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OHIO OIL AND GAS CONSERVATION LAW—THE FIRST TEN YEARS (1965-1975)

J. RICHARD EMENS* AND JOHN S. LOWE**

I. INTRODUCTION

In view of the energy shortage that this nation faces and of its particularly heavy impact on the State of Ohio,¹ it is appropriate to examine the legal framework within which petroleum energy is produced in Ohio. A general discussion and critique of Ohio's statutes was provided by Professors Meyers and Williams in their 1965 article *Petroleum Conservation in Ohio*.² However, the law has continued to grow and develop during the past ten years, both through legislative amendment and administrative interpretation. An understanding of these developments and their implications is essential to the use of the present law and to the evaluation of proposals for further change.

In considering Ohio's oil and gas conservation law,³ it is helpful to bear in mind the purposes of a conservation statute. Hydrocarbons are a depletable natural resource. Conservation statutes are primarily directed at the avoidance of physical or economic waste of such resources,⁴ or, to put it positively, the maximization of recovery over time at the least possible cost.⁵ Therefore, conservation laws are con-

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¹ The projected figures for curtailment of natural gas to the Ohio distribution companies for the winter of 1975-76 indicated that the gas companies serving Ohio would have their natural gas supplies reduced by at least twenty-five percent (except for East Ohio Gas Company, which was to have been curtailed by five percent). Such curtailment would have resulted in a projected decrease of natural gas to industries and businesses supplied by the companies of up to sixty percent. See PUCO Study, Table of Projected Natural Gas Curtailments for Ohio Winter 1975-76, September 17, 1975. In fact, as this is written, it appears that actual curtailments in the winter of 1975-76 will be less than was anticipated. Ohio's shortfall of both oil and gas supplies is a continuing one, however, and may be expected to increase in the coming years. See generally, Ohio Energy Emergency Commission, Ohio Energy Profiles, Vol. I - State Level Data (July, 1975).

² Meyers and Williams, *Petroleum Conservation in Ohio*, 26 OHIO ST. L.J. 591 (1965) [hereinafter cited as Meyers & Williams].

³ OHIO REV. CODE ANN. ch. 1509 (Page Supp. 1974).

⁴ A. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* 74 (2nd ed. 1964) [hereinafter cited as WILLIAMS & MEYERS].

⁵ McDonald, *Unit Operation of Oil Reservoirs as an Instrument of Conservation*, 49 NOTRE DAME LAW. 305, 309 (1974).

cerned not only with saving resources, but also with encouraging their development; rational development is a part of the prevention of waste. The secondary purpose of an oil and gas conservation statute is the protection of the private rights of landowners and operators, which are usually referred to as their correlative rights, *i.e.* the rights of those who own the fee interest or the right to drill on land above oil and gas bearing formations in the common source of supply.⁶ Thus the purpose of a conservation statute is both to further the public's interest in conservation and to protect the property rights of operators and landowners. Although private rights and the public interest usually coincide in the long run (since both the public and private entities have a stake in development), that is often not the case in the short run⁷ and a proper balance is not easy to attain.

The basic principle underlying private rights in oil and gas is the rule of capture. Oil and gas can migrate from place to place underground, so that a well drilled on one property may drain oil and gas from under neighboring land. Courts recognized early the driller's right to capture any oil that he might collect in a bore hole drilled on his property, even if that oil and gas migrated from the property of another.⁸ The rule of capture is limited, however, by common law principles that seek to mitigate its impact on others who share those private rights, and by statutory devices such as spacing rules⁹ and unitization procedures,¹⁰ which seek to maximize the ultimate production of hydrocarbons and minimize the expense of such production.¹¹ The impact of these statutory provisions is limited, in turn, by other statutory procedures, such as exception tract¹² and mandatory pooling orders,¹³ which protect private rights. Thus a conservation statute is a series of balancing provisions, whose purpose is to maintain the precarious equilibrium between public interest and private right.

⁶ There are two aspects of correlative rights: (1) the right of the landowner or leaseholder to capture such oil or gas as he is able and (2) the right of the landowner or leaseholder to be protected against damage to the common source of supply and to obtain a fair share of such supply. See WILLIAMS & MEYERS, note 4 *supra*, at 80-81.

⁷ In the short run, the individual owner may see his self-interest in obtaining as much production as quickly as possible. There may thus be waste of hydrocarbons or economic waste through unnecessary wells being drilled.

⁸ *Kelley v. The Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (1897).

⁹ See, *e.g.*, OHIO REV. CODE ANN. § 1509.24 (Page Supp. 1974).

¹⁰ See, *e.g.*, OHIO REV. CODE ANN. § 1509.26 (Page Supp. 1974).

¹¹ See discussion at Shank, *Present Status of the Law of Capture*, 6th Annual Institute in Oil and Gas Law and Taxation, Southwestern Legal Foundation 257 (1955).

¹² See, *e.g.*, OHIO REV. CODE ANN. § 1509.29 (Page Supp. 1974).

¹³ See, *e.g.*, OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

The developments under Ohio's conservation law in the past ten years have been consistent with its goals. This article will outline those developments by reviewing the amendments and interpretations that have transpired in view of those goals.

II. THE STATUTORY FRAMEWORK

A. *Pre-Morrow County Legislation*

Ohio was one of the first states in which oil exploration and production operations were conducted, but little was done by the state in terms of conservation legislation until the enactment of the 1965 statute. Oil was first discovered in Ohio in 1814 during the course of drilling operations aimed at producing brine.¹⁴ Prospecting for oil in Ohio began in the spring of 1860 in Washington County near Macksburg.¹⁵ In 1860 Ohio became the second state of the Union (after Pennsylvania) to record significant oil production.¹⁶ By 1896, Ohio was the nation's leading producer, with an annual production of nearly 24 million barrels, or approximately forty percent of the oil produced in the United States.¹⁷ During the next sixty-five years, however, Ohio's oil production declined sharply both in total production and in relation to the production of other states.¹⁸

During the 1930's and 1940's several oil and gas producing states adopted comprehensive conservation statutes which recognized the development of modern techniques of waste prevention. Ohio, however, had only the most rudimentary conservation legislation prior to 1965.¹⁹ The oil and gas laws enacted by the Ohio legislature were principally safety measures to protect coal mines located near

¹⁴ OHIO LEGISLATIVE SERVICE COMMISSION, OIL & GAS LAW IN OHIO, 63 Staff Research Report 12 (1965) [hereinafter cited as OIL & GAS LAW IN OHIO].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ In 1896 Ohio produced 23.9 million barrels of crude petroleum (I. BOWNOCKER, GEOLOGICAL SURVEY OF OHIO 53, (1903)), which amounted to thirty-nine percent of the total United States annual production of 61 million barrels. UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957 360-61 (1960).

¹⁸ By 1912, Ohio's contribution had rapidly declined to approximately 9 million barrels. R. ALKIRE, OHIO DIVISION OF GEOLOGICAL SURVEY, R. 1, no. 8, at 44, (1951). This was four percent of the national total, *id.* at 360. Ohio's annual crude oil production eventually levelled off at approximately 3.2 million barrels in 1950, *id.* at 44, or 16% of an increasing 1,973.6 million barrel national total, *id.* at p. 360.

¹⁹ See generally the discussion of Ohio legislation in B. MURPHY, CONSERVATION OF OIL AND GAS, A LEGAL HISTORY, 1948, 359-68 (1948); R. HARDWICKE, CONSERVATION OF OIL AND GAS, A LEGAL HISTORY, 182-85 (Sullivan ed. 1958).

oil and gas operations, and were administered by the state's inspector of mines.²⁰

The inaction of the Ohio legislature probably stemmed from the relative insignificance of Ohio's production of hydrocarbons after 1910.²¹ About the middle of the century, however, oil production began to increase once again, although gas production continued to decline.²² As a result, the legislative framework was expanded somewhat,²³ but as late as 1958 one commentator asserted that: "[c]onservation of oil and gas in Ohio has been a myth. Inadequacies in the earlier laws, many of which remain uncorrected and a disregard for current problems because production is insignificant, pose grave dangers for the immediate future."²⁴

Ohio's problems were exacerbated in 1963 when the "Morrow County boom" began with the discovery of oil in the Trempeleau Formation near Mt. Gilead in Morrow County. The extent of this oil and gas activity is indicated by the following quotation from the Ohio Legislative Service Commission's report published in 1965:

Production in Ohio has risen from about 14,000 barrels a day early in 1961 to between 40,000 and 50,000 barrels a day at present. Production in Morrow County alone has risen from 1,100 barrels of oil per day in February 1963 to a present daily recovery of between 30,000 and 40,000 barrels. From February 1963 to March 1964 the number of producing wells in Morrow County went from 17 to 146; the known oil reserves in the ground increased from 2.2 million barrels of oil to 20 million; there were over 200 wells drilled in the county. It is said that over three-fourths of Ohio has been leased for oil and gas Because of such increased activity, Ohio is the hottest subject in the oil industry.²⁵

²⁰ OIL & GAS LAW IN OHIO, note 14 *supra*, at 15-18.

²¹ See MURPHY, note 19 *supra*, at 368.

²² During the years 1951 to 1959 average oil production in Ohio was approximately 3,300,000 barrels of oil annually. By 1959 to 1961, average annual oil production in the state had increased to nearly 5,700,000 barrels. See Table, "History of Production Statistics", in INTERSTATE OIL COMPACT COMMISSION, A STUDY OF CONSERVATION OF OIL AND GAS IN THE UNITED STATES, 130 (1964).

²³ The provisions of the statutes relating to well logs, plugging and flooding were spelled out in detail in Act of May 22, 1951, 124 Ohio Laws 253. With the revised code in 1953, the gas and oil laws were segregated from the chapter of mining laws into a new chapter 4159, which was entitled "Wells—Oil; Gas." In 1957, an amendment to § 4159.12 of the Ohio Revised Code was adopted to provide that the cost of plugging wells abandoned prior to September 1, 1951, could be provided out of county funds. Act of May 20, 1957, 127 Ohio Laws 254. That same year, OHIO REV. CODE chapter 4161 was enacted to regulate the underground storage of gas. Act of May 21, 1957, 127 Ohio Laws 177.

²⁴ See HARDWICKE note 19 *supra*, at 184.

²⁵ See OIL & GAS LAW IN OHIO, note 14 *supra*, at 13.

The Morrow County boom focused the public's attention on the inadequacies of the Ohio conservation law and resulted in 1963 in the adoption of a "vague one-paragraph law [that] authorized the Division of Mines to regulate drilling in an unspecified manner."²⁶ The new statute did not repeal any of the then existing laws relating to oil and gas, but simply gave the Division of Mines the additional regulatory power to "make, publish, and enforce rules and regulations governing the issuance of permits for and the drilling of wells for the production of oil and gas and the operation thereof."²⁷ Under the authority of that legislation, emergency rules were issued early in 1964.²⁸ The 1963 act and the emergency rules were widely regarded as a stop-gap effort, however.²⁹ "The state's high level of activity in oil and gas production was unexpected by generations of Ohio lawmakers, and thus present laws do not provide adequate administrative supervision for safety and conservation of these minerals."³⁰

B. *The 1965 Act*

Even before the 1963 legislation was enacted, the work that ultimately resulted in the 1965 oil and gas conservation law had begun. Efforts to formulate a comprehensive approach to the problems made apparent by the situation in Morrow County were begun in late 1963 and continued throughout 1964 and into 1965. The chief proponents of the comprehensive approach were the members of the Interim Joint Legislative Study Committee of the legislature and the Conservation and Legislative Committee of the Ohio Oil and Gas Association, but many others participated. Amended House Bill No. 234³¹ transferred the function of administering oil and gas legislation from the Division of Mines in the Department of Industrial Relations to the newly created Division of Oil and Gas in the Department of Natural Resources. The act also created the position of Chief of the Division of Oil and Gas and granted the Chief powers to administer the act and to adopt rules and regulations in accordance with the provisions of the Ohio Administrative Procedure Act.³²

²⁶ OIL AND GAS J., Feb. 24, 1964, at 57 (referring to Act of Dec. 6, 1963, 130 Ohio Laws 1568).

²⁷ Act of Dec. 6, 1963, 130 Ohio Laws 982 (repealed 1965).

²⁸ Effective March 10, 1964.

²⁹ See text accompanying note 26 *supra* and McDonald, note 5 *supra*, at 19-20.

³⁰ See OIL & GAS LAW IN OHIO, note 14 *supra*, at 15.

³¹ Act of July 6, 1965, 131 Ohio Laws 1736 (effective Oct. 10, 1965).

³² OHIO REV. CODE ANN. §§ 1509.02 and 1509.03 (Page Supp. 1974).

Review authority was deposited in a five member Oil and Gas Board of Review empowered to hear appeals from persons claiming to be aggrieved or adversely affected by an order of the Chief of the Division of Oil and Gas.³³ The Board was given not only the power to overrule orders of the Chief which it found to be "unreasonable or unlawful," but was also authorized to make the "order which it finds the Chief should have made."³⁴ Appeals from decisions of the Board were to be to the Court of Common Pleas of Franklin County.³⁵

Technical assistance to the Chief was provided by a seven member Technical Advisory Council, composed of three members representing independent oil and gas operators, three members representing oil and gas operators having substantial producing operations both in Ohio and at least one other state, and one public member.³⁶ Although the Chief of the Division was not required to consult with the Technical Advisory Council prior to promulgation of regulations,³⁷ the intent of the statute was to encourage the administrator to avail himself of the opinion and expertise of the Council.

The law also provided a number of devices to protect the correlative rights³⁸ of mineral owners. Voluntary pooling was specifically permitted.³⁹ The statute also provided that the Chief might, upon application by the owner, order the mandatory pooling of adjoining tracts in order to protect the interests of one or more of the owners, if voluntary arrangements could not be negotiated.⁴⁰ Special provision was made to permit owners who were unable to join existing adjacent drilling units and whose tracts were too small to meet the standards set for minimum spacing requirements to drill on those tracts, with limitation of production based on acreage and well potential.⁴¹

³³ OHIO REV. CODE ANN. § 1509.35 (Page Supp. 1974).

³⁴ OHIO REV. CODE ANN. § 1509.36 (Page Supp. 1974).

³⁵ OHIO REV. CODE ANN. § 1509.37 (Page Supp. 1974).

³⁶ 131 Ohio Laws 485, *as amended*, OHIO REV. CODE ANN. § 1509.38 (Page Supp. 1974).

³⁷ Exceptions are rules and regulations setting or varying minimum average requirements for drilling units and minimum distance requirements between wells, which §§ 1509.24 and 1509.25 require to be approved by the Technical Advisory Council.

³⁸ OHIO REV. CODE ANN. § 1509.01(I) (Page Supp. 1974) defines correlative rights as "the reasonable opportunity to every person entitled thereto to recover and receive the oil and gas in and under his tract or tracts, or the equivalent thereof, without having to drill unnecessary wells or incur other unnecessary expense."

³⁹ OHIO REV. CODE ANN. § 1509.26 (Page Supp. 1974).

⁴⁰ OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

⁴¹ *Id.*

But the primary thrust of the new statutory provisions was toward the prevention of physical and economic waste. The act authorized the Chief, with the consent of the Technical Advisory Council, to set minimum spacing requirements for drilling in order to control the number of wells which might be drilled on adjoining tracts to drain the oil and gas from under a given area.⁴² Mandatory pooling was authorized to prevent waste as well as to protect correlative rights.⁴³ Unitization was authorized if the Chief found "that such operation is reasonably necessary to increase substantially the ultimate recovery of oil and gas . . ." subject to approval of a required percentage of mineral and royalty owners.⁴⁴ The act specifically required the use of "every reasonable precaution in accordance with the most approved methods of operation to stop and prevent waste of oil or gas, or both."⁴⁵

The statutory provisions imposing requirements upon oil and gas operators were substantially expanded and broadened. Permits were required to drill, reopen or plug back wells.⁴⁶ Many of the provisions of the prior legislation relating to the safety aspects of the production of oil and gas in the coal bearing areas were also incorporated into the new legislation.⁴⁷ Continuity was further insured by the act's provision that the rules, regulations, and orders of the Division of Mines concerning oil and gas production and oil field waste disposal that had been adopted in accordance with the Administrative Procedure Act under the earlier legislation would be valid rules, regulations and orders of the Division of Oil and Gas.⁴⁸

Meyers and Williams, in their 1965 article, were generally complimentary of the achievements of the legislature in enacting the new legislation.⁴⁹ They concluded, however, that the statute failed to provide complete enough authority to the Chief to achieve maximum conservation, that it failed to provide fully for the protection of correlative rights, and that administration could have been made simpler and more effective. They listed several substantive rules which departed from sound conservation practice, and noted a number of

⁴² OHIO REV. CODE ANN. § 1509.24 (Page Supp. 1974).

⁴³ OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

⁴⁴ OHIO REV. CODE ANN. § 1509.28 (Page Supp. 1974).

⁴⁵ OHIO REV. CODE ANN. § 1509.20 (Page Supp. 1974).

⁴⁶ OHIO REV. CODE ANN. § 1509.05 (Page Supp. 1974).

⁴⁷ OHIO REV. CODE ANN. §§ 1509.08, 1509.18, 1509.19 (Page Supp. 1974).

⁴⁸ Act of July 6, 1965, 131 Ohio Laws 1736, § 3.

⁴⁹ Meyers & Williams, note 2 *supra*, at 591.

ambiguities that they predicted would produce uncertainty in administration and unnecessary litigation. Meyers and Williams' observations and criticisms provide a useful framework for examining the development of Ohio's oil and gas law since 1965.

C. *Amendments to the Statute*

There have been seven substantive amendments to chapter 1509 over the past decade.⁵⁰ These amendments to the Ohio oil and gas law may be grouped roughly into two classes, both in terms of the image that they reflect of the oil and gas law and in terms of chronology. The first three amendments to the statute, adopted in 1967, can be characterized as pro-industry, being apparently aimed at removing ambiguities in the statute or at making it easier for operators to do business in compliance with the law. The last four amendments, enacted from 1972 through 1974, appear to be anti-industry, demonstrating a view of the oil and gas industry as an entity to be regulated and controlled, or at least as a force against which the people and the environment of the state must be protected.

The oil and gas statute was first amended in 1967 by a provision in House Bill 93,⁵¹ which was aimed at increasing the compensation to be paid to members of the Oil and Gas Board of Review. In their review of the statute in 1965, Meyers and Williams cited the "niggardly limit of \$20 a day . . .",⁵² which was the compensation provided for in the original statute,⁵³ as a factor that made the Board not as "likely to have the constructive influence on the conservation regime that such an institution might have. The Board may turn out to be another example of a good idea killed by parsimony."⁵⁴ House Bill 93 took a step toward correcting this parsimony by providing that members of the Board of Review should be paid an amount per diem when serving equal to that paid to other public members of boards in Ohio.⁵⁵

⁵⁰ In addition, there have been various "clerical" amendments correcting punctuation, misspellings, etc., which will not be considered here.

⁵¹ OHIO REV. CODE ANN. § 1509.35 (Page Supp. 1974).

⁵² Meyers & Williams, note 2 *supra*, at 593.

⁵³ Act of July 6, 1965, 131 Ohio Laws 481, *as amended*, OHIO REV. CODE ANN. § 1509.35 (Page Supp. 1974).

⁵⁴ Meyers & Williams, note 2 *supra* at 634.

⁵⁵ Specifically, the statute provided that members should be paid an amount per diem "fixed pursuant to § 143.09 of the Revised Code . . ." This is the section which sets salary ranges for public employees, *as amended*, OHIO REV. CODE ANN. § 124.14 (Page Supp. 1974). The current rate for members is \$7.72 per hour per day worked. However, the compensation

The second amendment in 1967 dealt with underground liquid disposal. Amended Senate Bill 226⁵⁶ added §§ 1509.051 and 1509.081, which provided for the issuance and regulation of liquid disposal permits by the Division of Oil and Gas. In addition, § 1509.01, the definition section, was amended by the modification of the definition of the term "well" as used in the statute to include wells for "sewage, and any liquid used in or resulting from any process or industry, manufacture, trade, business or agriculture."⁵⁷ Wells may not be used for liquid disposal unless a permit for that use is obtained from the Chief of the Division of Oil and Gas.⁵⁸ The application for a liquid disposal permit contains information similar to that required for a permit to drill a well, but the application must be approved by the Division of Geological Survey, the Division of Water, the Department of Health and the Environmental Protection Agency, as well as the Division of Oil and Gas and, if the well is located in a coal producing township, the Division of Mines.⁵⁹ These sections, with their multiple approval requirements, were enacted at the behest of heavy manufacturing industries to clarify the authority of the Division of Oil and Gas to allow underground disposal of pollutants under controlled circumstances.⁶⁰

The most important and extensive of the industry oriented amendments, however, was Amended Substitute House Bill 310 [hereinafter called House Bill 310].⁶¹ This amendment resulted from a review of chapter 1509 by the Ohio Bar Association's Committee

level has proved to be of little significance; at least until the beginning of 1975, no Board member ever claimed the compensation provided.

⁵⁶ Act of June 20, 1967, 132 Ohio Laws 2229.

⁵⁷ OHIO REV. CODE ANN. § 1509.01(A) (Page Supp. 1974).

⁵⁸ OHIO REV. CODE ANN. § 1509.051 (Page Supp. 1974).

⁵⁹ OHIO REV. CODE ANN. § 1509.081 (Page Supp. 1974).

⁶⁰ In fact, however, the amendment has not altogether clarified the situation. In *Ohio Liquid Disposal, Inc. v. Dawe*, Case No. 691 (May 16, 1975), Ohio's sixth appellate district upheld a lower court order to the Chief of the Division to issue a disposal well permit which had been approved by all the required agencies but the Water Pollution Control Board (whose functions were subsequently transferred to the Environmental Protection Agency), holding that the board had no basis in law or fact to determine that the proposed injection would pollute the "waters of the state" as defined in OHIO REV. CODE ANN. § 6111.01(H) (Page 1954) because the deep well injection zone was not included in that definition. The Environmental Protection Agency appealed the decision of the court of appeals to the supreme court, which refused to hear the case (Case No. 75-692, motion to certify overruled on October 24, 1975). Shortly thereafter, a bill was introduced in the Ohio Senate that would effectively overturn by legislative action the decision on the *Ohio Liquid Disposal* case. S.B. 404, 111th Gen. Ass'm., 1st Sess. [1975].

⁶¹ Act of Aug. 21, 1967, 132 Ohio Laws 2579.

on Oil and Gas Law.⁶² It is apparent from the matters treated in the amendments that the committee, and perhaps many of the legislators, had considered the criticisms and suggestions made by Meyers and Williams in their 1965 article.

One of the criticisms leveled by Meyers and Williams against the Ohio statute was that the provisions of § 1509.27 relating to mandatory pooling orders did not give the Chief of the Division enough discretion.⁶³ That section provided that an owner of land who was unable to negotiate voluntary pooling agreements with the owners or operators of adjacent properties and whose own tract did not meet the size or shape requirements for a drilling permit might apply to the division for a mandatory pooling order. If the order were granted by the Chief, two questions arose: first, how were the costs to be shared by the owners or operators of the leases included in the drilling unit thus created; and second, what would happen if one objected to putting up his share of the drilling costs for a well which he expected would not be commercially productive? The statute originally provided that a nonconsenting owner or operator would not be entitled to share in the proceeds of the production of such a well until the other operators had recouped two hundred percent of his share of the cost from the recalcitrant's leasehold interest. Meyers and Williams found this approach too inflexible and questioned its constitutional validity. They urged that the Chief be given discretion to make the penalty less than two hundred percent⁶⁴ and that the recalcitrant operator be given the option of transferring his leases to the unit operator upon terms set by the Chief.⁶⁵

Without an explanation of their choice, both the Bar Association committee⁶⁶ and the legislature accepted only part of Meyers' and Williams' suggestion. Section 1509.27 was amended to give the Chief discretion to determine the percentage of the "penalty" of drilling costs that would be levied against the nonconsenting operator, with a maximum limit of two hundred percent.⁶⁷ While not meeting both of Meyers and Williams' specifications, the amendment does provide some flexibility and would seem to be sufficient to remove all serious constitutional questions.⁶⁸

⁶² REPORT OF THE OIL & GAS LAW COMMITTEE, 39 OHIO BAR 1225 (1966).

⁶³ Meyers & Williams, note 2 *supra*, at 604-12.

⁶⁴ *Id.* at 638.

⁶⁵ *Id.*

⁶⁶ See note 62 *supra*, at 1228.

⁶⁷ OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

⁶⁸ Meyers and Williams contended that the rigid two hundred percent penalty might be

Meyers and Williams also raised questions as to the effect of the mandatory pooling and unitization sections of the oil and gas law⁶⁹ upon the unpooled or ununitized portion of a tract of land covered by a pooled or unitized lease.⁷⁰ They urged that the portion of a lease not included in the pool or unit should be split off so that operations or production on a portion of the pooled or unitized property would be attributed only to the acreage included in the pool or unit. Whether or not the lease would be preserved on the excluded acreage of the lease would depend upon the conduct of operations and the securing of production upon that portion of the property. Meyers and Williams argued that to interpret the statute otherwise—and they recognized that the language was somewhat ambiguous—would be unfair to the lessors, for it would tie up the excluded land without their consent and without any gain to them or the public. Again, the Committee on Oil and Gas Law and the legislature did not accept Meyers and Williams' suggestion. The committee report noted that:

As a matter of policy our committee was of the opinion that the excluded portion of a lease should be subject to the well settled laws of implied covenants. It was also the belief of our Committee that the drafters intended this result. The amendment preserves to a landowner or lessor the right to go into court and demand relief for failure to adequately develop oil and gas resources under all of his lands.⁷¹

Accordingly, §§ 1509.27 and 1509.28 were amended to provide specifically that drilling upon or operating or producing upon any portion of pooled or unitized tracts would be considered to be operations upon a lease "any portion of which is included" in the drilling unit or unitized area.⁷²

Although the landowners' position presented by Meyers and Williams has merit, the Oil and Gas Committee's argument is just as compelling. The scheme of § 1509.27 and § 1509.28 is no more

subject to the constitutional attack of arbitrariness. Note 63 *supra*, at 609-12. The amendment to § 1509.27 gives the Chief flexibility in determining the penalty and should defeat an attack on the basis of arbitrariness.

⁶⁹ OHIO REV. CODE ANN. §§ 1509.27 and 1509.28 (Page Supp. 1974).

⁷⁰ Meyers and Williams, note 2 *supra*, at 623-28.

⁷¹ See note 62 *supra*, at 1229. The landowner's right stems from the covenant of reasonable development, an implied duty in an oil and gas lease obligating the lessee to use due diligence to reasonably develop the leased property after the discovery of oil or gas in the area. See *Harris v. The Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897).

⁷² OHIO REV. CODE ANN. § 1509.27, last paragraph, and § 1509.28, fourth from last paragraph (Page Supp. 1974).

unfair or unsound than the scheme of most oil and gas leases, which provide that production on any part of the leased premises will perpetuate the lease on the entire acreage, subject to the implied covenant to reasonably develop. Further, the 1967 amendment has simplicity and certainty to recommend it.

Meyers and Williams, however, argued in 1965 that the scheme of the amendment ultimately adopted in 1967 would be violative of due process, since royalty owners do not have the opportunity under the statute to be heard on the contents of the order or its promulgation. The thrust of this argument is that if the state is to be empowered to satisfy the habendum clause of an oil and gas lease by administrative fiat, the lessor must have the right to be heard prior to the decision.⁷³ Its force depends upon the interpretation given the phrase "owners of land" as used in the second paragraph of § 1509.27. This paragraph requires that, prior to issuing a mandatory pooling order, the Chief must "notify *all owners of land* within the area proposed to be included within the order . . . of their right to a hearing"⁷⁴ Generally, in chapter 1509 the term "owner" means the operator, "the person who has the right to drill on a tract" under an oil and gas lease.⁷⁵ However, the term "owner" is seldom used in chapter 1509 in conjunction with the modifying phrase "of land." The phrase "owners of land" therefore, apparently refers to the landowner, who in Ohio is almost always the royalty owner, rather than to the operator. Thus, royalty owners are given an opportunity to be heard. The flaw in this reasoning is that the royalty owner is not always the same person as the landowner. Nonetheless, the interpretation suggested has been the one followed by the Division of Oil and Gas; the problem that would be raised if the royalty interest and the fee interest in the land had been severed has not yet had to be faced.

House Bill 310 also made three changes in the provisions of § 1509.07, which required the posting of a surety bond in order to guarantee the proper plugging of abandoned wells. First, the section was amended to provide that the surety bond required was conditioned on compliance with the plugging requirements and permit provisions of the law rather than on compliance with all the various and sometimes technical requirements of Chapter 1509.⁷⁶ This

⁷³ Meyers and Williams note 2 *supra*, at 627.

⁷⁴ OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

⁷⁵ OHIO REV. CODE ANN. § 1509.01(K) (Page Supp. 1974).

⁷⁶ OHIO REV. CODE ANN. § 1509.07 (Page Supp. 1974), *formerly* 131 Ohio Laws 463.

amendment was prompted by the difficulty encountered by some operators in obtaining the required surety bond from insurance carriers. Some bonding companies had interpreted the section to mean that the bond guaranteed compliance with all of the provisions of the oil and gas law. The rationale of the amendment was that the scope of the surety bond was intended to be narrow, that "the intention of the original drafters was to require a bond principally to insure against unscrupulous operators drilling wells and leaving the state without properly plugging such wells thereby endangering fresh water supplies."⁷⁷ Thus the risk to the operator that a technical, nonmaterial violation of the law might be construed as requiring the forfeiture of a substantial bond was removed. The bill as finally enacted added a new section, § 1509.071, to specify the procedures to be followed upon forfeiture of a bond. This section established an oil and gas well plugging fund, into which forfeited amounts from bonds were to be paid, and from which funds could be expended by the division to plug wells on which bonds had been forfeited.⁷⁸ Second, § 1509.07 was amended by the addition of a paragraph empowering the Chief of the Division of Oil and Gas to accept proof of financial responsibility in lieu of a surety bond.⁷⁹ This amendment was not proposed by the Bar Association committee, but by representatives of industry who believed that the surety bond requirement was often an unnecessary expense. The exercise of this power was discretionary; "[i]n lieu of such bond, the chief may accept proof of financial responsibility. . . ."⁸⁰ The limits of this discretion were stated only in very general terms.⁸¹ In practice, the power given the Chief has proved to be an administrative headache and is now rarely invoked. Third, § 1509.07 was amended by deleting the authority originally given the Chief to order the suspension of operations or the plugging of the well if he considered the original surety bond filed to be inadequate and the operator failed to post a new one within thirty days.⁸²

⁷⁷ See note 62 *supra*, at 1227.

⁷⁸ OHIO REV. CODE ANN. § 1509.071 (Page Supp. 1974).

⁷⁹ OHIO REV. CODE ANN. § 1509.07 (Page Supp. 1974), *formerly* 131 Ohio Laws 463.

⁸⁰ *Id.*

⁸¹ "[A] net financial worth within this state equal to twice the amount of the bond for which it substitutes and, as may be required by the chief a list of producing properties of the owner within this state or such other evidence showing ability and intent to comply with the law. . . ." *Id.*

⁸² 131 Ohio Laws 463, penultimate paragraph, *as amended*, OHIO REV. CODE ANN. § 1509.07 (Page Supp. 1974).

House Bill 310 also broadened the discretion of the Chief of the Division in ordering wells plugged pursuant to § 1509.12.⁸³ The statute originally provided that wells might not stand idle for more than six months and required that gas wells that had ceased to be productive and that had not been operated for a period of six months should be plugged. Meyers and Williams observed that this established "an absolute statutory duty of operation as a substitute . . . for the common-law duty of prudent operation."⁸⁴ The amendment dispensed with the arbitrary time limit by striking the references to the six month period. Whether this change constituted an acceptance of the common law doctrine of prudent operation became an issue in subsequent hearings before the Oil and Gas Board of Review, as will be seen below.⁸⁵

Finally, House Bill 310 modified § 1509.36, which deals with appeals to the Oil and Gas Board of Review, to permit any "interested person" to submit evidence to the Board at hearings.⁸⁶ This amendment was in response to the question, which had already arisen in hearings before the Board, whether landowners or operators of tracts adjacent to those involved in the hearing were entitled to participate in the hearing. Often, such persons have interests—or think they have—that may be vitally affected by decisions of the Board.

No further amendments to the oil and gas law were adopted for nearly five years. During that time, the interest of Ohio's legislators in oil and gas law turned from resolving ambiguities and making it simpler to do business under the statute toward protecting the public and the environment from the industry.

In 1972, Amended Substitute Senate Bill 387⁸⁷ added two provisions aimed at protecting the interests of royalty owners, who, in Ohio, are usually the farmers upon whose land wells are drilled. Section 1509.30 states that the holder of a royalty interest in any natural gas well has the right to require the operator to report to him on an ongoing basis information relevant to the amount of royalty due.⁸⁸ Section 1509.31 requires that the royalty interest owner be informed of the name and address of any transferee of an oil and gas lease within thirty days of the transfer. If the lease has been develop-

⁸³ OHIO REV. CODE ANN. § 1509.12 (Page Supp. 1974), formerly 31 Ohio Laws 467.

⁸⁴ Meyers and Williams, note 2 *supra*, at 596.

⁸⁵ See text accompanying notes 185-207 *infra*.

⁸⁶ OHIO REV. CODE ANN. § 1509.36 (Page Supp. 1974).

⁸⁷ Act of April 4, 1972, 134 Ohio Laws 657.

⁸⁸ OHIO REV. CODE ANN. § 1509.30 (Page Supp. 1974).

ed, *i.e.* if there are wells on it, the notification requirement is extended to include the Division of Oil and Gas.⁸⁹

Aside from the requirement of notification to the Division of Oil and Gas, which assists the Division in compiling information on the development of hydrocarbon resources in the state, this statutory amendment may seem unnecessary. Production information was already available to royalty owners from the gas companies that purchased the gas produced, and information relating to transfers of ownership should have been available from the records of the various county recorders. Furthermore, one would expect that the good business judgment of the operators would have made production and ownership information available to royalty owners simply as a matter of good business practice. This analysis, however, ignores the economic developments of the late 1960's and early 1970's. During that period of time, artificially low prices for hydrocarbons and rising costs of production undercut the profitability of the Ohio petroleum industry to such an extent that the tax shelter aspects of drilling ventures became the primary justification of much of the Ohio industry. Some operators initially attracted to Ohio by the Morrow County activity of the mid-1960's remained, marketing their drilling ventures on the basis of the high completion percentages of Clinton wells and the tax advantages offered to the investor rather than on the basis of returns on investment from the hydrocarbons produced. Because the emphasis of such operators was on sales promotion rather than production, a small but highly visible minority failed to maintain good relations with their royalty owners. Royalty owners made their dissatisfaction known to the legislature, and Amended Substitute Senate Bill 387 was the result.^{89,1}

The interests of royalty owners in oil and gas operations were further recognized in 1972 by enactment of Amended Senate Bill 425,⁹⁰ which expanded the membership of the Technical Advisory Council created by § 1509.38 to include a member representing royalty interest holders.⁹¹ Although the amendment did not specifically so state, it was apparently intended that the royalty interest owner

⁸⁹ OHIO REV. CODE ANN. § 1509.31 (Page Supp. 1974).

^{89,1} § 1509.30 is limited to gas wells because historically purchasers of oil have often made payment directly to the landowners in wells from which the production is purchased, while the gas companies have preferred to deal directly with operators, paying them for gas delivered and leaving it to them to remit to the interest owners, including royalty interest owners.

⁹⁰ Act of May 9, 1972, 134 Ohio Laws 832.

⁹¹ OHIO REV. CODE ANN. § 1509.38 (Page Supp. 1974). See text accompanying note 36 *supra*.

representative also be a landowner; this is appropriate, since there are few severed oil and gas mineral rights in Ohio.

Legislative concern with the interests of landowners, whether or not they owned royalty interests, again appeared two years later in the adoption of House Bill 216.⁹² A new provision imposed two requirements for restoration of drilled land by Ohio oil and gas operators. Within six months after a well is completed, the operator must remove all structures and excavations that are not necessary for the operation of the well and restore the surface of the land disturbed by the drilling process.⁹³ Further, within six months after the plugging of an abandoned well or a dry hole, all structures and excavations must be removed and the land restored.⁹⁴ Performance of these obligations is guaranteed by the extension of the terms of the surety bond required by § 1509.07. The operator may be relieved of the obligation to restore if the landowner requests that the requirements be waived. Such requests must be submitted to the Chief of the Division of Oil and Gas, who is required to approve them unless he finds that the waiver would be likely to have detrimental effects upon the adjoining property or upon the interests of the state in preventing pollution or erosion.⁹⁵

The restoration section of the statute was the product of an election year in which legislators of both major parties from oil and gas producing areas were attempting to demonstrate their concern for their landowner constituents. It cannot, however, be denied that the legislature responded to a real problem. Most oil and gas leases used in Ohio do not contain clauses obligating the operator to clean up and restore the premises either upon completion of the well or upon abandonment. The legal rights of the landowner at common law are rather ill defined⁹⁶ and, as a practical matter, difficult to enforce; damages suffered by the landowner seldom exceed a few hundred dollars, so that the cost of a suit on a nuisance or negligence theory, even if successful, might very well exceed the ultimate recovery. Most opera-

⁹² Act of April 14, 1972, 134 Ohio Laws 655.

⁹³ OHIO REV. CODE ANN. § 1509.072(A) (Page Supp. 1974).

⁹⁴ OHIO REV. CODE ANN. § 1509.072(B) (Page Supp. 1974).

⁹⁵ OHIO REV. CODE ANN. 1509.072 (Page Supp. 1974).

⁹⁶ The common law restoration remedies that a landowner has available are basically an excessive use of a surface easement, nuisance, and negligence; the reported cases are few and contradictory, usually being decided on their facts. *See, generally* A. WILLIAMS AND C. MEYERS, OIL AND GAS LAW, §§ 218.8-.12 (1972); Annot. 65 A.L.R. 2d 1356 (1959). It has also been proposed that there should be an implied obligation of restoration in oil and gas leases. *See* Smith v. Schuster, 66 So. 2d 430 (Ct. App. La. 1933); Note, 25 OKLA L. REV. 572 (1972).

tors, in the interest of good business relations, took restoration measures similar to those now required by statute, but the ever-present and highly visible minority did not.

House Bill 216 also modified the bonding requirements of § 1509.07 to permit a deposit with the Division of Oil and Gas of cash or a certificate of deposit in lieu of the posting of a plugging and restoration bond.⁹⁷ Formerly, the Chief could not accept cash in place of a bond, and if he refused to accept a financial statement in lieu of a bond, the operator was usually required to deposit the cash with an insurance company and pay an annual bonding fee to the insurer, after which the company would issue the bond required by the statute. No one was happy with this arrangement, and the 1974 legislation removed a small but sticky piece of red tape from the Ohio law relating to oil and gas.

The restoration section of House Bill 216 is a noteworthy development in the oil and gas law of Ohio for at least two reasons. First, it clearly recognizes the interest of the state in restoration and cleanup, even when the damage caused to the environment does not amount to a legal nuisance or violate the regulations of the Ohio Environmental Protection Agency or similar agencies. Under § 1509.072 the operator must, as a practical matter, satisfy both the landowner and the Division of Oil and Gas that his restoration efforts are adequate. Second, the new section reverses the common law and imposes broad, sweeping obligations on operators. With the exception of certain federal regulations relating to oil and gas operations on federally owned lands,⁹⁸ no other jurisdiction goes so far in requiring restoration.⁹⁹

The legislature's concern for the environmental impact of oil and gas operations can also be seen in a 1974 amendment relating to the plugging of orphan wells. Ohio law has, since 1951, required the posting of a surety bond to guarantee the proper plugging of nonpro-

⁹⁷ OHIO REV. CODE ANN. § 1509.07 (Page Supp. 1974).

⁹⁸ For example, those required by Forest Supervisors of the Forest Service of the United States Department of Agriculture, pursuant to 36 C.F.R. § 251.15 (1975), with respect to operations on lands where mineral rights are reserved to the United States.

⁹⁹ Research has discovered few states with restoration provisions. Illinois and Kansas treat the failure to restore as a public nuisance and require the lessee to return the land to its prior condition (as far as it is practicable). ILL. STAT. ANN. ch. 100 ½ § 26(12) (Smith-Hurd Supp. 1975); KAN. STAT. ANN. 55-132(a) (1964). In Indiana, any person who enters land to conduct oil and gas operations is liable for surface damages, to the surface owner, but no punitive damages may be assessed and the terms of a valid oil and gas lease dealing with such damages will prevail. IND. STAT. ANN. 46-1802(c) (Burns 1965).

ducing oil and gas wells.^{99.1} Prior to that time, however, no means existed to ensure that wells would be plugged after their productive lives were over. Wells which have been abandoned without being properly plugged are termed "orphan" wells, and their precise numbers are unknown, although it has been estimated that they number in the thousands. Such wells present a danger, albeit relatively minimal, to the safety of persons who may work or play around them, to the purity of underground water supplies, and to the pressure of nearby oil or gas producing reservoirs. As has been noted, in 1967 an oil and gas well plugging fund was established to which forfeited surety bonds were to be paid upon failure of operators to comply with the plugging requirements of the statute.^{99.2} The Division of Oil and Gas was empowered to spend the money credited to the fund to plug the wells for which bonds had been forfeited. No authority was given, however, to use such funds for the plugging of orphan wells drilled prior to the establishment of the bonding procedures. Under the statute, the responsibility for the plugging of those wells might under some circumstances be imposed upon the landowner upon whose property they were located.¹⁰⁰ However, enforcement of this obligation against landowners who may not even have suspected the presence of abandoned wells upon their property when they purchased it has never been politically attractive. Amended House Bill 221 took a hesitant but laudable step toward filling the gap by amending § 1509.071 to permit the use of monies from the oil and gas plugging fund to plug any wells "for which no funds are available"¹⁰¹ The bill provided that all fines imposed under the penalty section of the oil and gas law should be paid to the fund. This is at best a hesitant step, however, since prosecutions instigated by the Division of Oil and Gas have never generated sufficient revenues to accomplish the necessary plugging, and it would be unreasonable to expect that they will.¹⁰²

D. *Legislative Summary*

Meyers and Williams concluded in their 1965 article that the Ohio oil and gas statute provided "the authority and means to accom-

^{99.1} 124 Ohio Laws 260 (effective September 7, 1951).

^{99.2} See discussion in text accompanying note 78 *supra*.

¹⁰⁰ OHIO REV. CODE ANN. §§ 3617.13, 3617.24 (Page 1971).

¹⁰¹ OHIO REV. CODE ANN. § 1509.71 (Page Supp. 1974).

¹⁰² As of January 1, 1975, the oil and gas well plugging fund carried a balance of approximately \$2,300, an amount that could easily be expended to properly plug only one well.

plish effective petroleum conservation.”¹⁰³ In considering the legislative developments of the last ten years, it is important to remember that the impetus for the 1965 legislation came from oil and gas operators who were concerned with the lack of sound conservation practice that accompanied the Morrow County boom. Since these men worked closely with the legislature in drafting the statute, it is not surprising that the resulting enactment made Ohio an attractive place for oil and gas developers to operate. The 1967 amendments were also enacted at a time when considerable political importance was given to making Ohio a good place to do business. In the years since 1972, however, the ground swell of concern for the environment and distrust of the business community that has arisen across the nation has shifted the balance of legislative power against the oil and gas operators. On balance, the latter group of amendments has made it somewhat harder and less attractive for oil and gas operators to do business in Ohio. But neither group of legislative changes has substantially affected the basically sound conservation provisions of the statute. The assessment of the act as one which provides the “authority and means to accomplish effective petroleum conservation” is as accurate today as it was a decade ago.

On the other hand, several of the statutory ambiguities and deficiencies noted by Meyers and Williams remain. These problems will become increasingly important as the energy shortage continues and are worthy of note here, although they were discussed at length by Meyers and Williams.

As was noted by Meyers and Williams,¹⁰⁴ nothing in the statute or in any of the amendments enacted expressly permits the Chief of the Division to make rules to prevent waste. In fact, some of the rules adopted to insure safety also operate to prevent waste,¹⁰⁵ but there may be need for additional administrative devices—either now or in the future—to prevent waste, and the authority to create them should be explicit.

A second problem lies in the statute’s failure to permit prorationing to prevent waste.¹⁰⁶ Historically, prorationing has been used as a tool to maintain price levels in times when potential supply

¹⁰³ Meyers and Williams, note 2 *supra*, at 591.

¹⁰⁴ Meyers and Williams, note 2 *supra*, at 594.

¹⁰⁵ See, e.g., Rule NRo-9-05(A) of the Department of Natural Resources, Division of Oil and Gas [hereinafter cited as NRo].

¹⁰⁶ Meyers and Williams, note 2 *supra*, at 598.

exceeded demand.¹⁰⁷ In times of high demand, however, it can be used to prevent waste by minimizing loss of reservoir energy and maximize ultimate recovery by limiting production to the maximum efficient rate.¹⁰⁸ As Meyers and Williams noted,¹⁰⁹ the Ohio legislature rejected market demand prorationing in enacting § 1509.40 forbidding "limitation of production of oil or gas for any reason whatsoever,"¹¹⁰ but the final phrase of the prohibition is so broad that it appears to rule out prorationing to prevent waste as well.¹¹¹ The short-term advantages of higher than maximum efficient rates of production in times of energy shortages are apparent, but the long-term impact of reduced total recovery is just as real and arguably more important. Therefore, § 1509.40 should be amended, either to delete the prohibition on prorationing altogether or to make it clear that the section is intended only to prohibit market demand prorationing—at least as to the deeper geological formation.^{111.1} The effect of either amendment would be substantially the same, since the demand for Ohio production so far exceeds the supply that it is almost inconceivable that a case could ever be made for market demand prorationing.¹¹² There is, moreover, a clear need for the Chief of the Division to be able to work toward maximizing ultimate production through prorationing and regulation of gas-oil and water-oil ratios, a need that could be met by the amendments just proposed regarding § 1509.40 and the authorization of rules on waste.

A related defect in the original statute and the subsequent amendments appears in § 1509.20, which expressly permits the flaring of natural gas where "there is no economic market at the well. . . ."¹¹³ As noted by Meyers and Williams,¹¹⁴ this deprives the Division of the power to force gas connections in the field and permits

¹⁰⁷ WILLIAMS & MEYERS, note 4 *supra*, at 312-13.

¹⁰⁸ *Id.*, at 227-28.

¹⁰⁹ Meyers and Williams, note 2 *supra*, at 600.

¹¹⁰ OHIO REV. CODE ANN., § 1509.40 (Page Supp. 1974).

¹¹¹ Meyers and Williams note 2 *supra*, at 601 argue that it should not be so interpreted, but we believe that the language of the statute is so broad as to be difficult to rationalize away.

^{111.1} Historically, most Ohio drilling has been in the shallower Berea and Clinton formations that develop low reserves with little or no flush production. For both economic and engineering reasons it would be inappropriate to institute prorationing of any kind for these formations. As Ohio experiences drilling of deeper formation, however, it appears advisable for the Chief to have available the tool of conservation prorationing for the deeper horizons.

¹¹² See generally, Ohio Energy Emergency Commission, Ohio Energy Profiles, Vol. I - State Level Data (July, 1975).

¹¹³ OHIO REV. CODE ANN., § 1509.20 (Page Supp. 1974).

¹¹⁴ Meyers and Williams, note 2 *supra*, at 637.

operators to reap the short-term advantage of oil production at the sacrifice of long-term production of gas. The quoted phrase of § 1509.20 should be deleted, so that the Chief can limit or proscribe flaring in the interest of conservation and the maintenance of reservoir pressure.

In their article Meyers and Williams also criticized¹¹⁵ the provision of § 1509.25 that apparently prohibits the Chief of the Division from requiring the use of a "survey grid coordinate system with fixed or established unit boundaries."¹¹⁶ We agree with their suggestion¹¹⁷ that this restriction should be repealed, since the use of a rectangular grid system would make it much easier for the Division to set effective spacing standards, particularly in the portions of the state platted as part of the Northwest Territory.

Meyers and Williams' recommendation that §§ 1509.24 and 1509.25 should be amended to broaden the purposes for which well spacing orders may be entered also continues to be valid.¹¹⁸ In addition, it should be noted that § 1509.24 presently limits the authority of the Chief of the Division to issue well spacing orders to situations involving new wells.¹¹⁹ Because of Ohio's long history as an oil and gas producing state,¹²⁰ there are a substantial number of fields containing old or abandoned wells that, as the energy shortage worsens and the prices of oil and natural gas increase, may be reworked or be sites for new drilling. Many of those fields were wastefully and inefficiently operated when their production was flush, and the Chief of the Division should be given the tools necessary to prevent a recurrence.

The proposed amendments to the statute raise the issue of the role of the Technical Advisory Council (TAC). We agree with Meyers and Williams that the TAC should not have a veto over the decision making process.¹²¹ The Division should, however, be obli-

¹¹⁵ Meyers and Williams, note 2 *supra*, at 597.

¹¹⁶ OHIO REV. CODE ANN., § 1509.25 (Page Supp. 1974).

¹¹⁷ Meyers and Williams, note 2 *supra*, at 635.

¹¹⁸ Meyers and Williams, note 2 *supra*, at 597.

¹¹⁹ Section 1509.24 provides in relevant part that "the chief . . . with the approval of the technical advisory council . . . may establish . . . rules and regulations relative to . . . minimum distances from which a new well may be drilled or an existing well deepened, plugged back, or reopened to a source of supply different from the existing pool . . ." Thus, the Chief may not issue spacing orders in respect of wells in existence prior to the enactment of the statute in 1965. The Chief should, however, have authority under the present statute to issue spacing orders for new drilling in areas where there are old or abandoned wells.

¹²⁰ See note 14 *supra* 3, at 12.

¹²¹ Meyers and Williams, note 2 *supra*, at 637.

gated to consult with the TAC prior to adopting regulations prohibiting waste and prior to the issuance of prorating, antiflaring or gridding orders of general impact. The Division of Oil and Gas is run by competent career administrators, but its staff is small, and the experience and expertise of the members of the TAC can be valuable. It may also help to counterbalance the outside pressures on the politically appointed Chief and his superiors at the Department of Natural Resources, pressures which may have nothing to do with conservation.

Enactment of these changes would significantly strengthen the statutory scheme.

III. IMPLEMENTATION OF THE STATUTE

A. *Rules and Regulations*

Although the statute specifically provides for the adoption of administrative rules and regulations,¹²² two of the present five chapters of the rules and regulations were in existence prior to the enactment of the conservation law in October of 1965. The chapters dealing with operating procedures¹²³ and disposal of wastes¹²⁴ were initially adopted in 1964 and 1965 as emergency rules under the interim legislation enacted in 1963.¹²⁵ They were repromulgated with additions in 1965, shortly after the new law became effective. A third chapter, governing secondary recovery operations,¹²⁶ was adopted in late 1967. The fourth chapter, relating to safety standards,¹²⁷ was promulgated in 1968 and became effective early in 1969. The fifth and final chapter, dealing with the issuance of plugging permits,¹²⁸ was adopted early in 1975. Because the rules and regulations are in the main merely explanatory of various sections of the statute, only their general scope will be outlined, although some of the more problematic provisions will be considered in greater detail.

¹²² OHIO REV. CODE ANN. § 1509.03 (Page Supp. 1974).

¹²³ Presently chapter NRo-1.

¹²⁴ Presently chapter NRo-3.

¹²⁵ Under authority of § 4151.03, which provided that "the division of mines shall enforce and supervise the execution of all laws enacted . . . and for such purpose shall make, publish and enforce necessary rules and regulations not inconsistent with the mining laws of this state." In fact, chapters NRo-1 and NRo-3 were intended to serve as a stop-gap conservation law rather than merely as rules and regulations to the one paragraph 1963 law.

¹²⁶ Chapter NRo-5.

¹²⁷ Chapter NRo-7.

¹²⁸ Chapter NRo-9.

The basic rules for drilling and operation in Ohio are contained in chapter NRo-1,¹²⁹ which is entitled "Issuance of Permits for the Drilling of Wells and Operation Thereof." The owner, the person who has the right to drill on a particular tract, must obtain a drilling permit to drill, deepen, reopen, convert to another use, or plug back a well.¹³⁰ Before a permit is issued, cash or an insurance bond must be posted to guarantee plugging and restoration,¹³¹ and it must be established that there will be compliance with the applicable spacing requirements.¹³² Unless the well is to be located in a coal bearing

¹²⁹ Which stands for Department of Natural Resources, Division of Oil and Gas, Chapter 1. Rules within each chapter are numbered consecutively; 01, 02 . . . 10, etc.

¹³⁰ OHIO REV. CODE ANN. § 1509.05 (Page Supp. 1974).

¹³¹ The cash deposit or bond is required by OHIO REV. CODE § 1509.07. The rules set the amount of the deposit according to the depth of the well to be drilled and the number of wells to be covered by the bond. If an operator chooses to post bonds on a well by well basis, then a bond for a well with a proposed or actual depth of 1500 feet or less must be in the amount of \$750, while for deeper wells a face amount of \$1500 is required. On the other hand, if, as is more common, the operator chooses to post a so called "blanket bond" covering all wells he may operate, the face amount required is \$3500 for all wells with a proposed or actual depth of 1500 feet or less and \$5,000 for deeper wells. While bonding to guarantee performance is a well established procedure, the amount of the bond required is obviously an arbitrary determination; one may question the logic of requiring one \$5,000 bond for an operator who operates three wells and one \$5,000 bond for an operator who operates three hundred wells. Furthermore, the cost of plugging operations has sky rocketed in recent years along with other costs associated with operations. The addition of § 1509.072 extended the obligations of the bond to include restoration, but there has been no increase or proposal to increase the bond amounts. The thinking of the Division has probably been that the value of the casing and the equipment on the well would easily cover the cost of plugging and land restoration in the event of default. While liens or judgments filed against an oil or gas well usually attach to the oil and gas lease and its equipment and technically take priority over claims of the state relating to plugging and restoration, the purchaser of the equipment at foreclosure succeeds to the interest of the debtor in the lease and thus becomes the "owner of the well" within the terms of § 1509.12 and obligated to plug the well and restore the premises. So long as the price of used equipment remains at or above present levels, this appears accurate reasoning. If the operator defaults or is otherwise unavailable, and there is little or no equipment to sell to cover the cost of plugging and restoration, the Division's position is that the landowner must bear the cost. See the discussion of the *Vohlers* case in text accompanying notes 234-47 *infra*. Seen in this light, the purpose of the bond is to give the state a lever to use against the operator, and the size of the lever is less important than the fact of its existence. Nonetheless, at a time when theft of oil field equipment is widespread, an increase in the amount of the bond required is indicated to maintain the force of the statutory lever.

¹³² NRo-1-04 sets a sliding scale of minimum acreages and distances keyed to well depth, as is shown in the following table.

Depth	Minimum Acreage	Distance from Well in Same Pool	Distance From Boundary
0-1,000'	Not less than one acre	200 feet	100 feet
1,000-2,000'	Ten acres	460 feet	230 feet
2,000-4,000'	Twenty acres	600 feet	300 feet
4,000' or deeper	Forty acres	1,000 feet	500 feet

township, the Division must issue the permit if the requirements of the rules and regulations are met.¹³³

Chapter NRo-3, which like chapter NRo-1 predates the 1965 statute, deals with the disposal of saltwater and other wastes produced in operations. The heart of the chapter is in Rule 4,¹³⁴ which provides in relevant part that "[a]ll persons engaged in any phase of salt-water disposal operations shall conduct such operations in a manner which will not contaminate or pollute the surface of the land, or water on the surface or in the subsurface"¹³⁵ The remaining rules specify how disposal is to be accomplished. The absolute requirement of rule 4 has, in recent years, produced considerable disagreement over the environmental acceptability of some disposal methods.¹³⁶ In 1975, substantial amendments to chapter NRo-3 delineated more completely what are acceptable procedures and imposed additional obligations on operators.¹³⁷

The current spacing requirements were adopted November 1, 1967. Prior to that time the rules provided that wells had to be drilled on at least ten acre tracts, not less than 460 feet from the nearest well to the same formation, and not less than 230 feet from the boundary. The Chief is also given discretion by § 1509.25 to provide for temporary minimum spacing in the vicinity of discovery wells, in case the characteristics of the discovery well are such that it is not logical to apply the standards summarized in the table above. The goal of the detailed spacing requirements and the discretion given to the Chief is to protect the rights of the owners of adjacent tracts to recover the oil and gas under their tracts (their correlative rights) while achieving the maximum total production of oil and gas without the drilling of unnecessary wells (economic waste). A weakness of the Ohio statute noted by Meyers & Williams note 2 *supra* at 597, is that § 1509.24 does not adopt as a standard for determination of drilling unit size the principle that the drilling unit should be as large as the maximum area which can be drained by one well. It does not appear, however, that this principle has been ignored; although it may be said that the standards promulgated are more suited for oil wells than gas wells, and that gas wells should have larger minimum drilling units than oil wells, the standards set are generally in accord with those of other states for wells of similar depths.

¹³³ OHIO REV. CODE ANN. § 1509.08 (Page Supp. 1974).

¹³⁴ NRo-3-04.

¹³⁵ The broad prohibition of rule 4 is arguably in excess of the statutory authority, for the rule bars contamination of the "surface of the land" as well as water found on the surface or in the subsurface, while the language of the statutory provision upon which the rule is based refers only to contamination of water. As a practical matter, however, it would seem preferable for the Division to have jurisdiction over both land and water that might be damaged in oil operations, whatever the terms of the statute may be. Furthermore, prevention of pollution of the land is essential to prevention of pollution of water, since oil spilled on land is likely to end up in water. Thus the authority in question may be inferred.

¹³⁶ See discussion in Lowe, Legislative Report—Columbus, March 6, 1975 (a paper presented to the winter meeting of the Ohio Oil & Gas Association).

¹³⁷ In January 1975, a requirement that an annual report of saltwater disposal be provided to the Division was added to rule 4 of chapter NRo-3. At the same time, rule 5 was substantially rewritten to provide expressly for the authority of the Division to regulate annular disposal of saltwater. Saltwater produced along with hydrocarbons from oil and gas bearing

Secondary recovery operations, which are defined as involving the "injection of natural gas, water, or other fluids or gases into an oil or gas reservoir to increase pressure or to retard pressure decline . . . for the purpose of increasing the recovery of hydrocarbons . . . ,"¹³⁸ are the subject of chapter NRo-5. Attempts at secondary recovery operations in Ohio have been rare, however, so the chapter has been seldom referred to. The basic scheme and content of these rules are the same as those of chapter NRo-1; regulation and monitoring of secondary recovery operations is structured around a permit system.

The major regulations relating to safety standards are included in chapter NRo-9.¹³⁹ Both a broad duty to use "all reasonable means to safeguard against hazards to life, limb, and property"¹⁴⁰ and specific requirements concerning various practices and devices¹⁴¹ are imposed upon "owners" and the "persons or organizations in con-

formations is often disposed of by deposit down a disposal well especially drilled for that purpose, but the expense of such a procedure is substantial so that it is generally used in Ohio only where large quantities of salt water are produced. More commonly in Ohio, salt water is disposed of by annular disposal. The principle of annular disposal is to inject the saltwater produced into the annulus, the space between the outer wall of the pipe placed in the well bore and the side of the open hole that has been drilled. So long as the bore hole does not intersect or pass close to any strata containing running or potable water, this is generally considered an ecologically acceptable means of disposal. The key, of course, is to determine whether the bore hole has passed close to strata with potable or running water. The Division has exercised the authority for such determination since its establishment; the 1975 amendment effectively legitimizes that exercise. As this is written, however, the Federal Environmental Protection Agency is reportedly drafting rules under the Safe Drinking Water Act, 42 U.S.C. § 300(f) *et seq.* (1974), which would, if adopted, effectively ban annular disposal.

Also substantially rewritten in January, 1975, was rule 8 of chapter NRo-3, dealing with temporary storage of oil field wastes. Prior to the amendment, rule 8 provided that saltwater could be temporarily stored in earthen pits or in tanks so long as such pits or tanks were liquid tight and constructed so as to prevent escape of the saltwater. The chief difficulty with this formulation was that it did not define "temporarily," and saltwater stored in open pits for a long enough time will either evaporate, leaving the salt encrusted on the soil, or leak into the soil. At the hearings on the proposed rule, debate swirled around the period of time within which pits or tanks ought to be drained and the saltwater disposed of elsewhere. The eventual compromise was 180 days, but the amendment also substantially expanded and specified the terms of the rule.

¹³⁸ NRo-5-01.

¹³⁹ Logically, this chapter should be numbered NRo-7. The reason for the "skip" in numbers is that rules with the designation NRo-7 were proposed but never adopted. In early 1968, a public hearing was held on ten rules which were to govern the issuance of permits for and the operation of wells drilled to geological strata beneath the waters of Lake Erie. In 1970 the Ohio Legislature enacted § 1505.07, prohibiting any drilling for oil and gas in Lake Erie for two years. In 1972 the ban was extended for a further two years, and in 1974 for yet another four years. Thus, proposed chapter NRo-7 became moot.

¹⁴⁰ NRo-9-02.

¹⁴¹ NRo-9-03, -04 and -05.

trol"¹⁴² of work. In the event of a violation of the rules, either the Chief or his inspectors may issue orders requiring affirmative action to the persons responsible.¹⁴³

The most recent chapter of the oil and gas rules and regulations, NRo-11, deals with the plugging of wells. Promulgated in January, 1975,¹⁴⁴ this chapter consists only of a general definition rule¹⁴⁵ and a provision regulating issuance of plugging permits.¹⁴⁶ It specifies procedures intended to ensure that the Division and affected landowners have adequate notice that wells are to be plugged.¹⁴⁷

The major defect of the oil and gas rules is that each chapter appears to have been drafted as a restatement of a particular statutory section and not as a planned portion of a long-range pattern. As a result, a patchwork of overlapping general provisions has been created. This is not to condemn the existing rules, for they have functioned adequately to date, as will be seen in the subsequent review of administrative and judicial decisions. It would be better, however, if each chapter were created as a part of an integrated body of rules, and if the rules clarified and explained the technical concepts laid down in the statute. If oil and gas operations in Ohio increase,

¹⁴² NRo-9-02.

¹⁴³ *Id.*

¹⁴⁴ Filed with the Ohio Secretary of State January 3, 1975; effective January 22, 1975.

¹⁴⁵ NRo-11-01.

¹⁴⁶ NRo-11-02.

¹⁴⁷ The Division's interest in notice is that it be able to maintain records accurately showing the location of plugged wells and that its inspectors be able to be present at the plugging operation. See § 1509.13. The interest of the landowners upon whose land wells to be plugged are located is in protecting their right to royalties and free gas. Most leases in use in Ohio provide for a 1/8 royalty to the landowner and entitle him to use gas from the well for heat and light in his home and for farming operations. With the advent of the energy shortage, the value of these landowner rights increased considerably. At the same time, soaring market prices for used casing and equipment led some operators to plug marginal wells that they might have continued producing a few years earlier. The interaction of these factors produced a rash of complaints from landowners to the Division and to state legislators. Though § 1509.13 of the statute requires written notification of landowners, rule NRo-11-02 goes further by requiring that the notice be delivered by personal service or certified mail to ensure its delivery. Receipt of notice before the fact may seem of little consolation to an aggrieved landowner, but he has thus been afforded an opportunity to make arrangements for an alternate power source to the gas he was using. In addition, there are cases from other jurisdictions that hold that an operator may not plug an oil or gas well so long as marginal revenues exceed marginal costs on the grounds that to do so would be a breach of his implied covenant to reasonably produce the well. See, e.g., *Okmulgee Supply Corp. v. Anthis*, 189 Okla. 139, 114 P. 2d 451 (1940) and *Patton v. Rogers*, 417 S.W. 2d 470 (Tex. Civ. App. 1967). The rule would be stronger if it provided for a reasonable minimum period of notice to assure that affected landowners had adequate opportunity to seek counsel or obtain other supplies of energy, but such a limitation is likely to be implied by the Division as a matter of practice.

as may be expected as the hydrocarbon shortage becomes more acute, greater demands will be placed on the administrative apparatus.

B. *Interpretation of the Law*

The rules and regulations and the statute are administered by the Division of Oil and Gas through adjudication orders.¹⁴⁸ Any party adversely affected by an adjudication order has the right of appeal to the Oil and Gas Board of Review¹⁴⁹ and ultimately to the courts, beginning with the Franklin County Common Pleas Court.¹⁵⁰ In its first ten years of existence, the Division of Oil and Gas issued 217 adjudication orders,¹⁵¹ only twenty-one of which were appealed to the Board of Review. Eleven of the appeals resulted in opinions of the Board.¹⁵² Since those opinions of the Board of Review are the only

¹⁴⁸ OHIO REV. CODE ANN. § 119.01(d) (Page 1969) defines adjudication as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits or legal relationships of a specified person. . . ." An adjudication order is any order of an agency which affects the rights and duties of the individuals subject to the order.

¹⁴⁹ OHIO REV. CODE ANN. § 1509.36 (Page Supp. 1974).

¹⁵⁰ OHIO REV. CODE ANN. § 1509.37 (Page Supp. 1974).

¹⁵¹ The number of adjudication orders issued by the Chief of the Division of Oil and Gas has varied substantially from year to year, as may be seen from the following chart prepared from Reports of Oil and Gas Conservation Activities submitted annually to the Interstate Oil Compact Commission by J. Richard Emens, Member, Legal Committee, the Interstate Oil Compact Commission.

Adjudication Orders	1965	1966	1967	1968	1969	1970
	1	8	3	18	66	41
	1971	1972	1973	1974	1975	
	34	17	9	7	13	
	TOTAL — 217					

The numbers of adjudication orders issued may be deceptive, however, because an adjudication order is not necessarily related to one incident or one well. For example, two of the eighteen orders in 1968 related to noncompliance with bonding requirements on thirty-one wells. Another twelve of the eighteen orders directed the plugging of thirty-three idle wells. In recent years, there appears to have developed a trend toward the use of a separate adjudication order for each well, permit, application or other item that may be the subject matter of the adjudication order. It may be surmised that the practice that was previously followed was based on the premise that an individual operator is responsible for all the wells which he may have under his control, so that one adjudication order might rule upon a particular problem with respect to as many wells as that operator managed that shared the problem. Because of the lack of consistency in the Division's practice, however, an analysis of the number of adjudication orders issued on a year by year basis is not a reliable guide to the activity of the Division.

¹⁵² The remaining ten appeals were either withdrawn by the appellants or dismissed after the appellants failed to appear for the hearing scheduled. The Division has been willing to negotiate with appellants to solve problems that have resulted in adjudication orders. Often those negotiations are successful from the viewpoint of both sides, as the rate of dismissals would seem to indicate.

precedents interpreting the statute¹⁵³ and since some of them are significant to an understanding of the law as it has developed, it will be useful to consider them in conjunction with their subject matter.¹⁵⁴

(1) Scope of Discretion

The first decision of the Board of Review dealt with the issuance of permits and the scope of the discretion of the Chief in dealing with problems of well spacing. The tract involved in *Barton A. Holl*¹⁵⁵ contained acreage that should have been sufficient for the drilling of four wells, but because of the irregular shape of the land, at least one of the four wells would have been slightly closer to the boundary line than the two hundred thirty foot minimum distance required by the well spacing rule.¹⁵⁶ The appellant wanted to drill two wells closer to the boundary line than the minimum distance specified in the rule and so requested in his permit applications. In separate adjudication orders, the Chief refused to issue either permit, on the grounds that the applications did not substantially conform¹⁵⁷ with the minimum distance standards.

The Board reversed the Chief with respect to one adjudication order—the first of only two times in its history that the Board of Review has failed to uphold the Chief's decision. The Board examined the plat map of the property and noted that the Chief had indicated that safety factors did not present a problem in the cases before it, that the appellant had attempted unsuccessfully to pool voluntarily with adjoining property owners, and that the location of wells on adjoining properties was such that they were likely to drain the oil from under the property in question to the detriment of the

¹⁵³ Six of the Board's decisions have been appealed to the Franklin County Court of Common Pleas, but all but two have either been upheld by that court in pro forma decisions or dismissed by agreement of the parties. *Vohlers* and *Baldwin Producing Corp.* are pending, as of the time of this writing, in the Franklin County Court of Common Pleas (see notes 207 and 234 *infra*).

¹⁵⁴ Because opinions of the Oil and Gas Board of Review are neither published nor annotated in the Ohio Revised Code (omissions that should be remedied), we will devote more space to discussion of the facts presented and issues raised in such cases than their complexity would otherwise warrant.

¹⁵⁵ Appeal Nos. 2 and 3, Ohio Oil and Gas Board of Review, April 12, 1966.

¹⁵⁶ Rule IV of the rules and regulations of the Division of Oil and Gas, as adopted by the Division of Mines as emergency rules on March 10, 1964. On December 14, 1965 rule IV was modified and recodified as NRo-1-04.

¹⁵⁷ Rule IV(A)(1) provided in relevant part that "[t]he Division of Oil and Gas should not issue a permit . . . unless the proposed well location and spacing substantially conform to the requirements . . ." The language of NRo-1-04 is identical in this respect.

owner and operator of the subject property.^{157.1} The Board granted the permit, ruling that the protection of correlative rights¹⁵⁸ was of utmost importance.^{158.1} With respect to the other permit application, the Board suggested to the appellant that his proposed site be moved a short distance to a location that would fall within the distances set by the well spacing standards.^{158.2}

The importance of the *Holl* decision is that at its very first opportunity—less than six months after the effective date of the statute—the Board of Review took the position that the Division of Oil and Gas should be given considerable discretion rather than be tied to the express terms of the statute or the rules adopted under it.¹⁵⁹ The Board's decision indicated further than the Division was to interpret the statute in light of its purposes of prevention of waste and protection of correlative rights. In sum, the *Holl* decision gave an impetus to flexible administration to the Division that has been carried forward throughout the past ten years.^{159.1}

Having given notice of its view of the new statute, the Board of Review next delineated the scope of its function as the reviewing agency under that legislation. In *Jerry Moore, Inc.*,¹⁶⁰ the Board opened its proceedings to parties who, though they were not parties to the action in the strict legal sense, had an economic interest in the outcome. The *Moore* case raised issues relating to the mandatory

^{157.1} *Holl*, note 155 *supra*, at 3-4.

¹⁵⁸ For a discussion of correlative rights, see text at note 6 *supra*.

^{158.1} *Holl*, note 155 *supra*, at 3.

^{158.2} *Id.* at 4.

¹⁵⁹ Conceptually, there are two types of conservation statutes: self-executing and regulatory. A self-executing conservation statute is one that defines specifically what is required or prohibited and permits enforcement either by criminal prosecution or civil action by an injured party. The administrator has as his main task the policing of its enforcement under such a law. A regulatory conservation statute is one that broadly defines the principles sought to be effected or the goals sought to be achieved and delegates the determination of the means to be used to an agency or an administrator. The role of an administrator under such a statute is much broader than under a self-executing type of statute. INTERSTATE OIL COMPACT COMMISSION, note 22, *supra*, at 174. As a practical matter, of course, no statute fits neatly into either classification. The Ohio statute is an amalgamation of clauses, some of which may fit into one classification, some into the other, and some into neither. It *could* have been interpreted very narrowly with respect to the power of the Division.

^{159.1} Later in the *Lyons* case the Board again urged a practical approach and indicated the Chief's flexibility included the responsibility to meet with parties to arrive at a solution that satisfied the intent of the statute. Specifically in that case the Board said "the Chief may, and should, in such instance call an informal negotiation type meeting to attempt to determine prior to granting permits on regular locations which then may necessitate an exception tract, whether mandatory or voluntary pooling would be advisable."

¹⁶⁰ *Jerry Moore, Inc.* Appeal No. 1, Ohio Oil and Gas Board of Review (July 1, 1966).

pooling¹⁶¹ and exception tract¹⁶² sections of the statute. The appellant objected to the presence of other operators at the hearing and to their offers of evidence. At that time, the relevant language of the statute provided only that "either party to the appeal may submit such evidence as the board deems admissible."¹⁶³ The Board swept aside the literal language of the statute and overruled the objection raised by the Moore company. The Board noted that Moore's position was inconsistent with its demand that a hearing on mandatory pooling be permitted, since the hearing would have included the other parties who took part in the session before the Board, and found that the other parties either appeared as witnesses called by the state or that their appearances were waived by the Moore company, since it gave notice of the hearing to them.

The Board had to go beyond the literal terms of the statute as it then read to reach its result¹⁶⁴ in this appeal. In so doing it evinced an intent to take a solution oriented approach to hearings before it. Throughout its ten-year history, the Board has avoided unnecessary technical entanglements and has directed its attention to the substantive issues brought before it. Whether this approach has resulted from the Board's mindfulness of its obligation to make "the order which it finds the chief should have made"¹⁶⁵ or from other factors, it is consistent with the development of valid conservation law and it has preserved the Board's flexibility.

(2) Mandatory Pooling

The circumstances under which an operator might be entitled to a mandatory pooling order¹⁶⁶ under § 1509.27 were also at issue in the *Moore* case. The facts developed at the hearing before the Board

¹⁶¹ OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

¹⁶² OHIO REV. CODE ANN. § 1509.29 (Page Supp. 1974).

¹⁶³ Act of July 6, 1965, 131 Ohio Laws 482, 483 (repealed 1967).

¹⁶⁴ The following year, 1967, § 1509.36 was amended so that it now reads in relevant part that: "[e]ither party to the appeal or any interested persons who, pursuant to board rules and regulations has been granted permission to appear, may submit such evidence as the board deems admissible." OHIO REV. CODE ANN. § 1509.36 (Page Supp. 1974).

¹⁶⁵ OHIO REV. CODE ANN. § 1509.36 (Page Supp. 1974).

¹⁶⁶ Mandatory pooling is defined as "the bringing together as required by law or a valid order of regulation, of separately owned tracts sufficient for the granting of a well permit under applicable spacing rules." WILLIAMS & MEYERS, note 4 *supra*, at 68-69. Mandatory pooling both protects correlative rights (by permitting the participation of small tract owners who might not otherwise be able to meet spacing requirements) and prevents waste (by making it possible to enforce spacing requirements so that unnecessary wells are not drilled).

showed that the appellant wanted to drill a well on an eight acre portion of a one hundred and seventy-four acre tract.

The appellant requested a hearing pursuant to the mandatory pooling statute.¹⁶⁷ The Chief refused to hold such a hearing, however, relying on advice of the attorney general that the term "tract" as used in the statute meant, according to § 1509.01(J), "a single, individually taxed parcel of land appearing on the tax list." Since the "tract" by this definition totalled one hundred and seventy-four acres, far more than was necessary under the then applicable spacing requirements, the Chief concluded that the appellant had no right to a hearing on the question of whether or not a mandatory pooling order should be issued.

The Board criticized the position taken by the state, on the grounds that:

. . . an examination of said sections discloses that the word "tract" is used therein at least thirty-nine times and that in several instances where used a narrow construction of the language, "a single, individually taxed parcel of land appearing on the tax list" would be entirely unworkable

* * *

This Board is of the opinion, and believes that the legislature intended, that an integral part of conservation is to encourage development of oil and gas resources in the state of Ohio. As a consequence thereof, this Board questions whether, in the event a party wished to drill a wildcat well in a location similar to that set forth . . . , and a preponderance of the geological and geophysical evidence indicated a test well was warranted, and if all reasonable efforts had been made to voluntarily pool but were unsuccessful, a narrow construction of the definition of the word "tract" would be utilized to prevent such well from being drilled.¹⁶⁸

However, the Board upheld the decision of the Chief on another ground. It noted that § 1509.27 set forth two conditions that had to be met before a mandatory pooling hearing could be held. First, it had to be shown that the tract of land in question was of insufficient size or shape to meet the requirements for drilling; this, the Moore company had done. Second, however, the owner had to show that he had been unable to form a drilling unit by a voluntary pooling agreement on a "just and equitable basis."¹⁶⁹ In the *Moore* case, the

¹⁶⁷ OHIO REV. CODE ANN. § 1509.27 (Page Supp. 1974).

¹⁶⁸ *Moore*, note 160 *supra*, at 17-18.

¹⁶⁹ In 1967, § 1509.27 provided in relevant part that:

appellant had offered the owners of leases on adjacent properties the alternatives of straight cost participation or participation under an agreement by which the Moore company would pay all of the costs of drilling, completing and equipping, but the adjacent lease owners would receive nothing until twice what would have been their share of those costs had been recouped by Moore. This formulation, the appellant asserted, offered the other owners the same alternatives that they would be given by a mandatory pooling order, and was therefore "just and equitable." The Board, noting that the alternatives provided by the statute for nonparticipating owners subjected to a mandatory order were not necessarily the only alternative bases for voluntary pooling, rejected Moore's argument and explained the mandatory pooling provisions of § 1509.27 by relating them to the doctrine of correlative rights:

mandatory pooling, by definition, forces a party who is the owner or lessee of property to use that property with another lessee and/or for a purpose or price not acceptable to him. The importance of conservation, and particularly that aspect of conservation, which includes the development of the natural resources of this state, is the factor which may tip the scales in favor of forcing such a person to have his property utilized against his wishes. Such mandatory pooling should occur only, however, when the statutory conditions have been complied with.¹⁷⁰

The Board of Review thus announced its intention to take a strict approach to the availability of mandatory pooling orders. While mandatory pooling is often used as a means of protecting the corre-

If a tract of land is of insufficient size or shape to meet the requirements for drilling a well thereon . . . and *the owner has been unable to form a drilling unit under [voluntary] agreement on a just and equitable basis*, the owner of such a tract may make application to the division for a mandatory pooling order.

* * *

If an owner does not elect to participate in the risk and costs of the drilling and operation, or operation, of a well, he may elect to be a nonparticipating owner in the drilling and operation, or operation, of the well, on a limited or carried basis upon terms and conditions determined by the chief to be just and reasonable. If one or more of the participating owners bear the costs of drilling, equipping, or operating a well for the benefit of a nonparticipating owner, as provided for in the pooling order, *then such participating owner or owners shall be entitled to the share of production from the drilling unit accruing to the interest of such nonparticipating owner . . . until the . . . market value of such nonparticipating owner's share of the production . . . equals double the share of costs charged to such nonparticipating owner.* (emphasis added)

¹⁷⁰ Moore, note 160 *supra*, at 20.

lative rights of the owners of leases of small tracts, the Board, by tying its rationale to a broad definition of conservation, limited the availability of that protection where it would result in economic waste.¹⁷¹ It stated the following guidelines as to what is “just and equitable” under the circumstances:

[i]t appears that the more the well approaches being a rank wildcat, the lower the offer of override, money, etc. the party drilling the well should have to make to have made a reasonable offer, and the more the well approaches being an off-set well, the higher the value of the offer which must be made to the party who is forced to contribute to the mandatory pooling. Or, if a recoupment from production is contemplated, the larger the recovery the drilling party should have in the event of a rank wildcat; the nearer the well approaches being an offset well, the lower the penalty on the party who is forced to contribute to mandatory pooling.¹⁷²

The *Moore* decision is also of interest because the Board’s reasoning implicitly recognized the criticism of Meyers and Williams in 1965 of what they termed the “non-consent penalty provision” of the Act. Meyers and Williams had objected to the “rigid” imposition of a two hundred percent penalty in every case, stating that it would have been better to have given the Chief discretion in this respect.¹⁷³ The decision of the Board in the *Moore* case effectively adopted the reasoning of Meyers and Williams and set the stage for the amendment of § 1509.27 the following year.¹⁷⁴

(3) Exception Tract Permits

The final issue in the *Moore* case concerned the interpretation of § 1509.29, which grants the power to the Chief to issue permits for drilling on “exception tracts.”¹⁷⁵ The Moore company contended that if it could not secure a mandatory pooling order under § 1509.27, then it should be allowed to drill at its selected location under the terms of § 1509.29.¹⁷⁶ The Chief of the Division had refused to issue

¹⁷¹ Footnote omitted.

¹⁷² *Moore*, note 160 *supra*, at 20.

¹⁷³ Meyers & Williams, note 2 *supra*, at 611.

¹⁷⁴ As has been noted above, this section was amended effective December 1, 1967 to provide that the Chief should have the discretion to determine what, if any, nonconsent penalty should be levied, with two hundred percent recovery of costs being the maximum permitted rather than the rule in every case.

¹⁷⁵ OHIO REV. CODE ANN. § 1509.29 (Page Supp. 1974).

¹⁷⁶ The section in question provides in relevant part that:

the drilling permit on the advice of the Ohio Attorney General's office, based on its narrow interpretation of the meaning of the word "tract."¹⁷⁷ The Board upheld the decision of the Chief, however, on the grounds that the appellant had not shown that he had applied for a permit to drill on the exception tract and that the appellant had not established that he was unable to enter into a voluntary pooling agreement.¹⁷⁸ The Board listed four specific conditions to be met before an exception tract permit could be obtained:

(1) It must be a tract for which a drilling permit may not be issued, *and*

(2) There must be a showing by the owner-applicant that he is unable to enter into a voluntary pooling agreement, *and*

(3) The owner-applicant must show that he would be unable to participate under a mandatory pooling order, *and*

(4) The Chief must find that such owner would otherwise be precluded from producing oil and gas from his tract because of minimum acreage or distance requirements.¹⁷⁹

Less than a year later, the Board again had before it a case on the exception tract section. In *Evelyn H. Lyons*,¹⁸⁰ two leases covered a tract of land so shaped that the spacing requirements of rule NR0-1-04 could not be observed. Further, the location of the buildings on the eighteen and one-half acres in the tract was such that other Division rules calling for minimum distances from inhabited dwelling houses could not be observed. The owner of the lease had attempted, without success, to enter into a voluntary pooling agreement with the owners of adjoining leases. Mandatory pooling was impossible because the adjacent acreage was already within drilling units on which productive wells were located. The Chief granted a drilling permit pursuant to § 1509.29, and one of the adjacent leaseholders appealed the decision to the Board of Review. The Board applied the four

Upon application by an owner of a tract for which a drilling permit may not be issued, and a showing by him that he is unable to enter into a voluntary pooling agreement and that he would be unable to participate under a mandatory pooling order, the chief of the division of oil and gas shall issue a permit and order establishing the tract as an exception tract if the chief finds that such owner would otherwise be precluded from producing oil and gas from his tract because of minimum acreage or distance requirements.

¹⁷⁷ This interpretation was severely criticized by the Board; see text accompanying note 168 *supra*.

¹⁷⁸ *Moore*, note 160 *supra*, at 27.

¹⁷⁹ *Id.*, at 26.

¹⁸⁰ Appeal No. 4, Ohio Oil and Gas Board of Review, March 14, 1967.

conditions outlined in the *Moore* case to the facts and upheld the decision of the Chief. The Board also set forth, somewhat more fully than it had in the *Moore* case, its view of the rationale underlying § 1509.29. The Board approvingly quoted Richard C. McConnell,¹⁸¹ then chairman of the Technical Advisory Council.¹⁸²

Section 1509.29, popularly called the "Exception Tract Paragraph" was designed primarily for protection of correlative rights of landowners. That is, where a tract is of insufficient size and/or footage requirements, a man could not be denied his right to the oil and gas that is under him. Therefore, he is given an exception . . . [and the] percentage of the oil and gas he is permitted to produce . . . would be in direct proportion to the number of acres of the small tract . . . to the spacing acreage then in effect.¹⁸³

The Board then observed that it believed the legislature had intended that "no person should be precluded from producing oil and gas from his property because of minimum acreage or distance requirements where the [four] conditions set forth above are satisfied."¹⁸⁴

The Board's decisions with respect to exception tracts merely analyzed the terms of the statute and applied them to the fact situations that were before the Board. They are significant, however, in that they underscore the legislative intent that the exception tract section should serve as a safety valve for the protection of the correlative rights of landowners, but that it should not be too easily available.

(4) Plugging Orders

The problem most frequently dealt with by the Division in adjudication orders and by the Board of Review on appeal is the plugging of nonproducing wells.¹⁸⁵ The authority of the Division to order the plugging of idle wells stems from § 1509.12, which as originally enacted provided:

[u]nless written permission is granted by the chief of the division of oil and gas, *no owner of any oil well shall permit said well to stand more than six months without diligently pumping or flowing same.*

* * *

¹⁸¹ Now Ohio's representative on the Interstate Oil Compact Commission.

¹⁸² Created by OHIO REV. CODE ANN. § 1509.38 (Page Supp. 1974).

¹⁸³ *Lyons*, note 180 *supra*, at 11.

¹⁸⁴ *Lyons*, note 180 *supra*, at 12; *see also* *Meyers & Williams*, note 2 *supra*, at 598.

¹⁸⁵ Between October 15, 1965 and December 31, 1975, seven of the eleven appeals decided by the Board of Review involved plugging orders.

Unless written permission is granted by the chief, *all gas wells which have ceased to be productive of gas for domestic or commercial purposes and have not been operated for a period of six months shall be plugged and abandoned by the owner.*¹⁸⁶

The latter provision, as was noted by Meyers and Williams, "is aimed at fire hazard from escaping gas and at pollution of sub-surface strata."¹⁸⁷ The former provision, however, they called "curious" in that it established "an absolute statutory duty of operation as a substitute . . . for the common-law duty of prudent operation."¹⁸⁸

As has been noted above,¹⁸⁹ the statute was amended in 1967 to remove the six month statutory period, with a capability test being substituted.

Unless written permission is granted by the chief, *any well which is or becomes incapable of producing oil or gas in commercial quantities shall be plugged*, but no well shall be required to be plugged under this section which is being used to produce oil or gas for domestic purposes, or which is being lawfully used for a purpose other than production of oil or gas.¹⁹⁰

In 1969 the Board of Review was faced with the issue of the meaning of the amendment, as it considered two cases in which plugging orders were issued by the Chief. In *Noble Cunningham*¹⁹¹ and *John S. Kidd, Sr.*,¹⁹² it was clear that the wells had not been producing commercially for periods ranging from one year to eighteen months at the time of the adjudication orders. The appellants asserted that the deletion of the references to six months and the use of the word "incapable" in the 1967 amendment to § 1509.12 were intended to eliminate the statutory duty of operation identified by Meyers and Williams and to revert to the common law duty of prudent operation.¹⁹³ The state, on the other hand, contended that the 1967 amendment was intended to give the Chief of the Division of Oil and Gas more latitude to act with respect to the issuance of plugging orders.

¹⁸⁶ 131 Laws of Ohio 467 (emphasis added).

¹⁸⁷ Meyers & Williams note 2 *supra*, at 596.

¹⁸⁸ *Id.*

¹⁸⁹ See text accompanying notes 83-85, *supra*.

¹⁹⁰ OHIO REV. CODE ANN. § 1509.12 (Page Supp. 1974) (emphasis added).

¹⁹¹ Appeal No. 7, Ohio Oil and Gas Board of Review, September 10, 1969 appealed to Franklin County Court of common Pleas, Case No. 437-238271, *dismissed* April 27, 1971.

¹⁹² Appeal No. 8, Ohio Oil and Gas Board of Review, September 10, 1969; appeal dismissed by the Franklin County Court of Common Pleas September 19, 1969.

¹⁹³ Such a duty to use reasonable diligence to produce the lease has been found to exist in Ohio in *Tedrow v. Shaffer*, 23 Ohio App. 33, 155 N.E. 510 (1926).

The Board of Review accepted the state's argument and refused to interpret the 1967 amendment as a reversion to the common law duty of prudent operation. It concluded that in repealing the six month provisions the legislature had intended to eliminate "the possibility that it would be improperly interpreted as authorizing a six-month's delay in operations . . ." ¹⁹⁴ by imposing a statutory duty of prudent operation and expanding the power of the Chief to order plugging where he had "reasonable grounds to believe that such well is not or will not produce oil or gas in commercial quantities." ¹⁹⁵

The reasoning of the board in the *Cunningham* opinion is not entirely convincing, although its conclusion appears warranted. The Board based its interpretation primarily on the 1967 report by the Ohio State Bar Association's Committee on Oil and Gas Law, which had drafted the language that later became House Bill 310.

This amendment constitutes legislation designed to promote reform in the law. The existing statutory language suggests that an owner may permit a well to stand almost six months and if written permission is granted by the chief of the division of oil and gas, may go longer than six months without diligently pumping or flowing same. Oil and gas cases dealing with the implied covenant to diligently operate a lease impose the prudent operator standard upon all operators. In some instances a prudent operator would not permit a well to stand for thirty days without diligently pumping same. An arbitrary six months figure creates confusion and could encourage litigation over the question whether the statutory language intended to permit a six months delay in operations. ¹⁹⁶

In fact, however, the language of the Bar Association Committee Report is ambiguous and certainly not inconsistent with the conclusion that the intent of the amendment is to revert to the common law prudent operator standard; the Bar Committee simply criticized the arbitrary six month's figure. The key to the Board's reasoning may be seen from the following:

[a] literal interpretation of the 1967 amendment to Section 1509.12 . . . would . . . impose upon the state a duty to establish scientific proof that an idle well was not capable of producing oil or gas in

¹⁹⁴ Brief for Attorney General, quoted with approval in *Noble Cunningham*, note 191 *supra*, at 7.

¹⁹⁵ *Id.*, at 10.

¹⁹⁶ Report of the Oil and Gas Law Committee, 39 OHIO BAR 1225, 1227 (1966).

commercial quantities. Surely, the legislature did not intend to impose such an unreasonable burden upon the division of oil and gas.¹⁹⁷

* * *

[T]here are many instances when wells should not be allowed to stand idle for more than a few days and certainly not a six-months period; in cases of such oil and/or gas wells, there may be fire hazards, the possibility of leakage or seeping and even other hazards from open but uncompleted wells.¹⁹⁸

* * *

[We are] of the opinion that the basic intent of the revised 1509.12 was to allow the Chief more latitude in carrying out the initial legislative mandate of not allowing wells to stand idle¹⁹⁹

Thus, the Board of Review again seized the opportunity to assert that Ohio's conservation legislation was to be broadly administered.

The prudent operator standard is the usual test for determining whether the implied covenants have been met by oil and gas operators. The lessee is required under it to reach the level of performance that would be met by an ordinary, prudent operator under the same or similar circumstances.²⁰⁰ Ohio's statutory duty, as viewed by the Board of Review, differs primarily in that it focuses not on what a hypothetical prudent operator would do under the circumstances, but rather on the reasonableness and good faith of the Chief of the Division of Oil and Gas, and on the integrity of the administrative system rather than on the substantive issue of whether the well is technically capable of production. The "test is whether the Chief of the Division of Oil and Gas has reasonable grounds to believe that such well is not or will not produce oil or gas in commercial quantities."²⁰¹ The Board's decision reflects a sound administrative policy, although, as will be noted below, the delegation of authority that the Board found in the 1967 amendment²⁰² has been challenged in the courts.²⁰³

Having concluded that the 1967 amendment did not adopt the prudent operator standard, the Board suggested a number of criteria for determining whether the Chief had reasonable grounds to believe that a given well was incapable of producing oil or gas in commercial quantities. The criteria were:

¹⁹⁷ Brief for Attorney General, quoted in *Noble Cunningham*, note 191 *supra*, at 8.

¹⁹⁸ Note 191 *supra*, at 10.

¹⁹⁹ *Id.* at 11.

²⁰⁰ See *Meyers & Williams*, note 2 *supra*, at 315.

²⁰¹ *Noble Cunningham*, note 191 *supra*, at 10.

²⁰² Act of Sept. 1, 1967, 132 Ohio Laws 693 (effective Dec. 1, 1967); 132 Ohio Laws 693.

²⁰³ See discussion of *State v. Wallace* in text accompanying notes 208-33.

(1) Has the owner of the well requested permission from the chief for the well to stand idle and presented firm, reasonable plans which he is capable of carrying out to produce oil or gas in commercial quantities?

(2) How recently the well has, in fact, produced oil or gas in commercial quantities and how much oil or gas has been sold?

(3) Is the well equipped sufficiently with both surface and in hole equipment to allow for commercial production?

(4) How recently have actual good faith on-site attempts been made to produce the well in commercial quantities?

(5) Has the state caused investigation to be made on the well site?²⁰⁴

Four years later, in its next opinion dealing with the plugging provisions of the law, the Board added a sixth criterion. In *Sickafoose*,²⁰⁵ the appellant contended that the power of the Chief to order the plugging of idle wells was limited by § 1509.05, which requires a permit for the drilling of a well. The appellant argued that where the Chief granted a permit²⁰⁶ to drill a well, the Chief has no right to use the plugging order to force the diligent completion and equipping for production of that well. An uncompleted well, argued the appellant, could not be considered incapable of producing oil and gas.^{206.1} The Board of Review rejected these contentions and held in favor of the Chief, relying upon the five criteria suggested in *Cunningham* and suggesting that the question whether the well had been drilled to its intended depth should be an additional criterion in determining whether the Chief's actions were reasonable.^{206.2} This additional criterion seems to presume that § 1509.05 creates a requirement of due diligence in the completion of a permitted well. The impact of the sixth criterion is that failure to continue a well to its intended geological horizon or to complete it within a reasonable time after commencement of drilling is a factor to be weighed against the operator and in favor of the Chief in determining whether the Chief's plugging order was reasonable. In brief, the operator must proceed with diligence to complete and equip his well or risk a plugging order.

²⁰⁴ Note 191 *supra*, at 11.

²⁰⁵ Appeal No. 16, Ohio Oil and Gas Board of Review (January 31, 1973) appealed to Franklin Co. Court of Common Pleas on March 1, 1973, Case No. 73CV-03-762, *dismissed* November 12, 1974.

²⁰⁶ Rule NRo-0-02.

^{206.1} *Sickafoose*, note 205 *supra*, at 5.

^{206.2} *Id.* at 9-10.

The limits of the Chief's power to order the plugging of idle wells were tested three more times before the Oil and Gas Board of Review in 1973 and 1974, but the tests led to no new administrative developments.²⁰⁷ The law in this area would be clear but for a 1974 court opinion and a 1975 ruling of the board. *State v. Wallace*,²⁰⁸ the only reported judicial opinion interpreting the Ohio oil and gas conservation law, did not result from an appeal of a decision of the Board of Review, but rather from a prosecution instituted under § 1509.99²⁰⁹ by the attorney general. In March, 1974, the Findlay Municipal

²⁰⁷ In *Lynn*, Appeal No. 17, Ohio Oil and Gas Board of Review (January 17, 1973), the Board applied principles laid down in *Cunningham* to another fact situation with the same result. *Lynn* involved a plugging order issued against the operator of an oil well drilled in the late 1930's and located within the city of Cleveland, close to the waters of Lake Erie. No production from the well had been sold for several years previously and a fire at the site in 1970 had destroyed some of the equipment necessary to produce the well. The appellant claimed that the Chief's order in 1971 to plug the well was unreasonable because the well was capable of producing oil and gas. The appellant asserted that there was significant bottom hole pressure and that the well was standing full of fluid which was primarily oil. Finally, the appellant contended that he had made diligent efforts to produce the well, but because of his concern about legal action that might be instigated by the owners of a salt mine adjacent to the well, he had been unable to bring his efforts to fruition. The Board rejected the appellant's contentions and upheld the Chief's order, noting that the well was not presently equipped to produce, and that if it were equipped to produce, relogging and refracturing would be necessary.

In *Worthington Oil Company, Inc.* Appeal No. 18, Ohio Oil and Gas Board of Review (August 29, 1973) (appealed to Franklin County Board of Common Pleas, Case No. 73CV-12-4236, *dismissed*, July 29, 1975), the facts established that the well, located in the one-time boom area of Morrow County, had been drilled by an unknown company several years prior to 1968. In 1968 *Worthington Oil Company* reopened the hole and began to produce the well, though no production was sold in 1968. Only one tank of oil was sold in 1969, and after that date neither gas nor oil production had been sold from the well. No attempts had been made to produce the well since September, 1972. On this basis, the Board upheld the Chief's order, referring again to the criteria it had previously set forth to determine whether the Chief's actions in any given case were reasonable. The appellant appealed the decision of the Oil and Gas Board of Review to the Franklin County Court of Common Pleas (Case No. 73CV-12-4236). It was dismissed as moot on July 29, 1975 after the appellant plugged all the wells on the premises in question.

The Board's most recent interpretation of the plugging provisions of the oil and gas law came in *Baldwin Producing Corp.* Appeal No. 13, Oil and Gas Board of Review (October 15, 1974), which involved some 400 to 500 wells located on several leases purchased by the appellant in 1968. All of the wells in question had been drilled many years prior to 1968, some in the second decade of the century, and many of them were buried beneath the surface of the land. The appellant had purchased the leases with the vaguely formed intent of reworking the wells at a later point in time, but had been forced to plug them by orders from the Division of Oil and Gas. Again, the Board of Review adhered to the principles enunciated in its earlier decisions in upholding the Chief's order. The appellant appealed to the Franklin County Court of Common Pleas (Case No. 74CV-11-4255), where the appeal is pending.

²⁰⁸ 40 Ohio Misc. 2d 29, 318 N.E.2d 883 (1974).

²⁰⁹ OHIO REV. CODE ANN. § 1509.99 (Page Supp. 1974).

Court ruled that § 1509.12,²¹⁰ the plugging section of the statute, was an unconstitutional delegation of legislative authority. The case arose from an adjudication order issued by the Division without a hearing,²¹¹ ordering plugged three wells on leases owned by M. Neil Wallace. Mr. Wallace simply ignored that order; he did not appeal to the Board of Review or to the courts, and he did not even communicate with the Division. In December, 1973 the Division sought to enforce its order by prosecuting Mr. Wallace under § 1509.99.²¹² When the defendant was arraigned, his counsel claimed that the plugging statute was an unconstitutional delegation of authority by the legislature, and moved for dismissal of the complaint. The court granted permission for briefs to be filed on the issue of constitutionality, but the state failed to file its brief on time, and the court ruled on the motion to dismiss on the basis of the defendant's brief alone. The court focused on the phrase "incapable of producing oil or gas in commercial quantities" as used in § 1509.12, noting that it appeared "to leave the Chief without the slightest guidelines in issuing plugging orders,"²¹³ and held that the Chief had "exercised authority that was not his to accept nor the Legislature [sic] to give."²¹⁴

On the state's motion for reconsideration, the municipal court restated its position that:

to permit the Chief of the Division of Oil and Gas to order a well to be plugged, which is or becomes incapable of producing oil and gas in commercial quantities, is an unwarranted and unconstitutional delegation of legislative authority, absent a clear and definable guideline for such a determination.²¹⁵

* * *

²¹⁰ § 1509.12 requires in relevant part that:

[u]nless written permission is granted by the chief, *any well which is or becomes incapable of producing oil or gas in commercial quantities shall be plugged . . .* When the chief finds that a well should be plugged, he shall notify the owner to that effect by order in writing and shall specify in such order a reasonable time within which to comply. No owner shall fail or refuse to plug a well within the time specified in the order. Each day on which such a well remains unplugged thereafter constitutes a separate offense (emphasis added).

²¹¹ Adjudication Order 178, July 20, 1972.

²¹² The Division can attempt to effectuate its plugging orders by seeking an injunction under § 1509.04, by bond forfeiture under § 1509.071, or by prosecution under § 1509.99, which provides for fines from \$100 to \$500 for a first offense, and from \$200 to \$1000 for subsequent violations. In *Wallace*, there was no bond because the wells in question were drilled prior to the enactment of the statutory requirement. The state elected to prosecute rather than to seek an injunction because it feared Mr. Wallace would leave the state, rendering an injunction unenforceable as a practical matter.

²¹³ 40 Ohio Misc. 2d at 30-31, 318 N.E.2d at 885.

²¹⁴ *Id.* at 31, 318 N.E.2d at 885.

²¹⁵ *Id.* at 33, 318 N.E.2d at 886-87.

It is possible for the Legislature to clothe the Chief of the Division of Oil and Gas with the power to order a well to be plugged. But, when they give him, alone, unbridled authority to determine if any one well is producing in commercial quantities, that is an unconstitutional delegation of legislative authority because there are no guidelines.²¹⁶

The court of appeals dismissed the state's appeal²¹⁷ on procedural grounds that were upheld by the Ohio Supreme Court.²¹⁸ The ruling of the municipal court as to constitutionality we think was clearly wrong. In reaching its decision, the court relied on *Matz v. Curtis Cartage Co.*²¹⁹ In that case the Ohio Supreme Court held that "[a]s a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional. . . ."²²⁰ The supreme court in *Matz* went further, however, and stated an exception to the general principle, into which the facts of both the *Matz* case and the *Wallace* case fall:

but when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.²²¹

The *Matz* case, on the basis of this exception, upheld the right of the legislature to delegate authority to the public utilities commission to prescribe safety regulations for motor transportation companies. *Matz* may be distinguished from *Wallace* in that the public utilities commission had promulgated safety regulations for motor vehicles, whereas the Chief had never exercised his general authority under § 1509.03²²² to promulgate rules defining when a well becomes incapable of producing in commercial quantities. As has been noted, however, the Oil and Gas Board of Review has devoted considerable attention to the definition of the phrase "incapable of producing oil

²¹⁶ *Id.* at 35, 318 N.E.2d at 887.

²¹⁷ *State v. Wallace*, Case No. 5-74-7 (Ohio Ct. of App., Third App. Dis., June 5, 1974).

²¹⁸ *State v. Wallace*, 43 Ohio St. 2d 1, 330 N.E.2d 697 (1975).

²¹⁹ 132 Ohio St. 271, 7 N.E.2d 220 (1937).

²²⁰ *Id.* at 272, 7 N.E.2d at 222.

²²¹ *Id.*

²²² OHIO REV. CODE ANN., § 1509.03 (Page Supp. 1974).

or gas in commercial quantities.”²²³ The memorandum filed by the state in support of its motion to reconsider directed the attention of the court to those determinations,²²⁴ but without success. Furthermore, as was also noted in the attorney general’s memorandum,²²⁵ the term “commercial quantity” is well defined by precedent, custom, and usage in the industry. Williams and Meyers²²⁶ define “commercial quantity” as “a quantity of oil, gas or other minerals sufficient for production in paying quantities,” *i.e.* “production in quantities sufficient to yield a return in excess of operating costs, even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss.”²²⁷ In other words, the phrase “incapable of producing oil or gas in commercial quantities” means that the well is incapable of returning its marginal costs, and that point is reached when the cost of operating the well exceeds the revenue to be derived from operating it.²²⁸ Furthermore, similar delegations of authority in the oil and gas legislation of other states have repeatedly been upheld.²²⁹

The legislature’s delegation of authority to the Chief of the Division of Oil and Gas to determine whether a well is incapable of commercial production is precisely the sort of delegation which the Supreme Court of Ohio had in mind when it laid down the exception to the general rule in *Matz*. The Ohio oil and gas law is a conservation statute, aimed at securing the rational and beneficial development of the oil and gas resources of the state. Wells no longer capable of economical production must be properly plugged in order to protect the environment and the safety of the populace. Whether a specific well has become incapable of producing oil or gas in commercial

²²³ See text at notes 185-206 *supra*.

²²⁴ Memorandum for State at 7.

²²⁵ *Id.*

²²⁶ See WILLIAMS & MEYERS note 4 *supra*, at 60.

²²⁷ *Id.* at 307-08.

²²⁸ See also A. WILLIAMS AND C. MEYERS, TREATISE ON OIL AND GAS LAW, § 604.6.6(H) and discussion notes, 12 OIL AND GAS REV. 695 (1960).

²²⁹ For example, in *Wotton v. Bush*, 41 Cal. 2d 460, 261 P.2d 256 (1953), it was contended that the use of the phrase “field producing oil or gas” in the California statute without definition was an unconstitutional delegation of legislative authority. The California Supreme Court, however, held that the phrase “has an understandable meaning” in the industry and that the Administrator had applied the phrase consistently for over sixteen years (when interpreting the procedures of the statute in question), so that it must be assumed that the legislature intended this construction to establish the standard. 261 P.2d at 261. The court concluded that the delegation of power was limited by sufficient criteria to avoid a finding of an unconstitutional delegation of legislative discretion. See also the cases collected in 1A W. SUMMERS, THE LAW OF OIL AND GAS, § 106 at 182-85 nn. 34-35 (1954).

quantities is a determination that must be made on a well by well basis, as the attorney general argued. A statutory attempt to define the multitude of details that must be considered in making that determination of productive capability would have seriously taxed legislative ingenuity,²³⁰ and would probably have been a waste of time, given continued technological advances in production techniques.

In the nature of things there must be many things on which the wisdom of legislation must depend, which can only properly be determined in the course of administration of the legislative will as expressed in law There is in this no delegation of legislative power, but it is the imposition of an administrative duty in order to give practical effect to the enactment.²³¹

The *Wallace* case, of course, was a decision of Ohio's lowest court, and so of dubious precedential value. It presents a hindrance to the orderly development of oil and gas law in Ohio, however, because it was reported (unlike most decisions of courts of that level) and because it is at the municipal court level that most enforcement proceedings are brought.²³²

The state has met the *Wallace* decision squarely, instituting prosecutions on facts similar to those of *Wallace* with the intent of obtaining opinions from other courts to counterbalance *Wallace*. As of this writing, only two opinions resulting from the state's activity have come to light. One is an unpublished decision of the municipal court of Bowling Green in which the court refused to follow the *Wallace* reasoning on grounds similar to those outlined above.²³³ In the other, also unpublished, the County Court of Putnam County followed the *Wallace* decision.^{233.1} It is to be hoped that the Bowling Green decision will be followed by other courts. It is also hoped

²³⁰ See *Yee Bow v. City of Cleveland*, 99 Ohio St. 269, 273, 124 N.E. 132 (1919) quoted in *Matz*, note 219 *supra*, at 282-83, 7 N.E.2d at 226.

²³¹ *Green v. State Civil Service Commission*, 90 Ohio St. 252, 107 N.E. 531 (1914), quoted at *Matz*, note 219 *supra*, at 283-84, 7 N.E.2d at 226.

²³² In this connection, it is interesting to note that *Wallace* was relied upon by the County Court of Harrison County in ruling unconstitutional a portion of Ohio's Mining Reclamation Act in *State v. Consolidation Coal Co.*, Central Division, 43 O. Misc. 77 335 N.E.2d 403 (1974), on procedural grounds (appeal *dis*sm'd by the Ohio Supreme Court).

²³³ *State v. Cherry Hill Village Company*, Municipal Court of Bowling Green, Ohio, Case No. 75-CR-B-430, opinion dated October 20, 1975 overruling motion to dismiss.

^{233.1} *State v. Wallace*, County Court of Putnam County, Case No. 75CR8-9B, December 15, 1975; presently on appeal to the Court of Appeals for the Third Appellate District, Case No. 12-75-10.

that such opinions will be published or otherwise made available to the practicing bar.

Vohlers gave rise to a potentially troubling opinion of the Board of Review concerning plugging.²³⁴ The Board had before it a plugging order issued by the Division of Oil and Gas affecting a residential lot in Lorain County. Apparently, the owners of the lot, Mr. and Mrs. Vohlers, had purchased the property without actual knowledge that oil and gas wells had ever been drilled on it. Subsequently, gas was discovered bubbling to the surface in a drainage ditch on their property. The Division of Oil and Gas alleged that the gas came from an unplugged well and issued a plugging order against the Vohlers. The Board overruled the Chief on the grounds that he had failed to sustain his burden of proof that the gas came from a well (rather than from a fissure) and that the Vohlers were the owners of the well.

It is entirely proper that the Chief should have had the burden of proof in the hearing. As the Board noted in its opinion, the appellants' only opportunity to have the evidentiary hearing envisioned by Ohio's Administrative Procedure Act²³⁵ came when they appeared before the Board of Review. There ought to be no presumption in favor of the ruling of the Chief in such a situation.²³⁶ The Board should look first at the facts on which the disputed order of the Chief was based and, on the basis of the evidence presented to it, determine whether the burden of proof has been met by the Division. Then, the Board should determine whether the facts established are sufficient to justify the order issued as reasonable and lawful in light of the criteria laid down by the Board in earlier decisions or other criteria which may appear relevant. Moreover, one cannot dispute the Board's finding that the Chief had failed to establish there was a well within the meaning of the statute. The law grants the Chief the right to order the plugging of wells²³⁷ and a well is defined as a bore hole.²³⁸ As the Board noted, "the evidence presented of the bubbling of gas was not inconsistent with either the conclusion that there was a bore hole on land in the vicinity not belonging to the appellants or

²³⁴ Appeal No. 20, August 20, 1975 appealed to Franklin County Court of Common Pleas, Case No. 75CV-10-4423.

²³⁵ Ohio Rev. Code Ann. § 119.06 (Page 1969) provides that no adjudication order shall be valid unless an opportunity for a hearing is afforded. However, (c) excepts from this rule an order of an authority within an agency if there is a right of appeal (either by statute or the rules or the agency) to a higher authority within such agency and a right to a hearing on appeal.

²³⁶ *Bloch v. Glander*, 151 Ohio St. 381, 86 N.E.2d 318 (1949).

²³⁷ OHIO REV. CODE ANN. § 1509.12 (Page Supp. 1974).

²³⁸ OHIO REV. CODE ANN. § 1509.01(A) (Page Supp. 1974).

with the conclusion that there was no bore hole at all and the gas bubbling came from natural sources"²³⁹ Nor can one quarrel with the Board's criticism of the Chief's failure to produce a "title opinion or abstract as evidence for the Board to consider as to the existence of outstanding oil or gas leases."²⁴⁰ If there is an outstanding valid oil and gas lease covering the premises, then the lessee under that lease is the owner of any wells upon the property within the meaning of section 1509.12.²⁴¹ Therefore, the Division should have the obligation of establishing that it is the landowner who has the right to drill on the tract, either by presentation of current title evidence or by the use of other competent evidence.²⁴²

The Board went further than it needed to—indeed, too far—however, when it found that the Chief had not established that the Vohlers were the owners of the alleged well. The Board found that the Chief had failed to sustain the burden of proof imposed because one of his own exhibits, the warranty deed held by the Vohlers, contained a restriction against oil or mining operations, and because of the lack of any current outstanding oil or gas leases covering the premises.²⁴³ The Board overlooked the meaning of the restrictions in the warranty deed. Traditionally, property ownership has been described as a bundle of sticks. A restriction on use in a deed is simply a covenant between the grantor and the grantee and his successors in interest that one or more of those sticks will not be used. The existence of the restriction does not mean that the stick, the right to conduct drilling operations in this case, does not pass from the grantor to the grantee.²⁴⁴ Thus, the restrictions in the deed from the Vohler's grantor to them were logically irrelevant to the question of whether the Vohlers were, under the conservation statute, the owners of any existing wells on their property.

It is important to note that the Board in *Vohlers* did not overrule

²³⁹ *Vohlers*, note 234 *supra*, at 10.

²⁴⁰ *Vohlers*, note 234 *supra*, at 13.

²⁴¹ See discussion in text accompanying notes 244-251.

²⁴² For example, if there had been available in the *Vohlers* case a title opinion or abstract indicating the presence of no outstanding oil and gas leases affecting the property when the Vohlers purchased it, and if the state had elicited from Mr. and Mrs. Vohlers testimony to the effect they had granted no leases on the property, then the Board could properly have concluded that the Vohlers were the owners of the well within the meaning of the statute even in the absence of current title information.

²⁴³ *Id.* at 13. If there had been an outstanding oil and gas lease on Vohlers' premises, the lessee would have been the "owner" under § 1509.12 rather than the Vohlers.

²⁴⁴ A restrictive covenant is a restriction on use, but not a derogation of the estate. 7 J. GRIMES, THOMPSON ON REAL PROPERTY § 3162 at 121 (1962 Repl.).

the criteria established in previous cases²⁴⁵ for determining the reasonableness of plugging orders. The Board properly distinguished the *Vohlers*' fact situation from the pattern of previous cases by noting²⁴⁶ that those earlier cases dealt with the question whether existing oil and gas wells were capable of producing in commercial quantities rather than the fact of the existence of the well. Because *Vohlers* is distinguishable on its facts from the earlier plugging cases considered by the Board, and bearing in mind the quasi-judicial nature of the Board and the practical functions it serves under the Ohio statute, it is to be hoped that future Board of Review hearings will not become bogged down in lengthy debates over what is necessary to meet the burden of proof.

The Board's decision in *Vohlers* is not inconsistent with the position of the Chief that, if the operator cannot be held accountable, the landowner should be obligated to plug any nonproducing wells on his property.²⁴⁷ Even this analysis does not, however, provide a totally equitable answer to the problem of orphan wells. There are probably several thousand unplugged abandoned wells in Ohio whose operators are no longer available.²⁴⁸ It does not seem fair or politically acceptable to hold the present landowners responsible for plugging them.

²⁴⁵ See the discussion in the text accompanying notes 190-207, *supra*.

²⁴⁶ *Vohlers*, *supra* note 234, at 8.

²⁴⁷ There are at least three compelling policy justifications for the Chief's position. First, until the legislature allocates monies to be applied to plugging in such cases, there is no other source of funds to do the necessary job. The purpose of plugging is to prevent physical waste and pollution and to promote safety; an unplugged well not capable of commercial production is either a present or potential source of waste, pollution or danger. Douglass, *The Obligations of Lessees and Others to Plug and Abandon Oil and Gas Wells*, 25 Ann. Inst. on Oil and Gas Law and Taxation 123, 124 (1974). Plugging is central to the effectiveness of the statute, and the logical legislative intent to be attributed to the provisions requiring it would define "owner of the well" so as to include the landowner in the absence of a viable operator. Second, the landowner (or his predecessors) has had, through royalties, the benefits of oil and gas operations and has the possibility of profit from future operations on the premises; the burden should follow the benefits. This statement assumes, of course, that the landowner owns the mineral rights, as is almost always the case in Ohio and will become more so as the impact of the 1973 amendment applying Ohio's Marketable Title Act, §§ 5301.47-56, to severed oil and gas interests after December 31, 1976 is felt. Third, the landowner usually becomes the legal owner of the well at the time, or soon after, the last well on the premises stops producing, due to the expiration of the oil and gas lease. Thus, the landowner is entitled to any value contained in the equipment left on the well and should be held responsible for the costs of plugging it.

²⁴⁸ The Chief of the Division of Oil and Gas testified in 1974 to the legislative committees then considering Amended House Bill 221, which broadened the scope of § 1509.071 to permit what monies were available in the oil and gas well plugging fund to be applied to the plugging of orphan wells, that the Division had identified at least 1900 such wells, but that there were certainly many more not yet located by the Division.

A practical answer to this dilemma is found in a bill pending before the Ohio legislature. Amended House Bill 28²⁴⁹ would direct a portion of the severance taxes paid on hydrocarbons extracted from currently producing Ohio wells to the fund established by § 1509.071²⁵⁰ for the plugging of orphan wells,²⁵¹ thus imposing upon the present industry the burden of correcting the oversight of its predecessors. The problems noted above may be rendered moot by enactment of this or similar legislation.

On the whole, the statutory interpretations discussed have been consistent with the definition of conservation developed above and with the purpose of the oil and gas conservation law. The Board of Review has given itself and the administrator broad latitude to make decisions within the framework of the law, has limited the availability to operators of the exception tract and mandatory pooling remedies, and has found a statutory duty to produce. Almost as important, the interpretations of the Board and their application by the Division have apparently been accepted by the regulated industry.

Although the *Wallace*²⁵² decision is regrettable and the reasoning of the Board of Review in the *Vohlers*²⁵³ opinion leaves something to be desired, those decisions do no significant damage to the interpretative pattern that has evolved. *Wallace* is simply a bad decision, probably motivated by the failure of the attorney general's office to file its brief on time. Whatever precedential value it has will likely be overcome by the series of cases being pressed by the attorney general's office. The *Vohlers* opinion, on the other hand, has little value as precedent because it turned upon a determination that the Division had failed to meet its burden of proof.

In sum, the interpretations of the oil and gas conservation statute given during its first ten years generally have lent support to its statutory scheme. Though they have not been numerous or widely

²⁴⁹ Am. H.B. 28, 111th General Ass'm. 1st sess. (1975), passed by the House on March 25, 1975; presently pending before the Senate Rules Committee.

²⁵⁰ OHIO REV. CODE ANN. § 1509.071 (Page Supp. 1974).

²⁵¹ In its present form, Am. H.B. 28 provides that § 5749.02 of the severance tax statute shall be amended so that

not to exceed twenty-five percent [of the monies received by the treasurer of state from severance taxes] shall be credited to the oil and gas well plugging fund to be used to restore distressed lands, plug abandoned wells, or use abandoned wells for the injection of oil and gas production wastes.

²⁵² *State v. Wallace*, note 208, *supra*.

²⁵³ Note 234 *supra*. Appeal No. 20, *Vohlers v. State*, Ohio Oil and Gas Board of Review, August 22, 1975.

publicized, the interpretations provide a sound basis for administration of the law.

IV. CONCLUSION

Ohio's oil and gas conservation statute has provided a solid foundation for the orderly development of this state's oil and gas resources during the past ten years. As has been noted above, many of the issues that initially concerned commentators and practitioners have been resolved by amendment or an interpretation by the Board of Review. Further, rules and regulations consistent with the goals of the statute have been adopted.

The coming years should see increased drilling and production activity in Ohio. As the energy shortage worsens, the incentive for operators to seek out previously marginal sources of production in Ohio will increase. Furthermore, Ohio industry has already begun, with the encouragement of the Public Utilities Commission,²⁵⁴ to explore for and develop additional reserves of natural gas within the state, thus introducing a new factor to the industry in this state.

Rising prices for oil and gas and increased drilling activity will likely place new stresses on the statutory system. As was demonstrated during the Morrow County boom some twelve years ago, problems that can be ignored or handled on an ad hoc basis when drilling activities are at low or moderate levels loom threateningly as the level of activity increases. Furthermore, the current activity of Ohio's oil and gas industry and the increased value of the interests at stake are likely to result in more frequent challenges to actions of the Division of Oil and Gas. While the statutory scheme is basically sound and it is likely that the courts will give substantial weight to the administrative interpretations and practices developed, there are several steps that should be taken in the near future.

²⁵⁴ On October 31, 1975, in Case No. 73-761-G, In the matter of the Development of the Supply of Natural Gas Within the State of Ohio, the Public Utilities Commission of Ohio liberalized the guidelines under which industrial natural gas users may develop resources within the state and transport gas by intrastate pipelines to their industrial plants, so that industries participating in the so called "self-help" plans may be entitled to all of the gas found through their efforts in addition to their allocations established by the Public Utilities Commission of Ohio and the public utilities which supply them. Originally, guidelines issued in this same case on October 18, 1973, had provided that the industrial users would be entitled to fifty percent of the gas made available to the public utilities pipelines through such schemes. On January 23, 1975, that standard was increased to seventy-five percent. Despite numerous questions of interpretation and application, the January and October, 1975 amendments have resulted in the creation of a substantial number of self-help plans under which Ohio industry is participating in drilling activities within the state.

First, the statute should be amended to strengthen the Chief's authority to act to prevent waste of petroleum. He should be empowered to bar the flaring of natural gas, to establish spacing requirements with more flexibility, and to issue rules prohibiting waste after consultation with the Technical Advisory Council. With burgeoning need and activity, the importance of these and other statutory amendments suggested herein will become increasingly apparent.

Second, the rules and regulations under which the statute is administered should be reviewed in view of the increased activity anticipated. Existing procedures and standards applied by the Division should be specifically stated to provide guidance to newcomers to the industry and to ensure continued compliance by those presently operating in the state. The amounts of the plugging and restoration bonds required to be posted should be increased somewhat to maintain the force of the lever of forfeiture. Current well spacing requirements and saltwater disposal standards should also be reexamined. A long range plan for the development of additional rules should also be adopted.

Finally, the problem presented by this state's legacy of orphan wells should be met by the enactment of House Bill 28 or similar legislation. It may be that the impetus for legislative action in this respect will have to come from enforcement by the Division of present plugging provisions against selected landowners.

In sum, Ohio's oil and gas conservation law goes far toward insuring the orderly and beneficial development of this state's oil and gas resources during the acute energy shortages of the latter half of the 1970's and thereafter, and provides a foundation upon which the erection of a coherent and substantive legal structure can and must continue.