Pennsylvania's Clean Streams Law: The Liability Imposed

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I. INTRODUCTION

This comment will review the history of the Clean Streams Law, a law aimed at controlling or abating water pollution. The legislative enactment and amendments to the law will be discussed along with the Pennsylvania court’s application and interpretation of the law. The focus of this Comment is upon section three of the law, entitled "Industrial Waste," with emphasis placed on the circumstances in which liability arises. Water pollution, in this section, has been divided into three categories: industrial waste, mining discharges and sewage. Cases involving the first two categories will be examined. Legislative changes and judicial interpretation have expanded the scope of the Clean Streams Law.

II. LEGISLATIVE HISTORY

In 1905, the Pennsylvania legislature enacted the Purity of Waters Act1 which addressed the problem of water pollution as it affected public health. The Act regulated sewage discharge into the waters of the Commonwealth, but specifically excluded discharges from coal mines and tanneries.2 Two rationales were suggested for the exemptions: First, that the Pennsylvania coal industry held a powerful influence over the lawmakers of the day and, second, that the extent of the harm caused by mine drainage was unknown at the time.3

In 1937, The Clean Streams Law4 supplanted the Purity of the Waters Act as the water pollution legislation for Pennsylvania. The General Assembly broadened the scope of water pollution control

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2. Section 4 of the Purity of Waters Act stated:
   No person, corporation, or municipality shall place, or permit to be placed, or discharge, or permit to flow into any of the waters of the State. . . . But this act shall not apply to waters pumped or flowing from coal mines or tanneries. . .
3. Daniel E. Rogers, Acid Coal Mine Drainage — The Perpetual Treatment Problem, 1 EASTERN MINERAL LAW FOUNDATION, ANN. 1980 6-1, § 6.05 at 6-9 n. 3 (1980).
by declaring a public nuisance the discharge of sewage, industrial
wastes or any other noxious deleterious substances into the Com-
monwealth's waters. The underlying policy was protection of the
"clean waters" of the state; that is, those waters which were unpol-
luted and free from any industrial waste discharge. Conversely,
those streams which were already polluted by this time could con-
tinue to be polluted. Acid mine drainage and silt from coal mines
were specifically exempted from the provisions of the law by se-
cion 310.

The Sanitary Water Board was established as the regulatory
agency overseeing sewage and industrial waste permits. The board
was empowered to modify or revoke permits and to investigate all
sources of water pollution. A violator of the Clean Streams Law
could be fined or imprisoned, upon conviction, of creating a public
nuisance in a summary proceeding.

In 1945, the legislature amended the Clean Streams Law. For
the first time, the Sanitary Water Board could regulate mine
drainage, as it was included in the definition of industrial waste.
Through the addition of section 313, the mine operator had to for-
mulate a plan for the control of any acid mine drainage and had to
implement this plan while operating his mine. The Clean

5. Id. Art. 1, § 3 declared:
Discharge of sewage and Industrial Wastes Not a Natural Use.—The discharge of
sewage or industrial waste of any other noxious and deleterious substances into the
waters of the Commonwealth, which is or may become inimical and injurious to the
public health, or to animal or aquatic life, or to the users of such waters for domestic
or industrial consumption, or for recreation, is hereby declared not to be a reasonable
or natural use of such waters, to be against public policy and to be a public nuisance.


7. Broughton, Koza & Selway, Acid Mine Drainage and the Pennsylvania Courts, 11

8. Section 310 provided:
The provisions of this Article shall not apply to acid mine drainage and silt from coal mines
until such time as, in the opinion of the Sanitary Water Board, practical means for the
removal of the polluting properties of such drainage shall become known.

9. Section 305.
10. Section 305.
11. Section 309.
12. Section 1 - Definitions:
"Industrial Waste" shall be construed to be any liquid, gaseous or solid substance,
not sewage, resulting from any manufacturing or industry, or from any establish-
ment, as herein defined, which causes pollution, as hereinafter defined, and silt,
coal mine solids, rock, debris, dirt and clay from coal mines, coal colleries, breakers
or other coal processing operations. (Emphasis added).

13. Section 313.
Streams Law still maintained the distinction between "clean waters" that were subject to regulation and the private or unclear waters which were exempt from the provisions of the law.\textsuperscript{14} Further indication of the General Assembly's intent to abate water pollution could be found by the inclusion of section 311, which authorized the Board to purchase polluted tributaries with state funds and to divert their courses from clean waters.\textsuperscript{15}

After legislative findings that the Clean Streams Law had failed to prevent water quality deterioration and declaring that the economic future of Pennsylvania was at stake, the General Assembly revamped the law in 1965.\textsuperscript{16} The lawmakers embarked upon a new policy of reclamation of the polluted streams coupled with increased prevention of further pollution.\textsuperscript{17} Sections 310 through 313...

\begin{itemize}
\item \textsuperscript{14} Section 310 exempting acid mine drainage was amended to read:
\begin{quote}
It shall be unlawful and a nuisance to discharge, or to permit the discharge, of acid mine drainage (1) into "clean waters" of the Commonwealth which are being devoted or put to public use at the time of such discharge; or (2) into "clean waters" of the Commonwealth, unless the Commonwealth, after the Sanitary Water Board has approved plans of drainage pursuant to § 313 thereof...
\end{quote}

\item \textsuperscript{15} Section 311 - authorized the purchase. Section 312 - authorized the diversion clean waters.


\item \textsuperscript{17} Section 4 continues:
\begin{quote}
The General Assembly of Pennsylvania therefore declares it to be the policy of the Commonwealth of Pennsylvania that:
\begin{enumerate}
\item The Clean Streams Law as presently written has failed to prevent an increase in the miles of polluted water in Pennsylvania.
\item The Present Clean Streams Law contains special provisions for mine drainage that discriminates against the public interest.
\item Mine drainage is the major cause of stream pollution in Pennsylvania and is doing immense damage to the waters of the Commonwealth.
\item Pennsylvania, having more miles of water polluted by mine drainage than any state in the nation, has an intolerable situation which seriously jeopardizes the economic future of the Commonwealth.
\item Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry; and
\item Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead.
\end{enumerate}
\end{quote}

\end{itemize}
were repealed, thus, eliminating the special exemption for acid mine drainage. Acid mine drainage was now subject to section 307, which outlawed the discharge of pollution into dirty waters. A trifurcated section 315 establishing a permit procedure run by the Sanitary Water Board for mining operations was added. Section 315(a) required a drainage plan be filed with and approved by the board; section 315(b) outlawed the operation of a mine without a permit and detailed a procedure upon which the board would issue permits; and, section 315(c) granted the board additional powers to revoke, suspend, or modify permits in addition to any other penalties the board may impose.  

Section 316 declared the duty of a landowner or occupier to grant access to a Water Board member upon a finding that a polluting condition existed upon the land. The board member was empowered to take necessary action to eliminate the pollution.  

Section 317 stated a violation of sections 315 and 316 is a misdemeanor, subjecting the violator, upon conviction, to fines and imprisonment.  

Section 605 established a Clean Water Fund, consisting of fines paid by violators to abate the cost of fighting water pollution.  

The 1970 amendments strengthened the Clean Streams Law and, in particular, sections 315 and 316. Section 315 clarified what the legislature meant by "operation of a mine." Mining operations included any preparatory work done to open or reopen a mine, the closing procedures, and "any other work done on land or water in connection with a mine." Bond posting requirements were established for mining operations. Under the amended section 316 the Sanitary Water Board only had to find a "danger of pollution" on the land to institute action. In addition, the board could either order the landowner to correct the condition himself or order access be given to a state agency to correct the condition.  

By 1980, the Department of Environmental Resources (hereinafter

(2) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth.

23. Id.
25. Id.
DER) had assumed the functions of the Sanitary Water Board. Section 315 was broadened. Section 315(a) included refuse disposal in its definition of an operation of a mine. Subsection (b) required a mine operator to post a bond along with a guarantee of his company's creditworthiness to insure compliance with the permit. Forfeiture of the bond could result for post-mining discharges due to improper restoration measures. Section 315(c) required a hydrological study to be incorporated in the permit application. Subsections (d) through (o) further detailed the permit procedures. Section 315(i) listed four situations in which the DER could designate an area as unsuitable for mining. Subsection (m) gave standing to persons having an interest in or who may be adversely affected to petition the DER to have an area declared unsuitable for mining.

By these amendments, it is clear that mining had lost its favored status under the law. The regulations regarding the application and issuance of permits placed more duties upon the mine operator. Heavier fines and penalties for noncompliance were authorized. Through the amendments to the Clean Streams Law the state developed a thorough plan to deal with water pollution.

III. ACID MINE DRAINAGE

In order to fully appreciate the impact of the clean stream law upon the coal mining industry, an understanding of what constitutes acid mine drainage is required. In underground mining wide chambers of coal are carved out. The resulting structure of caverns and tunnels leading to the lower parts of the mine resembles a honeycomb. After all the coal is removed from one room, it is sealed off by closing all the underground passageways to it by constructing barriers. Groundwater collects in the mines and pools there; if it is not pumped out, an underground lake may be formed. Acid mine drainage occurs when pyrite, marcasite, and iron

28. Id. § 691.315(i), They are: 1) if it's incompatible with existing State or local land use plans or programs; 2) affect fragile or historic, cultural, scientific, and esthetic values and natural systems; 3) affect renewable resource lands in which such operation could result in substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands include aquifer recharge areas; or 4) affect natural hazard lands in which such operation could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.
29. Id. § 691.315(m).
desulfides, found in coal beds, come in contact with air and water. The result is acid and iron pollutants. The pyrites in the ground are exposed when coal is mined. Through a chemical reaction, pyrites oxidize to form ferrous sulfate and sulfuric acid, which are washed into the ground water flowing in the mine. Further hydrolyzing or oxidizing occurs and ferric iron is oxidized to the ferric state with resulting additional acidity. As a result of these chemical reactions, the receiving streams are loaded with sulfates, acid and iron hydroxides, along with dissolved minerals. The iron by-products give the acid mine drainage a reddish color. "Yellow-boy, a slightly soluble iron hydroxide, precipitates out of the streambeds."  

The cost of treatment is very high due to several factors, including: the remoteness of the area with its attendant problems of bringing in electricity and machinery; and the time consuming and expensive process of limification.

IV. Early Modern Cases: Clean Streams Law Constitutionally Applies to Inactive and Active Mines

Two cases arising under the Clean Streams Law, based upon a similar factual pattern were consolidated for hearing by the Pennsylvania Supreme Court when it granted allocatur. The case, Commonwealth v. Harmar Coal Co., held that the Sanitary Water Board could require the operator of an active mine to treat acid mine drainage that originated in an adjacent inactive mine along with the drainage generated from working the active mine. Section 315 of the Clean Streams Law was thus upheld as constitutional after withstanding a due process analysis. Secondly, the


33. 306 A.2d at 321.

34. Id. The court reasoned: The regulation of the state's water resources were within the scope of police power. "Reasonableness" is the standard to measure the law. The presumption of reasonableness is with the state and the question of reasonableness is for the
court held that the 1970 amendments to the Clean Streams Law were not being applied retroactively. The Court focused on the present pumping and discharge of the polluted water into the surface waters, not the past mining operations which contaminated the underground water.\textsuperscript{38}

The facts were as follows: The Indianola Mine, an inactive abandoned mine was next to the active Harmar Mine.\textsuperscript{36} A dangerous level of hydrostatic pressure in the Indianola Mine had to be relieved to prevent the collapse of a barrier separating the two mines and flooding the Harmar mine.\textsuperscript{37} To protect its mining operations, the company would have to pump 6.48 million gallons per day of untreated acid mine drainage from Indianola and discharge it into Deer Creek, a tributary of the Allegheny River.\textsuperscript{38} Prior to the 1965 amendments, there was no violation of the Clean Streams Law for mines which followed this mode of operation. In Pittsburgh's Hutchinson Mine, fugitive mine water\textsuperscript{39} flowed from an abandoned adjacent mine into the deeper active mine.\textsuperscript{40} Due to gravitational forces, the ground water present in the sealed abandoned mine ran into the active mine at the rate of 2.17 million gallons of water per day.\textsuperscript{41} In applying for a permit, pursuant to sections 315(a) and 315(b) of the Clean Streams Law, Pittsburgh only would have assumed responsibility of treating the 1.27 million gallons per day that originated from the Hutchinson mining operation.\textsuperscript{42} The Commonwealth Court held that if the water did not come from its mine, the coal company could not be held responsible for its treatment.\textsuperscript{43} To hold otherwise would constitute an unreasonable, arbitrary and oppressive exercise of the state’s police power because it would deny the coal company the use and enjoyment of its property unless it treated the entire discharge.\textsuperscript{44} The court below limited the application of section 315 to discharges from active mines

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{35} 306 A.2d at 319.
\item \textsuperscript{36} 306 A.2d at 311.
\item \textsuperscript{37} \textit{Id}.
\item \textsuperscript{38} \textit{Id}.
\item \textsuperscript{39} \textit{Id}.
\item \textsuperscript{40} \textit{Id}.
\item \textsuperscript{41} \textit{Id}.
\item \textsuperscript{42} \textit{Id}.
\item \textsuperscript{43} 306 A.2d at 314.
\item \textsuperscript{44} \textit{Id} at 316.
\end{enumerate}
\end{footnotesize}
only, to the "first" discharge of noxious and deleterious substances into the Commonwealth's water and also held that the moving of the polluted subsurface water to the surface waters did not come within the definition of mine drainage or any other of industrial waste. The Pennsylvania Supreme Court reversed the Commonwealth Court's restrictive interpretation of the Clean Streams Law. Writing for the majority, Chief Justice Jones construed the Clean Streams Law as applying to both active and inactive mining operations in accordance with the legislative intent. The Court dismissed as nonsense the idea of a "first" discharge into the surface waters. The Court adopted a "but for" analysis to determine causation: but for the mining operation would there have been any discharge of polluted water into the surface waters? The Supreme Court further held that the discharge was industrial waste, a result of the industrial pursuit of mining. The Supreme Court defined "mine drainage" as waters which have been polluted as a result of the operation of a mine, including fugitive mine waters. Finally, the Supreme Court upheld the constitutionality of both the 1965 and 1970 amendments of the Clean Streams Law as it applied to this case.

Essentially, the court conducted a due process analysis of the Clean Streams Law by measuring it against the standards set forth in Lawton v. Steele. The court found a public interest in the con-

45. Id. at 314.
46. Id. The court declared: "We do not agree with the Commonwealth Court's interpretation of the Clean Streams Law in Harmar Coal." 306 A.2d at 314.
47. 306 A.2d at 315.
48. Id. The court stated:
Water polluted underground can itself pollute the surface water into which it is discharged. Nothing in the Clean Streams Law justifies the Court's (Commonwealth) holding that pollution occurs only when the polluting substances are "first discharged into any "waters of the Commonwealth," in this case the underground pool . . . [T]he critical and principal illegal conduct under the Clean Streams Law is the discharge into the surface waters. The Court below, however, failed to distinguish between pollution of waters, created by mining, which remain underground and those waters which are discharged to the surface. In the Clean Streams Law and the Rules and Regulations thereunder this distinction is crystal clean . . . (emphasis in the original).
452 Pa. at 89-90, 306 A.2d at 315.
49. Id.
50. 306 A.2d at 316.
51. 306 A.2d at 316.
52. 306 A.2d at 316.
53. Id. Lawton v. Steele, 152 U.S. 133, 137, (1984), is quoted in the opinion as proposing the following test:
control of acid mine drainage pollution; a reasonable relationship between the means used to control the drainage and the end result of clean streams sought by the statute, buttressed by a presumption of constitutionality and no imposition of undue hardship on Consolidated Coal, the owner of the mine.

Thus, the Harmar decision strengthened the Clean Streams Law by its determination that the law applied to both inactive as well as active mines, and that such application was constitutional. The Supreme Court employed a negligence "but for" analysis to determine the causation element of nuisance. This test would be expanded in later cases. The court selected the time when the contaminated water was released above ground, rather than the earlier point in time when it was first polluted, to impose liability.

V. HOW FAR DOES LIABILITY REACH? DOES THE "BUT FOR" ANALYSIS APPLY TO A CLOSED MINE? HOW FAR CAN THE DER GO IN ORDERING CLEAN-UP?

The next case to arise under the Clean Streams Law involved a situation where acid mine drainage discharge emanated from a closed mine. In Commonwealth v. Barnes & Tucker Co., the state through its agent, the DER, brought an equity action to require the owner to treat the acid mine drainage which was discharging from his closed mine. The Commonwealth Court found the company not liable on any of the theories. The DER appealed the decision to the Supreme Court of Pennsylvania which held the discharge abatable either under a statutory or common law nuisance theory and remanded to the Commonwealth Court to take additional evidence and fashion an appropriate decree.

To justify the state . . . interposing its authority in behalf or the public, it must appear—First, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.


54. Id. The court cited Article I, § 27 of Pa. Constitution, P.S., declaring: Natural resources and the public estate — The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.


57. 319 A.2d at 873.

58. Id. The four theories on which the Commonwealth sought relief were:
wealth Court ordered the mine owner to operate a pumping facility to prevent future discharge of any untreated acid mine drainage into the surface waters of the state.\textsuperscript{59} The mine owner then challenged the constitutionality of that order the Supreme Court in \textit{Commonwealth v. Barnes \\& Tucker II}\textsuperscript{60} arguing such an order amounted to a taking without just compensation.

The Barnes and Tucker company operated the Lancashire Mine No. 15 from 1939 to July 1969, at which time it was closed and sealed.\textsuperscript{61} Barnes and Tucker operated under permits granted prior to 1965 when it was permissible to discharge untreated water into unclean streams. The company received three one year extensions of the pre-1965 permits allowing it to continue its operation until 1969.\textsuperscript{62} After it was plugged, another discharge occurred from the Mayberry borehole\textsuperscript{63} and some surface breakout occurred.\textsuperscript{64} These discharges eventually found their way into the western branch of the Susquehanna River.\textsuperscript{65} By requiring the company to pump out the water beyond an established level and then treat it prior to its discharge, the DER sought to prevent future discharges into the public waters.\textsuperscript{66} Fugitive mine waters from mines not owned by Barnes and Tucker accounted for six million gallons of the 7.2 million gallons required by the DER to be treated.\textsuperscript{67}

The Pennsylvania Supreme Court cited the United States Supreme Court case of \textit{Lawton v. Steele}\textsuperscript{68} in its analysis of the constitutionality of Section 315 of the Clean Streams Law.\textsuperscript{69} It did not consider the percentage ratio when it considered the "takings" argument and the reasonable exercise of police power. Rather, the

\begin{itemize}
  \item 1). a permit violation
  \item 2). a violation of §316
  \item 3). a statutorily declared public nuisance
  \item 4). a common law public nuisance.
\end{itemize}

\textsuperscript{319} A.2d at 878.
\textsuperscript{61} 371 A.2d 461, 463.
\textsuperscript{62} \textit{Id}.
\textsuperscript{63} \textit{Id}.
\textsuperscript{64} \textit{Id}.
\textsuperscript{65} \textit{Id}.
\textsuperscript{66} 371 A.2d at 464.
\textsuperscript{67} 371 A.2d at 465.
\textsuperscript{68} \textit{See supra}, note 52 for \textit{Lawton v. Steele} factors.
Court focused on the severity of the acid mine drainage problem\textsuperscript{70} and elaborated on *Harmar*’s “but for” rationale: but for the activity of mining, the discharge would not have occurred, therefore, the mining company is enjoinable for abating this public nuisance.\textsuperscript{71} The Court concluded, apparently after balancing the severity of the harm against the abatement order, that the order was not an unreasonable exercise of police power.\textsuperscript{72} The Court quickly handled the “ takings” argument and noted that the coal company had failed to produce any evidence that this would impact adversely on their business or present an alternative solution.\textsuperscript{73}

Under *Barnes and Tucker II*, the Clean Streams Law and the power to enforce it were greatly strengthened. It is hard to imagine when liability would not attach when the court employs the “but for” test in a mining situation where there is discharge arising under section 315. *Harmar* addressed the present situation when the water flowed from other inactive mines. *Barnes and Tucker II* warned that there would be future liability when, by mining activity, a public nuisance of acid mine drainage is created even when the company closes its mine. Although this does adequately address the concern that unscrupulous companies will merely close up a polluting mine and walk away from it to avoid costly clean up, by focusing on the present situation in these cases, the court can avoid the ex post facto law argument.

One commentator has suggested a novel approach to challenging orders such as the one at issue in *Barnes and Tucker II*, which was based on the historical policy of promoting the free alienability of land and the law’s antagonism towards perpetuities.\textsuperscript{74} Daniel E.

\textsuperscript{70} 371 A.2d at 465-66. The court stated the acid mine drainage problem had reached a critical state.

\textsuperscript{71} 371 A.2d at 466-67. The court quoted the Commonwealth Court’s opinion: Whether the impelling force which produced the public nuisance is solely or partially that of fugitive mine water flowing into and adding to the generated water of that mine, the conduct of Barnes & Tucker in its mining activity remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did. (Emphasis added).

\textsuperscript{72} 23 Pa. Commw. at 510, 353 A.2d at 479.

\textsuperscript{73} 371 A.2d at 467-68.

\textsuperscript{74} Daniel E. Rogers, *Acid Coal Mine Drainage: The Perpetual Treatment Problem*, 1
Rogers in his article, *Acid Coal Mine Drainage: The Perpetual Treatment Problem*, viewed this order as imposing a “forever” obligation upon the coal companies by requiring that affirmative acts be performed involving the exclusive use of the real property of the company to control pollution for an indefinite period of time. If the area that has been mined was large enough, he estimated that the obligation could extend for centuries.\(^7\) He suggested a challenge based on the theory that the order would violate the Rule Against Perpetuities.\(^7\) First, he interprets the language in the Pennsylvania Constitution as establishing the state as trustee of all the natural resources within its borders.\(^7\) By ordering Barnes and Tucker to clean the waters, the state was transferring its obligation as trustee for a portion of the environment. The company now had a legal title to the land with the people of Pennsylvania holding beneficial title, and the reversionary interest may revert to the company centuries later. Rogers advanced that the Rule Against Perpetuities and the creation of any future interest in realty which would violate the Rule must be held invalid.

### VI. SECTION 316: LANDOWNERS AND OCCUPIERS LIABILITY

The first mining case involving section 316 was the 1978 Commonwealth Court case, *Philadelphia Chewing Gum Corp. v. Commonwealth.*\(^7\) The issue presented was: Whether a landowner or occupier could be held liable for a polluting condition which existed on his land and resulted in pollution of the state’s waters when that polluting condition was created by the past conduct of a former occupier. After the Environmental Hearing Board\(^7\) upheld the DER order which called for corrective measures to be taken, the parties appealed to Commonwealth Court.

A chemical, pentachlorophenol, used in the wood preserving bus-

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75. *Id.* at 6-31.

76. *Id.* He quotes the Rule Against Perpetuities, which provides upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested... shall be void, from 20 Pa. Stat. Ann. at § 6104.


ness, was identified as the source of the pollution.\textsuperscript{80} The court found that it had been dumped into a disposal well on the property, by the previous tenant who was in the wood preservation business, but that the dumping had ceased in 1956.\textsuperscript{81} The chemical had polluted the groundwater, entered a storm sewer and was discharged into a stream.\textsuperscript{82}

Four parties were joined in the action to challenge the DER corrective order. They were: the landowner and the landlord of the property continuous since the 1940's, the Rogers; the present tenant, National Wood Preservers; the landowner of a parcel adjacent to the polluting property; Philadelphia Chewing Gum Company; and the tenant of that adjacent property, Shell Oil Company.\textsuperscript{83} All were ordered by the DER to take corrective action.

The Commonwealth Court interpreted Section 316\textsuperscript{84} as applying to this situation even though the pollution was not the result of a mining operation. Then, the court construed the statute so it could be constitutionally applied, explicitly renouncing a strict liability interpretation.

The court found the legislative intent clearly indicated that Section 316 dealt with non-mining activities.\textsuperscript{85} The legislature by the 1970 amendments broadened the scope of the liability imposed by the Clean Streams Law. Specifically, with the deletion of the specific reference to acid mine drainage in policy section four; and secondly, by empowering the DER to order the landowner to correct the condition himself and empowering the agency to take action at an earlier date, upon the appearance of a danger of pollution from a land condition.

The Commonwealth Court interpreted section 316 as not imposing strict liability, but rather fashioned a two prong test to constitutionally apply the statute. Apparently accepting the appellant's

\textsuperscript{81} 387 A.2d at 146.
\textsuperscript{82} Id.
\textsuperscript{83} 387 A.2d at 144.
\textsuperscript{84} The applicable § 316 (1970 amendments) reads:
Whenever the Sanitary Water Board finds pollution or a danger of pollution is resulting from a condition which exists on the land in the Commonwealth, the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For purposes of this section, 'landowner' includes any person holding title to or having a proprietary interest in either surface or subsurface rights.
387 A.2d at 147.
\textsuperscript{85} Id.
argument that the plain meaning interpretation of section 316 would be an impermissible unconstitutional regulation because it imposed liability on an individual merely because he acquired the status of landowner or occupier, the court announced that ownership alone was an insufficient basis to order clean-up when the pollution was created by another. The court adopted the theory of common law liability of one who continues or adopts an existing nuisance. Thus the court did not interpret section 316 to expand the statutory liability of the Clean Streams Law beyond that of common law liability. Liability would attach under the test proposed by the court: 1) If the owner/occupier either permitted or authorized the creation of the polluting condition on his land, or if he knew or should have known of the condition on his land, and 2) associates himself in some positive respect, beyond mere ownership or occupancy with the condition after its creation.

The court applied this test to the four parties and dismissed the adjacent landowner, Philadelphia Chewing Gum Company, and the adjacent tenant, Shell Oil Company. The landowners, the Rogers, were liable because they should have known about the condition since they rented the property to industrial tenants and, by collecting rent from the polluters, they affirmatively associated themselves with the conduct. The tenant, National Wood Preservers, was held accountable because, it knew of the polluting problem prior to renting the premises, and it used this knowledge of a potential environmental problem to drive down the price of the business it bought. The bargain was enough to satisfy the element of affirmative conduct indicating an adoption of the problem. A reduction in selling price due to potential environmental liability does not extinguish that liability but passes it on to a shrewd buyer. Furthermore, the seller of the polluted property, if sued by the buyer, can raise the defense of caveat emptor.

86. The court stated:
Since we believe that serious constitutional problems arise if the police power of this commonwealth can be wielded against landowners or occupiers whose ownership or occupancy bears absolutely no relationship to the polluting condition, we hold that Environmental Hearing Board committed an error of law in concluding that § 316 is a declaration of strict liability based upon the mere fact of ownership or occupancy.
387 A.2d at 148.
87. 387 A.2d at 150.
88. Id.
89. 387 A.2d at 150-51.
90. 387 A.2d at 152.
91. 387 A.2d at 151.
92. For a case dealing with this situation, See Philadelphia Electric Co. v. Hercules,
The court also disposed of the ex post facto claim in the same manner as the Harmar and Barnes and Tucker I courts had handled that issue: the court declared it was not past conduct that was being punished, but a present condition being abated. Thus, by focusing on the present situation rather than the past acts which caused the pollution, the court easily avoided the charge of retroactive enforcement. However, unlike the mining cases, the court in Philadelphia Chewing Gum could not rely on a "but for" analysis to supply the element of causation on a public nuisance charge.

In 1980, the Pennsylvania Supreme Court heard the case of National Wood Preservers v. Commonwealth. The Court affirmed the Commonwealth Court's opinion that section 316 applied to non-mining pollution. The Court declared that the police power of the state "is the state's least limitable power." Next, the Court reviewed the lower court's application of the Lawton test to the facts of this case. The court found the law to be in the public's interest; and the means were reasonably necessary to achieve the result of clean waters. The Court focused on the third prong of the Lawton test, the requirement that the means of the regulation not be "unduly oppressive upon an individual." The Court adopted the Penn Central test which analyzed the economic impact of the regulation of the property holder and, the character of the governmental action. The Court sidestepped the status argument as not being an issue based on the Environmental Hearing Board findings of fact. The Court also intimated that fault was not a prerequisite to liability under a water pollution statute. The court cited the United States Supreme Court cases Penn Central and Miller v. Schoene for upholding the position that the

95. 414 A.2d at 42.
96. 414 A.2d at 43.
97. 414 A.2d at 44.
98. 414 A.2d at 45.
100. 414 A.2d at 45.
101. 414 A.2d at 46.
102. Id. The court stated that the "validity of an exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation." 414 A.2d at 46.
state did not have to show that the property owner caused the condition being regulated to occur. The court concluded its opinion by stating the appellants failed to carry their burden of persuasion that the state had exercised its police power unconstitutionally.

Justice Flaherty, who concurred in result only, rejected the majority’s reliance on the two United States Supreme Court cases and revived the *Philadelphia Chewing Gum* rationale of liability based on a continuing nuisance theory. Justice Flaherty reiterated that obligations placed on property by the state must relate to a use of that property and not to the mere act of ownership of the property. The Justice rejected the strict liability interpretation of section 316 as an unconstitutional taking. An appeal to the United States Supreme Court was dismissed.

In a recent Commonwealth Court case, *McIntire Coal Co. v. Commonwealth*, the court invoked section 316 as establishing liability, but quoted Justice Flaherty’s concurring opinion to interpret this section. *McIntire* involved a situation in which an operator of strip mines was held liable for the clean-up of the acid mine drainage emanating from the previous deep mines located on the property. The court found that liability would attach under either section 315 or 316. Under section 315, the strip mining operator violated several conditions of his permit, which imposed the obligation to treat the pre-existing discharge. By violating the conditions of the permit, the court held that the McIntires increased the

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103. *Id.*
104. The Court summarily concludes:
   In light of Penn Central, Miller and the other cases cited, appellants have failed to persuade us that the Commonwealth exercised its police powers. 414 A.2d at 47.
105. 414 A.2d at 47-48 where he quotes at length the *Philadelphia Chewing Gum* opinion.
106. Justice Flaherty concludes:
   Where society requires, the property of another can be taken, but only with due compensation. To construe the subject Act as providing for strict liability, based on nothing more than the ownership or occupation of land, would be to impose on innocent individuals the burden which should be borne by society as a whole, thus an unconstitutional taking (emphasis in the original). 414 A.2d at 48.
107. *See supra*, note 74.
109. The court states, in discussing § 316 liability:
   However, before liability will attach, it must be shown that the owner or occupier knew of the polluting conditions and positively associated with it by engaging in some affirmative conduct, indicating an intent to adopt the condition. 530 A.2d at 144.
110. 530 A.2d at 142-43.
potential for acid mine drainage to develop. Under section 316, the McIntires were liable on a continuing nuisance theory. They knew of the previous polluted condition and positively associated themselves with it by some affirmative conduct, which indicated their intent to adopt it. The court did not state what this affirmative action was, but under *Philadelphia Chewing Gum*, the purchase of the land would have qualified.

After *McIntire*, the state could impose liability based on either section 315 or 316. In another 1987 case, *Commonwealth v. PBS Coal Co.*, the Commonwealth Court expressly declared fault not to be a prerequisite to section 315 liability.

*PBS Coal* involved the contamination of the well water of seven homes and a dairy farm in a mining region by acid mine drainage. The lower court held two mining companies jointly and severally liable for the damage. The company appealed to the Commonwealth Court with the following tautology: The court imposed joint and several liability which implies tortious conduct, tortious conduct implies an element of culpability, and because the state failed to prove fault the judgement must be reversed. The court dismissed this contention by stating the conduct, creation or maintenance of a statutorily-declared public nuisance, was declared unlawful and against public policy. The court concluded, "Fault, thus, is irrelevant for purposes of the statutory declaration that the conduct is unlawful." The court in this case did not apply the "but for" test to supply the element of causation.

**VII. Federal Decisions**

**Can a Buyer of a Polluted Site, Who Subsequently Incurs Substantial Clean-up Costs, Recover Against the Seller?**

To appreciate the impact of Clean Streams Law liability, and the power the DER has to order the clean-up of polluting conditions, the third circuit decision of *Philadelphia Electric Co. v. Hercules* (hereinafter PECO) is illustrative. The facts in this case are as follows: PECO operated a hydrocarbon resin manufacturing plant on its property abutting an inlet on the Delaware River. It closed off the inlet and created a pond in which it bur-

111. 530 A.2d at 143.
113. 534 A.2d at 1140.
115. Philadelphia Electric Co. v. Hercules, 762 F.2d 303 (1985) reversing the U.S. Dis-
ied its resin waters. In 1971, PECO sold its property to Gould, who leased certain tanks on the site to a waste water disposal service. PECO was at all times the next door neighbor to these activities. In 1973, PECO bought an option from Gould to buy this site even though it had learned by inspecting the site that the waste disposal company was a "sloppy tenant." In 1974, the waste disposal company vacated the property, although it had not finished cleaning up several oil spills in the pond. PECO exercised its option to buy the land and has owned the property subsequently. Its only activity on the land was to lease a portion to the American Refinery Group.

After a 1980 inspection of the site which found resinous materials to be leaching into the Delaware River, the DER ordered PECO to clean up the site pursuant to section 316. PECO complied. In February, 1981, the resinous leaching was found again and in May, the DER again ordered PECO to clean up the site. In February, 1982, PECO instituted suit against the former site owner, Gould, and the corporate successor of PECO, Hercules, on the theories of private nuisance and public nuisance. The court dismissed Gould from the proceedings upon a finding of no wrongdoing.

The jury found damages for PECO in the amount of $394,910.14. Hercules appealed. Hercules, after having been found to be liable as the corporate successor of PICCO on a de facto merger theory and an express assumption of liability in the merger agreement, raised the defense of caveat emptor. The United States Court of Appeals for the Third Circuit agreed this defense was properly raised. The court found that PECO had no

116. Id. at 306.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id. at 307.
123. Id.
124. Id.
125. Id. at 308.
126. See Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86 (3rd Cir. 1988), for a contrasting federal view. There the court declared the doctrine of caveat emptor was not available as a defense to an action brought buyer under CERCLA against the corporate successors of a manufacturer of asbestos seeking contribution for clean up costs, despite the buyer's inspection of the site and knowledge of possible environmental clean up costs to be incurred in the future. Caveat emptor would only be considered in mitigation of amount due.
cause of action on a private nuisance theory for conditions existing on the land transferred.\textsuperscript{127} The court noted that private nuisance actions are instituted to resolve conflicts between neighboring contemporaneous land uses.\textsuperscript{128} Here, the same property was involved and the land use sued upon was a prior land use. The court, employing the Calibreasan risk shifting analysis that had been used in \textit{Philadelphia Chewing Gum}, reasoned that because PECO got a good deal on the land, or at least should have gotten a reduction in the purchase price it should be barred from what would amount to a double recovery (reduction in the purchase price and recovery from the former owner for clean-up costs).\textsuperscript{129} On its second theory of shifting the liability back to the prior owner, the court held that PECO lacked standing to sue on a public nuisance theory because it failed to show a "particular damage" which would permit recovery.\textsuperscript{130} Furthermore, PECO lost on its indemnification argument. The court stated that there was no final adjudication of the actual legal liability incurred by PECO for its violation of the Clean Streams Law, therefore an award of damages could not be upheld. The court noted that PECO had had the opportunity to protect itself through inspection of the site and negotiation of the terms of purchase.\textsuperscript{131} PECO/Hercules was not completely absolved of all liability. In a footnote, the court pointed out that it did not discharge PECO from the possible future state or federal action for statutory nuisance or on a public nuisance charge.\textsuperscript{132}

\textbf{VIII. Conclusion}

The Clean Streams Law establishes a comprehensive program for dealing with water pollution through its permit scheme under section 315 and the landowner or occupier liability section, section 316. The underlying policy is to shift the clean-up costs to a responsible party and off the shoulders of the taxpayers. The courts and legislature have a rather liberal standard for determination of who is a responsible party, as indicated by the \textit{National Wood} majority opinion and \textit{Philadelphia Electric Co.}, and through a plain

\begin{itemize}
\item \textsuperscript{127} Id. at 312.
\item \textsuperscript{128} Id. at 314.
\item \textsuperscript{129} The court states: "We find it inconceivable that the price it (PECO) offered Gould did not reflect the possibility of environmental risks, even if the exact condition giving rise to this suit was not discovered." \textit{Id.}
\item \textsuperscript{130} Id. at 316.
\item \textsuperscript{131} Id. at 317-318.
\item \textsuperscript{132} Id. at 318,n. 20.
\end{itemize}
meaning reading of section 316. The permit requirement of section 315 and the penalties imposed for violation can lead to harsh results as seen in *Barnes and Tucker II* for the coal company.

The practical problem raised by the Clean Streams Law is: How far do you have to go to satisfy the duty of inspection? Environmental audits should be undertaken prior to purchasing any industrial property. Mining companies, too, must be careful in acquiring new areas to mine. They should calculate into the purchase price the amount of acid mine drainage already existing and the amount it will increase once their operations begin. The inspection cost prior to buying property has risen dramatically for mining companies and industrial buyers. Another way to guard against incurring high clean up costs is to buy an insurance policy that covers environmental problems.

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