

Water Pollution Control

GWYNNE B. MYERS*

The 99th General Assembly's Amended Substitute Senate Bill No. 62, commonly called the "Deddens' Act", represents the first attempt to establish a comprehensive state program of water pollution control in Ohio.¹ The new law is patterned in some respects after a rigorous water control law in Pennsylvania,² and must be considered an off-spring, as well as an implementation of, the Ohio River Valley Water Sanitation Compact.³ It is interesting that Ohio, the primary mover in interstate control of water pollution, has waited twelve years after the Compact to achieve intrastate control. Analysis of the Act is simplified by grouping the provisions under five headings.

DEFINITIONS

As with any statute, the frequently used terms such as sewage, industrial wastes, and treatment works are given their customary definition.⁴ The meanings given (1) pollution, (2) waters of the state, and (3) persons, are worth noting for in a large part they govern the scope of the law.

"Pollution" for the purposes of this Act is the act of (1) placing, (2) noxious or deleterious substances, (3) in any waters of the state, (4) if placing such substances makes the waters harmful or inimical to public health, animal life, industrial or agricultural usage, or recreation.⁵ This is a broad definition, which, if enforced without limitation could only result in a very clean stream.

The "waters of the state" to which the Act applies include all waters, surface or underground, natural or artificial except private waters which do not join with any natural surface or underground waters.⁶

The Act applies to all natural persons, all private corporations, all municipalities and political subdivisions.⁷ One tangible result of the Ohio River Valley Compact is evidenced by this definition. Previous pollution laws specifically exempted Ohio River cities from

*Assistant Attorney General of Ohio; Member of the Ohio Bar.

¹ The piecemeal provisions of the present law have appeared, in practice, to be inadequate in their coverage and cumbersome to enforce. See OHIO GEN. CODE § 1249 *et seq.*; §§ 1240-1, 2 and 3. The Attorney General is now enforcing the provisions of § 1240-4, but an actual test of that law has not been needed.

² PA. STAT. ANN § 691.1 *et seq.* (Purdon, 1949).

³ 54 STAT. 752 (1940), 33 U.S.C.A. § 567a (1950).

⁴ Amended Substitute Senate Bill No. 62, § 2 (b) (c) (d) (e) (f) and (g). Unless otherwise shown citations to sections of the law will refer to this Act.

⁵ § 2 (a).

⁶ § 2 (h).

⁷ § 2 (i).

provisions requiring sewage treatment facilities until such time as Ohio River cities in other states should construct such facilities.⁸ The present law just as specifically includes the Ohio River cities, apparently demonstrating the Legislature's belief that the Compact is effective in the other states.

THE WATER POLLUTION CONTROL BOARD

The agency which will administer and enforce the Act is the Water Pollution Control Board. This board is made a part of the Department of Health and the Director of Health serves as chairman of the board.⁹ The implication of these provisions must be that pollution control is more closely identified with public health than with conservation.¹⁰ The Directors of Commerce and of Natural Resources are *ex officio* members of the board. The two remaining members are appointed by the Governor. One must be experienced in municipal government, the other in industrial activity. Quarterly meetings of the board are required, but interim action is also provided for. The Chairman is empowered to exercise all the powers of the board except the powers to revoke permits, adopt rules, and issue or revoke orders. Experience indicates that in effect most of the administrative decisions will be made by the Director of Health with periodic ratification by the board.

POWERS OF THE BOARD

The important powers given the board can be summarized as follows:

(a.) The Act grants the usual powers to develop pollution control programs,¹¹ to participate in pollution research and to administer grants of money,¹² to disseminate information on pollution,¹³ and to establish rules of procedure¹⁴

(b.) The crux of the Act is the power of the board to issue; modify or revoke orders, after public hearing, (1) prohibiting or abating the discharge of sewage or wastes into the waters of the state,¹⁵ or (2) requiring the construction of new disposal systems, or the extension or alteration of present systems, if such action will prevent, control or abate pollution. In conjunction with the order power, the

⁸ OHIO GEN. CODE § 1251.

⁹ § 3.

¹⁰ It is interesting to compare the powers and duties, as well as the significance, of the Ohio Water Resources Board, which is a part of the Division of Water in the Department of Natural Resources. See OHIO GEN. CODE § 408 *et seq.* It has been the writer's observation that while the Pennsylvania Water Board is weighted, in point of view, toward the conservation approach to pollution, the Ohio Board should be inclined toward industry's approach.

¹¹ § 4 (a).

¹² § 4 (c) and (d).

¹³ § 4 (e).

¹⁴ § 4 (f).

¹⁵ § 4 (g).

board is also given a permit power allowing it to issue, modify, revoke or deny permits for the discharge of sewage or wastes and also for the installation, modification or operation of disposal systems. These permits may specify the volume or strength of the permissible discharge.¹⁶ This permit power, of course, would not be so efficacious were it not that the penalty provisions of the Act, discussed *infra*, provide that discharge without permit is a criminal offense.¹⁷ As part of the permit power the board may require the submission, for review by the board, of plans, specifications and other information relevant to the issuance of permits.¹⁸ This permit and order power is subject to one special limitation of considerable importance. When making all orders, the board must "... hear and give consideration to evidence relating to conditions to result from compliance with such orders, and their relation to benefits to the people of the state of Ohio to be derived from such compliance ..."¹⁹

(c.) The board has the power to institute proceedings in common pleas court to enforce its orders.²⁰

(d.) The board is given the power to investigate, on its own motion, any act of pollution or any failure to comply with the Act, and is required to do so upon request being made by officials of a political subdivision or upon petition by twenty five electors. The incidental powers for access to land and records are granted.²¹

(e.) Neither the order and permit power nor the penalty provisions of the Act apply to the discharge of industrial wastes or acid mine drainage until the board, after hearing, determines that there is a practical method for removing the polluting properties from the wastes or drainage.²² Certain additional kinds of discharge are

¹⁶ § 4 (i).

¹⁷ § 8 (a).

¹⁸ §§ 4 (h) and 5 (d). Do these provisions repeal by implication or just supplement the present provisions of Ohio General Code Section 1240-1, requiring the approval of the State Department of Health for any plans to construct or alter treatment facilities?

¹⁹ § 4 (g). The writer believes that this language is quite significant. If the provision had not been incorporated the board could meet the test of § 154-73 of the Administrative Procedure Act, requiring that an order be supported by "... reliable, probative and substantial evidence ...", by finding, on the basis of evidence, that a stream was polluted, that X was polluting it, and that the pollution could be abated. The proviso of § 4 (g) however, seems to mean that the board must examine innumerable collateral factors affecting the total welfare of the people of Ohio.

²⁰ § 4 (j).

²¹ § 6. This remedies one of the more apparent deficiencies of the present law which gave the Department of Health no power to proceed on its own initiative. See OHIO GEN. CODE § 1249 *et seq.*

²² § 5 (e).

specifically exempted.²³ All the proceedings of the board must be in accord with the provisions of the Administrative Procedure Act.²⁴

PENALTY PROVISIONS

Offenses against the Act are broadly defined. After one year following the effective date of the act, September 27, 1952, it is unlawful for any person to pollute the waters of the state, or to place sewage or wastes in such a position that they cause pollution, and such action is defined to be a public nuisance, unless a valid permit for such action has been issued by the board.²⁵ The obvious purpose of the one year provision is to allow time for the extensive work to be done by cities and industries in order to meet the requirements of the Act.²⁶ It is unlawful to discharge wastes or sewage in excess of permit specifications.²⁷ Violation of the provisions of the Act or of orders by the board is a misdemeanor punishable by fine or imprisonment or both, and a new offense is deemed committed each day the violation continues after conviction and final determination of a violation.²⁸ Violations may also be enjoined.

MISCELLANEOUS PROVISIONS

Violators of the Act or of orders by the board must be given written notice of the violation, and the right to a hearing is spelled out in some detail.²⁹ The same hearing protection applies to denial, modification or revocation of permits.³⁰ The attorney general is given the duty of prosecuting violators, when requested to do so by the board. The attorney general also, at the request of the board, must seek an injunction against any violation or threatened violation of the Act or the orders of the board.³¹ Equitable and common law rights of action to suppress nuisances or to abate pollution are preserved by the terms of the statute, as are the ordinary rights of riparian owners.³²

²³ § 5 (f) (g) (h) and (i).

²⁴ § 7 (b).

²⁵ § 5 (a).

²⁶ It would probably be wise procedure for permit applicants to seek permits before the expiration of the one year grace period. Nothing prevents this, though nothing compels it.

²⁷ § 5 (b).

²⁸ § 8 (a).

²⁹ § 7 (a). § 7 (d) covers emergency situations.

³⁰ § 7 (c).

³¹ § 8 (b).

³² § 9. There is no reference to other statutory remedies. Nor does the Act expressly repeal any other statutes. So many of the old provisions are out of harmony with the permit scheme that an implied repeal may well have taken place. Would this also affect the conservation laws? If one were discharging wastes pursuant to a permit from one state agency, could another state agency prosecute if the wastes killed fish?

This Act is wholly untested, and Ohio's experience in this field is quite limited. Many problems will undoubtedly arise in the application of the Act, but it would seem that governmental action to preserve water resources is here to stay, and experience with this act will, if anything, probably lead to the extension of its present provisions.