be provided by a proposed 40,000 gallon per day bio-wheel reactor type sewage treatment plant which will discharge to the West Branch Susquehanna River.



Burnside Borough Council

-2-

NOV 01 2004

Burnside Borough Council will be responsible for operation and maintenance of the sewage facilities. This includes the grinder pumps. The Borough will be required to maintain at least one spare grinder pump and parts in order to complete timely repair/replacement of faulty pumps.

Permits will be required for these facilities. Information and applications can be obtained by calling our Water Quality Management permitting section at 570-321-6560. Permits will also be required for River Crossings and any wetland encroachments. Information for these permits can be obtained by calling our Soils and Waterways Section at 570-327-3700.

Enclosed is a form which you can use to apply for 50% reimbursement of your planning costs from this Department. Please complete the form, attach required documentation and send to the address indicated on the form.

If you have any questions, please call William Bailey at 570-327-3688.

Sincerely,

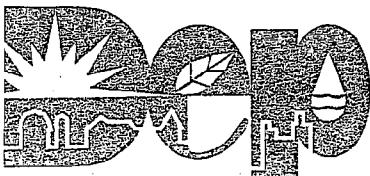


Daniel L. Alters  
Environmental Program Manager  
Water Management

Enclosure

cc: Hess and Fisher Engineers, Inc.  
Clearfield County Planning Commission  
Gary Metzger  
Al Sever  
Rich Adams  
Curt White  
William Bailey  
File

WB/rjh



Pennsylvania Department of Environmental Protection

208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

NOV 01 2004

Northcentral Regional Office

Fax 570-327-3565

**CERTIFIED MAIL NO. 7004 1160 0002 2580 7661**

Burnside Borough Council  
c/o Twila Sunderlin, Secretary  
General Delivery  
Burnside, PA 15721

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Burnside Borough Council

-2-

NOV 01 2004

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If you have any questions, please call William Bailey at 570-327-3688.

Sincerely,



Daniel L. Alters  
Environmental Program Manager  
Water Management

Enclosure

cc: Hess and Fisher Engineers, Inc.  
Clearfield County Planning Commission  
Gary Metzger  
Al Sever  
Rich Adams  
Curt White  
William Bailey  
File

WB/tjh

**FILED**

**DEC 14 2005**

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

COMMONWEALTH OF :  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
:

Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v. :  
BURNSIDE BOROUGH, :  
Respondent. :  
:

FILED 2  
11:41 AM  
JAN 27 2006 Chuprinski  
6R

William A. Shaw  
Prothonotary/Clerk of Courts

Petitioner Department of Environmental Protection's  
Answer to New Matter Raised in Respondent's  
Answer

AND NOW COMES the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "the Department"), who files this Answer to New Matter raised in Respondent's Answer to the above captioned action.

1-15. No response required.

16. It is specifically denied that on January 26, 2005 the Department accepted a Plan Revision from the Borough. By way of further answer, the Department received a draft Plan Revision from the Borough's consultant on January 28, 2005. This submission was not a formal submission from the Borough, but was submitted to solicit the Department's comments prior to finalization of the Plan Revision and formal adoption by the Borough. The Department's staff reviewed

the draft and provided written comment to the Borough and their consultant on March 3, 2005. The written comments identified a number of deficiencies in the draft Plan Revision, and recommended that the deficiencies be addressed prior to formal adoption by the Borough and formal submission to the Department.

By way of further answer, the final, municipally adopted Plan Revision was submitted to the Department on June 20, 2005. Said submission was found by the Department not to be administratively complete. A supplemental submission was made by the Borough's consultant on July 19, 2005, and subsequently determined to be administratively complete. On October 12, 2005, the Department completed its technical review of the Plan Revision and formally approved it. Said approval was well within the 120-day period required for such technical reviews by the Sewage Facilities Planning Program Regulations at 25 Pa. Code § 71.32(c).

It is specifically denied that the Borough could not submit a Water Quality Management Permit application because a requirement of the Water Quality Management Permit application is a copy of the Department's letter approving the Plan Revision [said letter indicating that the Department had formally approved the Act 537 Plan Revision]. It is further specifically denied that additional delay in the Borough's project was caused because the Borough could not submit its Water Quality Management Permit application. By way of further answer, it is the policy of the Department to conduct simultaneous reviews of Plan Revisions and Water Quality Management Permit applications in "compliance cases", i.e., cases where there is an existing Departmental Order or Consent Order and Agreement providing deadlines for task completion. In this matter, the Department had already approved the construction of a new sewerage system for the Borough. On November 1, 2004 the Department approved the Borough's "Act 537 Update, Burnside Borough, Clearfield County" which the Department received on May 6, 2004. The Plan Revision in question was simply an alteration of some of the

details of the "Act 537 Update, Burnside Borough, Clearfield County". By way of further answer, the Department would have readily provided a simultaneous review of the Plan Revision and the Water Quality Management Permit application upon request of the Borough.

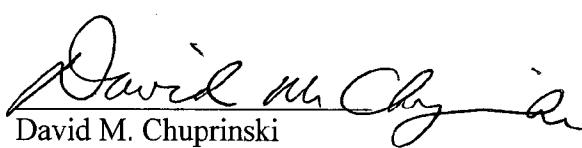
17. No response required.

18. It is admitted that a water Quality Management Permit was received from the Borough on December 6, 2005.

19- 25. No response required.

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 1-25-06

  
David M. Chuprinski  
Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

VERIFICATION

I, Gary L. Metzger, Chief, Planning and Finance Section, Commonwealth of Pennsylvania, Department of Environmental Protection, Northcentral Regional Office, hereby certify that I am authorized to make this verification on behalf of the Department of Environmental Protection and that the facts recited in the foregoing Answer to New Matter are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

DATE: 1-24-06

Gary L. Metzger  
Gary L. Metzger, Chief, Planning and Finance Section  
PA Department of Environmental Protection

IN THE  
CLEARFIELD COUNTY COURT OF COMMON PLEAS

COMMONWEALTH OF :  
PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
Petitioner, : Civil Action in Law and Equity  
: Compel Compliance with January  
: 23, 2003 Order of Department  
: No. 2005-1593-CD  
v.  
BURNSIDE BOROUGH, :  
Respondent. :

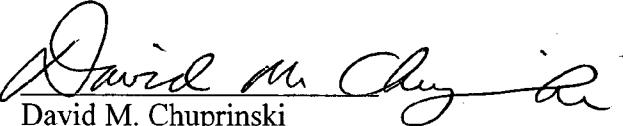
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date noted below the foregoing Answer to New Matter Raised in Respondent's Answer has been sent to the following via First Class Mail, Postage Prepaid:

Kim Kesner, Esq.  
23 North Second Street  
Clearfield, PA 16830

Respectfully submitted,  
FOR THE COMMONWEALTH OF PA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

DATE: 1-25-06

  
David M. Chuprinski  
Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

**FILED**

**JAN 27 2006**

William A. Shaw  
Prothonotary/Clerk of Courts

## Notice of Proposed Termination of Court Case

March 2, 2012

RE: 2005-01593-CD

Commonwealth of Pa., Department of Environmental

Vs.

Burnside Borough

**FILED**

MAR 02 2012

William A. Shaw  
Prothonotary/Clerk of Courts

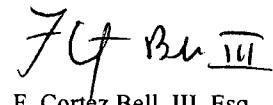
To All Parties and Counsel:

Please be advised that the Court intends to terminate the above captioned case without notice, because the Court records show no activity in the case for a period of at least two years.

You may stop the Court terminating the case by filing a Statement of Intention to Proceed. The Statement of Intention to Proceed must be filed with the **Prothonotary of Clearfield County, PO Box 549, Clearfield, Pennsylvania 16830**. The Statement of Intention to Proceed must be filed on or before **May 2, 2012**.

**If you fail to file the required statement of intention to proceed within the required time period, the case will be terminated.**

By the Court,

  
F. Cortez Bell, III, Esq.  
Court Administrator

Reznicki  
Lesner

FILED

MAR 02 2012

William A. Shaw  
Prothonotary/Clerk of Courts



PLS

Atty. David Chupinski  
208 W. Turner St. Ste 101  
Waukesha, WI.

12701