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Amendment to Ohio's Environmental Protection Verified Complaint Law

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S. B. 284: AMENDMENT TO OHIO'S ENVIRONMENTAL PROTECTION VERIFIED COMPLAINT LAW

In May of 1980, the 113th Ohio General Assembly enacted Senate Bill 284 to amend section 3745.08 of the Ohio Revised Code.[1] The purpose of the enactment is stated to be clarification of procedures utilized for filing and resolving complaints of alleged violations of specific pollution control laws.[2] The bill was enacted in response to the recommendation[3] of the Ohio Environmental Protection Agency (OEPA)[4] that changes and clarification of procedures regarding verified complaints were necessary.[5]

Of particular concern to the OEPA was the exercise of hearing rights as a dilatory tactic by persons charged in a complaint.[6] The OEPA asserts that a hearing requirement prior to an order becoming effective permits the alleged pollution danger to continue unabated until an adjudicatory hearing is concluded.[7] The OEPA also takes the position that when a hearing before the agency is demanded by everyone affected by verified complaints, the entire environmental regulatory system is stultified.[8] The General Assembly responded to

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1. Am. S.B. 284, 113th General Assembly (1980) (codified in OHIO REV. CODE ANN. § 3745.08 (Page Supp. 1980) (effective Aug. 7, 1980)).

2. The bill's enacting clause states: "An Act . . . to amend section 3745.08 of the Revised Code to clarify procedure for resolution of complaints by public officials and persons allegedly aggrieved or adversely affected by a violation of pollution control law."

3. OHIO REV. CODE ANN. § 3745.01(F) (Page 1980). This section permits the Director of the OEPA to make recommendations to the General Assembly for legislation he considers appropriate to carrying out his duties or in the accomplishment of the legislative purpose in creating the OEPA, *supra* note 1.

4. When the Ohio General Assembly created the OEPA in 1972, it intended that the agency be a unified anti-pollution authority with broad powers to prevent as well as abate pollution of the environment. OHIO REV. CODE ANN. § 3745.011(B), (F) (Page Supp. 1980).

5. Interview with Patterson Pepple and Sidney Stein, OEPA Legislative Liaison and Assistant to the OEPA Legal Advisor, respectively (Sept. 14, 1980) [hereinafter cited as Interview with OEPA Legislative Liaison]. Mr. Pepple contacted Senator Kenneth R. Cox regarding the proposed amendment. Senator Cox subsequently introduced S.B. 284 in the Senate on Sept. 20, 1979. On Feb. 21, 1980, it was reported by the Senate Committee on Agriculture, Conservation, and Environment [hereinafter cited as Senate Comm.] and passed in the Senate on Feb. 28, 1980. The House Energy and Environment Committee reported S.B. 284 on April 16, 1980 and subsequently enacted it on May 7, 1980. The bill became effective on Aug. 7, 1980.

6. Memorandum to Senate Committee from OEPA Legal Advisor Mark Stenga (Jan. 30, 1980) [hereinafter cited as memorandum from OEPA Legal Advisor to Senate Comm.] (Copy on file in the Ohio Legislative Service Commission Library).

7. *Id.*

8. *Id.*

these concerns by enacting S.B. 284. Principally, the bill eliminates the former requirement that the director convene a hearing prior to entering an operative order in response to a verified complaint.[9] In its place, the General Assembly has granted to the director discretion in deciding whether to conduct a hearing upon receipt of a verified complaint. Objection to this change stems from the constitutional due process requirement that adequate notice and opportunity to be heard must be afforded a party prior to adversely affecting such person's constitutionally protected "property" interest.[10]

The following analysis of S.B. 284 will begin with a discussion of the statutory framework, including the scope of complaints and the required verification procedures before a complaint may properly be filed. Next, the procedure for handling and resolving a complaint once filed with the OEPA will be analyzed. Finally, the legislative grant of discretion to the director in convening a hearing will be discussed, along with its effect on the issue whether the administrative procedures provided for in S.B. 284 are constitutionally sufficient.[11]

II. ANALYSIS

A. The Statutory Scheme

Senate Bill 284 provides that an alleged violation of any rule, law, standard, order, license, permit, or variance the OEPA administers with regard to water pollution, air pollution, solid waste, public water supply, or hazardous waste is a proper subject of a complaint.[12] Once the alleged violation is within the scope of a verified complaint, S.B. 284 permits an officer of a state agency or political subdivision, or any person allegedly aggrieved or affected by an alleged violation which has occurred, is occurring, or will occur, to file a complaint with the

9. OHIO REV. CODE ANN. § 3745.08 (Page 1980) (repealed and amended 1980).

10. U.S. CONST. Amend. XIV § 1. Constitutional due process under the fourteenth amendment requires that state governments provide notice and a hearing before taking action which deprives an individual of "liberty" or "property." *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972). For a discussion of what constitutes a "property" interest, *see* notes 40-46 and accompanying text *infra*.

11. Specifically, the procedure to be focused upon is the "conference" which has replaced the hearing as a required proceeding, *See* notes 54-56 and accompanying text *infra*.

12. OHIO REV. CODE ANN. § 3745.08(A) (Page Supp. 1980). Violations of laws relating to public water supply and hazardous wastes were added by S.B. 284 to the scope of alleged violations which may prompt the filing of a complaint. These additions allow for expanded public participation in the environmental regulatory area. Under prior law citizens were precluded from filing complaints on these subjects. *See* Letter from Ohio League of Women Voters to Daniel Bernardin (Nov. 21, 1980) (on file with the University of Dayton Law Review office).

director of OEPA.[13] The complaint must be in writing, verified by the affidavit of the complainant, his agent, or attorney.[14] The verification procedure requires that the affidavit be sworn to and signed before "any person authorized by law to administer oaths."[15] The complaint must allege that another person has violated, is violating, or will violate any rule, law, standard, order, license, permit, or variance which is a proper subject for a verified complaint.[16] If the alleged violator is in possession of a valid license, permit, variance, or plan approval relating to a proper subject of a verified complaint, the complaint must allege that the person has violated, is violating, or will violate the conditions of that license, permit, variance, or plan approval.[17]

Once a complaint is properly filed with the OEPA, S.B. 284 requires the director to initiate a "prompt investigation" into the allegation.[18] The investigation is to be conducted "such as is reasonably

13. OHIO REV. CODE ANN. § 3745.08(A) (Page Supp. 1980). Prior to S.B. 284, the statute read: "An officer of an agency of the state or of a political subdivision . . . or any person allegedly aggrieved or adversely affected by an alleged violation may file a verified complaint. . . ." This language was deemed troublesome since it tended to be interpreted to mean that a violation had to have occurred before a complaint could be filed. Interview with OEPA Legislative Liaison, *supra* note 5. Senate Bill 284 specifies that any alleged violation of a pollution control law within the scope of the section that has occurred, is occurring, or will occur is a proper subject for a verified complaint.

14. OHIO REV. CODE ANN. § 3745.08(A) (Page Supp. 1980). Before the enactment of S.B. 284, the statute simply used the term "verified complaint" without detailing procedures necessary to verify a complaint filed with the OEPA.

> Senate Bill 284 requires that a complaint be written and verified by the affidavit of the complainant, his agent, or attorney . . . made before any person authorized by law to administer oaths and must be signed by the person who makes it. The person before whom it was taken shall certify that it was sworn to before him and signed in his presence, and his certificate signed officially by him shall be evidence that the affidavit was made, that the name of the person was written by himself and that he was such person.

15. *Id.* Senate Bill 284 changes the definition of "verified complaint" in OHIO AD. CODE § 3745-47-03(O) (Baldwin 1980) (formerly EP-40-03(O)), as applied to the OEPA, from a complaint "sworn to by the complainant before a notary public" to one "made before any person authorized by law to administer oaths." This change was criticized by the Ohio League of Women Voters as creating confusion since a notary public is well recognized by the public as a proper agent for verifying a complaint and therefore there was no need for the change. Ohio League of Women Voters memorandum to OEPA Legislative Liaison, Patterson Pepple (Aug. 6, 1979) [hereinafter cited as Ohio League of Women Voters Memorandum] (copy on file in the Ohio Legislative Service Commission Library). This criticism is unwarranted. The change is beneficial since it expands the number of persons before whom an affidavit may be sworn, facilitating the complaint filing procedure.

16. OHIO REV. CODE ANN. § 3745.08(A) (Page Supp. 1980).

17. *Id.* Senate Bill 284 adds violations of conditions of a plan approval to the list of alleged violations which may prompt the filing of a complaint.

18. *Id.* § 3745.08(B). There is no legislative indication of just how prompt a "prompt investigation" must be. One OEPA official interprets the phrase to require

necessary"[19] to determine whether an alleged violation has occurred, is occurring, or will occur.[20] Senate Bill 284 raises the standard of a violation finding by the director from "probable cause to believe a violation has or will occur" under the old statute,[21] to an affirmative finding that an alleged violation has occurred, is occuring, or will occur.[22] As part of the investigation, the director is required to discuss the complaint with both the complaintant and the alleged violator,[23] in the hope that a resolution may be reached easily.[24]

Upon conclusion of the investigation, the director has plenary power to exercise one of several options. If the investigation reveals that a violation has occurred, is occurring, or will occur, the director "may":[25]

(1) "enter such order[26] as may be necessary,"[27]

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that an investigation be conducted as soon as reasonably possible after receipt of a complaint by the OEPA. Interview with Charles Forsthoff, OEPA Southwestern District Office Chief (Feb. 23, 1981) [hereinafter cited as Interview with Southwestern District Office Chief].

19. The Ohio League of Women Voters criticized this as weak statutory language which could be interpreted as a reason for not conducting an investigation. Ohio League of Women Voters memorandum, *supra* note 15. The OEPA favors this change since very often an alleged violator is aware of the problem and is taking steps to abate it. In these situations a required thorough investigation is useless. Interview with Southwestern District Office Chief, *supra* note 18.

20. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980). *See* note 13 *supra*.

21. OHIO REV. CODE ANN. § 3745.08 (Page 1980) (repealed and amended 1980).

22. *Id.* § 3745.08(B) (Page Supp. 1980). This language was recommended by the Ohio Manufacturers' Association (OMA). The original language of S.B. 284 § 1(B) read: "If the Director does not determine that a violation has occurred, is occurring, or will occur, he shall dismiss the complaint." The OMA objected that "it is overly burdensome for an entity to be subject to the sanctions authorized in this bill if a finding of a violation cannot be found . . . . Our change would merely require dismissal of a complaint when no finding is possible." Memorandum from attorney John W. Hoberg to Ohio Manufacturers' Ass'n (July 23, 1979) [hereinafter cited as Ohio Manufacturers' Ass'n Memorandum] (copy on file in the Ohio Legislative Services Commission Library).

23. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980).

24. Interview with OEPA Legislative Liaison, *supra* note 5.

25. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980). The Ohio League of Women Voters objected to the use of the word "may" in regard to options available to the director. It proposed the word "shall" replace it because, as S.B. 284 is written, even if the director determines that a violation exists, he is not legally required to do anything at all. Ohio League of Women Voters Memorandum, *supra* note 15.

26. An order may be of two types: (1) an "abatement" order and (2) a "consent agreement." Interview with OEPA Southwestern District Office Chief, *supra* note 18. An "abatement" order is defined as the reduction in the degree or the intensity of pollution. G. FRICK, ENVIORNMENTAL GLOSSARY (1980). A "consent agreement" consists of any written document containing stipulations of fact; conclusions regarding material issues of law, fact, or discretion; and a specified proposed penalty or proposed revocation or suspension acceptable to both the OEPA and the alleged violator. *Id.*

27. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980). Prior to S.B. 284, the statute required the director either to convene a hearing and enter such order as may be

(2) "request the Ohio Attorney General to initiate appropriate legal proceedings" against the alleged violator,[28] or
(3) dismiss the complaint "where he determines that prior violations have been terminated and that future violations of the same kind are unlikely to occur . . . ."[29]

If the director does not convene a hearing prior to entering any operative order, he must provide an opportunity to the complainant and the alleged violator to attend a "conference" with the director or his delegate concerning the alleged violation.[30]

When the director is unable to determine that an alleged violation has occurred, is occurring, or will occur, S.B. 284 requires him to dismiss the complaint.[31] The original language of S.B. 284 allowed the director to dismiss a complaint only upon his affirmative finding of no violation.[32] One group objected that such a requirement for dismissal would be unfair to a party named in a complaint if a violation could not be found.[33] The argument is that a dismissal under these circumstances would not work against the OEPA or any third party with respect to other violations which could be shown.[34]

Although various minor objections have been raised concerning S.B. 284,[35] this note's principal focus is on the bill's failure to assure that no party will unconstitutionally be deprived of a property interest

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necessary, or contact the Attorney General for appropriate legal proceedings. Senate Bill 284 grants sole discretion to the director in convening a hearing prior to an order becoming effective. *See* notes 6-10 and accompanying text *supra*.

28. *Id.*

29. *Id.* The OEPA favors this provision since past experience has shown that the charged violator was often aware of the violation and was taking steps to abate it. Interview with Southwestern District Office Chief, *supra* note 18.

30. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980). Senate Bill 284 also clarifies the procedure to be utilized should the director decide to convene a hearing prior to entry of an operative abatement order. The requirement that the director publish notice in a newspaper of general circulation in the county of the alleged violation twenty days before any hearing is unchanged from prior law. The enactment requires the director to mail written notice by certified mail, return receipt requested, to the complainant as well as the alleged violator. *Id.* § 3745.08(C). S.B. 284 further requires that the OEPA and the alleged violator be parties to any adjudicatory hearing initiated by a verified complaint. The complainant may participate by providing written notice of intention to participate any time before the hearing date. Any other person may participate at the discretion of the director by filing a motion to intervene. *Id.* § 3745.08(C). Finally, S.B. 284 provides that a verified complaint may be consolidated with another verified complaint or independent finding of the director where he determines that a consolidation will facilitate enforcement of any law the OEPA administers and one of more issues of fact or law are in common. *Id.* § 3745.08(D).

31. *See* note 22 and accompanying text *supra*.

32. *See* note 21 and accompanying text *supra*.

33. *See* Ohio Manufacturer's Ass'n Memorandum, *supra* note 22.

34. *Id.*

35. *See* notes 15, 19, and 25 *supra*.

without first being afforded the opportunity to show why such action should not be taken.

B. Due Process Considerations in Administrative Adjudiciation

Assuming the director decides to proceed against a private individual on the basis of information acquired by the investigation, he must respect certain procedural safeguards. If the OEPA action would adversely affect a private interest protected by the due process clause of the fourteenth amendment,[36] absent rare and extraordinary circumstances,[37] some form of notice and opportunity to be heard must be afforded.[38] The due process clause does not necessitate a hearing in advance of an order being drawn up, so long as an opportunity is given for a meaningful hearing before that order becomes operative.[39]

The first issue presented, therefore, when the director determines that a violation exists is whether the interest potentially affected by an OEPA order is one considered to be "property" within the meaning of the fourteenth amendment's due process clause.[40] To ascertain whether due process applies, the "nature of the interest at stake" must be examined to determine whether it falls within the fourteenth amendment's protection of "property."[41] If so, the amendment requires notice and some form of opportunity to be heard prior to any OEPA order becoming effective.[42]

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36. For a discussion of the private interests involved, *see* notes 67-71 and accompanying text *infra*.

37. For "rare and extraordinary situation" cases which have held that deprivation of a protected interest need not be preceded by some kind of hearing, *see* Central Union Trust v. Garvay, 254 U.S. 554 (1921) (Congress has power in wartime to provide for immediate seizure of property supposedly belonging to the enemy leaving the question of enemy ownership to a later suit by claimant); Phillips v. Commission of Internal Revenue, 283 U.S. 589 (1931) (the United States may collect its internal revenue by summary administrative proceedings if adequate opportunity is afforded for a later determination of legal rights); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (due process does not require a hearing in connection with seizures of misbranded articles harmful or dangerous to health).

38. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Bell v. Burson, 402 U.S. 535 (1971); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); United States v. Illinois Cent. Ry. Co., 291 U.S. 457 (1934).

39. Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

40. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Prior to *Morrissey* the applicability of due process was determined by balancing the state's interest in summary action against the individual's claim for a hearing. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970). In *Morrissey* the Court stated that the proper focus is not on the weight of the individual's interest but whether the nature of the interest is one within the meaning of the fourteenth amendment. 408 U.S. at 481.

41. *See* note 36 and accompanying text *supra*.

42. Board of Regents v. Roth, 408 U.S. 564 (1972). *See also* Connell v. Higgenbotham, 403 U.S. 207 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Slockhower v. Board of Higher Educ., 350 U.S. 551 (1956).

Although there is no clear-cut definition, certain attributes of "property" have emerged from a line of Supreme Court cases interpreting the word.[43] There must be more than a desire or unilateral expectation to constitute "property." "A legitimate claim of entitlement" to a benefit is required, stemming from such independent sources as state laws which support claims of entitlement to such benefits.[44] Such benefits as these are justifiably relied on by persons in daily life, so that fairness requires the interest not be arbitrarily deprived.[45] In regard to S.B. 284, the property interest affected by the director's affirmative response to an alleged violation will usually be monetary in nature.[46]

In determining whether a hearing is required prior to an order becoming effective, it is not sufficient that a constitutionally protected interest be identified. The particular facts in dispute must also raise the type of issues requiring a hearing. When the disputed facts involve determination of policy or principles of general future application, a hearing on those facts is generally not required.[47] The rationale is that where a rule of conduct applies to a class of the public, it is impracticable that everyone affected should have a direct voice in its adoption.[48] When, on the other hand, the disputed facts relate to past conduct of a particular individual or party, the general rule is that a hearing on those facts is required.[49] Although there is no clear-cut distinction between the two,[50] resolution of verified complaints pursuant to S.B. 284 will generally involve issues concerning which particular party did what, when, how, and why.[51] Notice and opportunity to be heard will therefore generally be necessary before an OEPA order becomes operative against the individual.

C. *Procedure under S.B. 284*

Before considering the factors bearing on the constitutional sufficiency of procedures in S.B. 284, it is first necessary to detail the pro-

43. *See* note 42 *supra.*

44. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

45. *Id.*

46. *See* note 63 and accompanying text *infra.*

47. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

48. *Id.* at 445. Such disputed issues fit into Professor Kenneth Culp Davis' category of "legislative facts." *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.06 (1958) [hereinafter cited as Davis Treatise].

49. Londoner v. Denver, 210 U.S. 373 (1908). These issues are labeled "adjudicative facts" by Professor Davis. 1 Davis Treatise at § 7.02.

50. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.2 (2d ed. 1979) [hereinafter cited as Davis Treatise 2d ed.].

51. *See* 1 Davis Treatise at § 7.02. Such issues involve "intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them." *Id.* at 413.

cedures afforded prior to any order becoming operative. Upon receipt of a verified complaint, the director dispatches a district engineer who is required to visit the site to determine whether the alleged violation has occurred, is occuring, or will occur.[52] After the engineer concludes his visit, a report is made and sent to the director in Columbus.[53] If a violation is found, the director may draw up an abatement order which could conceivably require discontinuance of a particular operation. There is no requirement that an opportunity be afforded the alleged violator to challenge the evidence at a hearing before that order becomes effective.[54] Senate Bill. 284 requires only that the director give the alleged violator notice of the charges and an opportunity to attend an informative "conference," with the director or his delegate.[55] Although there is no legislative indication of precisely what procedures are to be followed in the "conference," legislative history notes that the principal purpose behind S.B. 284 was to eliminate the necessity of a hearing.[56] The "conference" was, therefore, not intended to be a hearing.

A de novo hearing is available on appeal to the Environmental Board of Review;[57] however, the appeal is available only after an order goes into effect.[58] The OEPA relies on the bifurcated scheme of prior

52. Interview with OEPA Southwestern District Office Chief, *supra* note 18.

53. *Id.*

54. Ohio Manufacturers' Ass'n Memorandum, *supra* note 22.

55. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980). OEPA Southwestern District Office Chief Charles Forsthoff described the "conference" as an informal proceeding where the alleged violator and the complainant are appraised of the determination and permitted to "ask questions." Interview with OEPA Southwestern District Office Chief, *supra* note 18.

56. *See* notes 6-8 and accompanying text *supra.*

57. OHIO REV. CODE ANN. § 3745.05 (Page Supp. 1980). The Environmental Board of Review (EBR) is a three-man board which is separate and distinct from the OEPA. The members are appointed by the Governor and submit their own budget to the General Assembly. Each member is required to have extensive experience in pollution control and abatement technology, ecology, public health, environmental law, economics of natural resource development or related fields. *Id.* § 3745.02.

58. *See* OHIO REV. CODE ANN. § 3745.05 (Page Supp. 1980); OHIO AD. CODE § 3746-5-13 (Baldwin 1980) (formerly EBR 3-10). Filing an appeal with the EBR does not automatically suspend or stay execution of the OEPA order that is the subject of the appeal. Upon application of the appellant, the EBR may suspend or stay execution of the director's order pending immediate determination of the appeal without interruption by continuances for other than unavoidable reasons. OHIO REV. CODE ANN. § 3745.05 (Page Supp. 1980). In Broadway Christian Church v. Republic Steel Corp., 50 Ohio App. 2d 98, 361 N.E.2d 1090 (1976), the Court of Appeals for Cuyahoga County stated in dicta that in deciding whether to grant a stay, the EBR must take into account the distinction between a new proposed source of pollution and a presently operating source, intimating that a stay of an order affecting a currently operating source will be granted more easily. *Id.* at 103, 361 N.E.2d at 1094.

"conference" and subsequent de novo review by the EBR as adequately affording an opportunity to be heard. Its reliance is placed on the case of *Kripke-Tuschman Industries v. Ned E. Williams, Director of Environmental Protection*,[59] before the Franklin County Court of Appeals.[60] The court held that due process was afforded equally well whether a hearing was conducted initially before the OEPA or de novo by the EBR.[61] This holding is contrary to the United States Supreme Court's mandate that procedural due process requires that there be a meaningful opportunity to present one's case before governmental action adversely affects a protected interest.[62]

One solution to this problem is to have the director enter a provisional order. A provisional order is one that will become finally operative provided nobody takes timely steps to reopen it.[63] The burden of going forward would then rest on the affected individual rather than on the OEPA. The ex parte administrative determination by the OEPA would become binding unless the individual seizes the opportunity by demanding de novo hearing before the EBR.

Because the hearing required under prior law has been replaced by a "conference," the constitutional adequacy of procedures in S.B. 284 will turn on how that "conference" is conducted in practice and the subsequent interpretation by the courts of what minimal procedural safeguards are required in this proceeding.

D. The "Conference"

Because of the lack of specific provisions concerning the conference, the director presumably may establish his own criteria for the goals and purpose of this proceeding.[64] Although given wide latitude

59. No. 78-AP-865 (Ct. App. Franklin County 1979). This case involved an appeal by the OEPA director from a decision of the EBR. The board had vacated the director's order denying an application by Kripke-Tuschman for a permit to operate a reverbatory furnace and ordered the director to reissue his order as a proposed action so as to afford Kripke-Tuschman a hearing before the OEPA. *Accord,* Olin Corp. v. James F. McAvoy, Director of Environmental Protection, No. 79-AP-377 (Ct. App. Franklin County 1979); General Motors Corp. v. James F. McAvoy, Director of Environmental Protection, No. 79-AP-53 (Ct. App. Franklin County 1979); Cincinnati Gas & Elec. Co. v. Ira L. Whitman, Director Environmental Protection, No. 74-AP-151 (Ct. App. Franklin County 1974).

60. OHIO REV. CODE ANN. § 3745.06 (Page 1980). This section provides: "any person adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County."

61. No. 78-AP-865 (Ct. App. Franklin County 1979).

62. *See* notes 35-38 and accompanying text *supra.*

63. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS, at 648 (6th ed. 1974).

64. *See* notes 55, 56, and accompanying text *supra.*

by the General Assembly in this regard, the director is still bound by due process considerations. The United States Supreme Court, in *Mathews v. Eldridge*,[65] formulated a standard for evaluating the constitutional adequacy of administrative procedures. The Court noted that the interests of the private individual must be balanced against the governmental interests:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[66]

In order to analyze the types of safeguards that may be required under *Mathews* it is necessary to examine the private and governmental interests that must be accommodated by S.B. 284.

1. Private Interests

According to *Mathews* the first consideration is the nature of the private interest affected by the governmental action.[67] The interest affected by implementation of S.B. 284 procedures by the OEPA is often likely to be a substantial property interest since actions authorized by section 3745.08 of the Revised Code could require expenditure of millions of dollars on the part of a private party to meet an abatement order and conceivably the discontinuance of operation until that order is met.[68]

The second aspect of the private interest concern is the risk of erroneous deprivation of the property interest.[69] In many instances the risk of error under S.B. 284 could be high. Once the director draws up an abatement order in response to alleged violations, there is no requirement that evidence gathered in the investigation[70] be compiled, tested, and verified at a hearing prior to the order becoming effective.[71]

65. 424 U.S. 319 (1976). This case involved an appeal concerning the constitutional validity of procedures on termination of welfare benefits.
66. *Id.* at 334.
67. *Id.* at 335.
68. *See* Ohio Manufacturers' Ass'n Memorandum, *supra* note 22.
69. 424 U.S. at 335.
70. *See* notes 18-24 and accompanying text *supra.*
71. Ohio Manufacturers' Ass'n Memorandum, note 51 and accompanying text *supra.*

A principle of administrative law is that a prior hearing may not be required when testing, examination, or inspection is a better method for ascertaining the facts.[72] When the testing or inspection technique[73] utilized in an investigation pursuant to S.B. 284 is objective and conclusory,[74] rarely will a prior evidentiary hearing on that issue be useful since the test is conclusive of a violation.[75] Many of the tests used to ascertain pollution control law violations, however, are dependent upon subjective application of the tests, as well as subjective analysis of the data compiled.[76] In these situations, unless the director grants the procedural protection of a hearing, there is no opportunity to challenge the test, the engineer's qualifications, or to propose alternative methods of testing or abatement.[77] In such circumstances, a wide variety of information may be relevant and the issues of credibility and veracity could be considered crucial to the decision-making process.[78] The affected party should be afforded an opportunity to challenge such procedures since he is likely to be in the best position to point out shortcomings.[79]

2. Governmental Interest

The third element of the *Mathews* standard is an evaluation of the state's interest in implementation of the procedure.[80] The state of Ohio's interest under S.B. 284 is two-fold. First, there is a legitimate interest in seeing that exposed pollution control violations are abated as quickly as possible.[81] The OEPA asserts that full adjudicatory hear-

72. *See, e.g.*, Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974).

73. OHIO AD. CODE § 3745 (Baldwin 1980). This section details regulations administered by the OEPA regarding pollution control. Testing procedures to be used are specified. For example, § 3745-1-03 provides that all methods used in analyzing water quality standards shall be in accordance with 40 C.F.R., part 136, as amended, "Test Procedures for Analysis of Pollutants."

74. Interview with Southwestern District Office Chief, *supra* note 18. Mr. Forsthoff cited as an example, tests conducted to determine the concentration of certain chemical elements in water. Generally there can be no dispute as to findings concerning the concentration.

75. *Id. See also* 2 Davis Treatise 2d ed. at § 12:12.

76. Interview with Southwestern District Office Chief, *supra* note 18. As an example of subjectivity in testing, Mr. Forsthoff noted that often verified complaints of foul odors are filed. When OEPA personnel are dispatched there is no conclusive test to determine a violation, but rather a determination is made based on subjective analysis.

77. *See* note 51 and accompanying text *supra*.

78. *See* Mathews v. Eldridge, 424 U.S. 319, 328 (1976).

79. W. GELLHORN, C. BYSE, & P. STRAUSS, ADMINISTRATIVE LAW CASES AND COMMENTS, at 686 (7th ed. 1979).

80. 424 U.S. at 335.

81. *See* notes 6 and 7 and accompanying text *supra*.

ings have the adverse effect of allowing the pollution problem to go unabated until the hearing is concluded.[82] A review of the United States Supreme Court cases indicates that some type of imminent threat is required before summary administrative action is appropriate. In *Fahey v. Mallonee*,[83] the Court upheld the action of a conservator in taking possession of a bank without providing a prior hearing. The Court held that, although this was a drastic procedure, the delicate nature of a banking institution and the imminent threat of destruction of credit made it constitutionally proper to apply supervisory power prior to a hearing.[84] In *North America Cold Storage Co. v. Chicago*,[85] the Court upheld a statute permitting the summary seizure and destruction of putrid chickens, holding that an administrative agency may seize private property in situations involving imminent threats to public health.[86] Verified complaints rarely involve such imminent threats to human or environmental safety necessary to justify an ex parte determination becoming operative prior to a hearing.[87] If such an imminent threat were revealed, however, no statutory provision would be necessary before immediate abatement is ordered.[88] The right to take such summary action is based on the duty of the state to protect and guard the lives and health of its citizens.[89]

Ohio has a second substantial public interest in the administrative efficiency of the OEPA.[90] This interest in efficiency would be impeded by requiring an extensive hearing in every case in which a violation is found, particularly since de novo review is available at the EBR level.[91] Because approximately ninety-five percent of all verified complaints investigated are "false alarms,"[92] roughly only five percent reach the

82. *Id.*
83. 332 U.S. 245 (1947).
84. *Id.* at 253.
85. 211 U.S. 306 (1908).
86. *Id.* at 315.
87. All but approximately five percent of investigated verified complaints are dismissed as "false alarms." *See* notes 92 and 93 and accompanying text *infra.* Of the remaining five percent, only one in 15 can be considered imminent threats to human safety. Interview with Charles Forsthoff, OEPA Southwestern District Office Chief (April 21, 1981).
88. 211 U.S. at 315.
89. *Id.*
90. *See* note 8 and accompanying text *supra. See also* Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267 (1975). "It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection . . . ." *Id.* at 1276.
91. *See* notes 57 and 58 and accompanying text *supra.*
92. *See* Interview with Southwestern District Office Chief, *supra* note 18.

stage where some form of hearing is necessary.[93] Of these few, some may require more extensive hearings than others.[94] In any event, providing adequate procedural safeguards to this limited number would not seem to significantly infringe upon the state's interest in administrative efficiency.

3. Balancing the Interests

Upon balancing the three factors formulated in *Mathews*, it is apparent that procedures dictated by S.B. 284 may not, in all circumstances, adequately take into account situations where the risk of erroneous deprivation of a substantial private interest outweighs the state's interest in immediate abatement and administrative efficiency. The opportunity to appear before the OEPA at a "conference"[95] may not always provide satisfactory procedural due process safeguards. This will particularly be true unless the director, on his own initiative, establishes the safeguards the statute failed to supply.

Consideration of what procedures would better prevent the risk of erroneous deprivation of a protected interest requires an evaluation of the more important elements of "some kind of hearing."[96] As Judge Friendly notes, these elements should not be considered separately, but rather, if the OEPA chooses to afford more of one procedural protection than constitutionally required, this may be a reason for diminishing or even eliminating another.[97] First, it is fundamental that timely, clear notice be given, sufficient to inform the affected party of the proposed action and the grounds for the decision.[98] This is essential to allow the party to acquire evidence to prepare his case so as to benefit from any opportunity to be heard.[99]

Another fundamental requirement is an opportunity to present

93. Under S.B. 284, dismissal is required when no violation is found to exist. OHIO REV. CODE ANN. § 3745.08(B) (Page Supp. 1980). *See* note 31 and accompanying text *supra*.

94. *See* notes 92 and 93 *supra*.

95. *See* notes 30, 52, 53, and accompanying text *supra*.

96. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) [hereinafter cited as Friendly]. Judge Friendly suggested a second list of "various types of government action that have been urged to call for a hearing, starting with the most serious" such as revocation as distinguished from denial. "As we go down the second list from the more severe actions to the less, the needle would point to fewer and fewer requirements on the list of required safeguards." *Id.* at 1278.

97. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelley, 397 U.S. 254 (1970); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See also* Friendly, *supra* note 96, at 1280.

98. *See In re* Gault, 387 U.S. 1 (1967).

99. Friendly, *supra* note 96, at 1281.

reasons why the proposed action should not be taken.[100] As noted previously, the affected party is often in the best position to point out deficiencies in the procedures used as the basis for a decision.[101] The big issue in S.B. 284 is what exact form should this opportunity take. Should there be the right to call witnesses?[102] Generally, there is no reason to deny the opportunity to call a witness. The OEPA, however, must be entitled to limit the number of witnesses and scope of examination.[103] Similarly, the right to know the nature of the evidence on which the director relies cannot be disputed.[104] Should the opportunity to confront witnesses be given?[105] When the OEPA relies on evidence which is subjective in nature, it seems only fair that some opportunity be afforded to confront the people who gathered that evidence.[106] In such situations the identity of the witness and the content of his testimony will generally have been disclosed, so there is no reason not to allow at least limited cross-examination of that witness.[107] Finally, the party affected by an adverse order should be entitled to have any decision regarding the issuance of an operative order based solely on evidence presented at the "conference."[108] Outside evidence concerning issues of general policy should be permissible, provided the OEPA clearly indicates the basis for its decision.[109] This allows any erroneous findings to be challenged on appeal to the EBR and the courts.[110] The OEPA's consideration of these factors when holding a conference, along with a de novo hearing on appeal to the EBR, may create a bifurcated scheme which sufficiently guarantees that due process is served.

In examining possible procedures to be implemented through the "conference," it is important to note that procedural due process is flexible and requires only the procedural protections a particular situation demands.[111] The required degree of procedural safeguards varies

100. *Id.*
101. *See* note 79 and accompanying text *supra.*
102. *See* Friendly, *supra* note 96, at 1282.
103. *See generally*, Wolff v. McDonnell, 418 U.S. 539 (1974) (unrestricted right to call witnesses from among a prison population carries with it potential for disruption and interference of the correctional program).
104. *See* Greene v. McElroy, 360 U.S. 474 (1959).
105. *See* Friendly, *supra* note 96, at 1286.
106. *See* note, 76, 77, and accompanying text *supra.*
107. *See* Friendly, *supra* note 96, at 1286.
108. *Id.* at 1287.
109. *Id.*
110. Challenging erroneous fact-findings on appeal requires that at least an informal record be compiled, even if it consists of only the director's notes. *See* Friendly, *supra* note 96, at 1291.
111. Morrissey v. Brewer, 408 U.S. 471 (1972).

directly with the importance of the protected interest and the need for a particular safeguard, weighed against the burden of affording it.[112]

III. CONCLUSION

With the enactment of S.B. 284, Ohio has amended its environmental protection verified complaint law. The bill clarifies procedures to be utilized in filing a complaint of alleged pollution control law violation and its subsequent resolution once received by the OEPA. Objections to S.B. 284 stem from the grant of broad discretion to the director of the OEPA in acting upon verified complaints, particularly the change that the director is no longer required to conduct a hearing prior to issuing an operative order. S.B. 284 requires only that the alleged violator be afforded an opportunity to attend a "conference" with the director or his delegate.

Although S.B. 284 is not unconstitutional on its face, the constitutional adequacy of its procedures for affording an opportunity to be heard will depend upon its application in practice as well as the courts' subsequent interpretations of what safeguards are required in the "conference" prior to any order becoming operative. In a particular instance this will generally involve a balancing of competing interests along with an evaluation of what additional procedures might better prevent the risk of erroneous deprivation of a protected interest.

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112. *See* Friendly, *supra* note 96. Judge Friendly enumerates eleven procedural elements to be considered: (1) unbiased tribunal; (2) notice of the proposed action and grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) right to call witnesses; (5) right to know the evidence against one; (6) right to have decision based only on the evidence presented; (7) counsel; (8) the making of a record; (9) the statements of the reasons; (10) public attendance; and (11) judicial review. This note has dealt briefly with only those elements considered particularly essential to a fair disposition.