OPINION NO. 80-066

Syllabus:

A local board of health may regulate only those sewage disposal systems which serve a private residence. (1964 Op. Att'y Gen. No. 978, p. 2-142 overruled in part.)

To: Michael DeWine, Greene County Pros. Atty., Xenia, Ohio
By: William J. Brown, Attorney General, October 17, 1980

I have before me your request for my opinion concerning sewage treatment works and sewage disposal systems serving "separate commercial facilities." It is my understanding that your specific concern is the authority of local boards of health to regulate "separate commercial facilities."

As you note in your letter, these questions arise due to the conclusions reached by a prior Attorney General in 1964 Op. Att'y Gen. No. 978, p. 2-142. Part one of the syllabus of 1964 Op. No. 978 reads as follows:

> Boards of city or general health districts do not have authority, pursuant to Section 3709.20 and 3709.21, Revised Code, to require approval of plans and specifications for sewage treatment works, public water supply facilities and garbage and refuse disposal plants and facilities, as defined in Chapters 6117, 6103, and 343, Revised Code, respectively, but by implication have such authority over facilities for the use of a private residence or separate commercial facilities.

The term "separate commercial facilities" was not defined in 1964 Op. No. 978, nor does it appear in any statute or regulation dealing with sewage disposal.

The majority of the Revised Code sections pertaining to sewage disposal systems and sewage treatment works have been amended since 1964. It is, therefore, necessary to reexamine the question of whether a local board of health has the authority to require plan approval of sewage disposal systems and sewage treatment works.

As was noted by my predecessor in 1964 Op. No. 978, boards of health possess broad powers, under R.C. 3709.20 and 3709.21, and may even exercise the police powers of the state in the area of public health. Schlenker v. Board of Health, 171 Ohio St. 23, 176 N.E. 2d 900 (1960). If boards of health were the only entities with authority in this area, there would be no doubt that they could require plan approval of sewage disposal systems and treatment works. However, more specific authority with regard to sanitary regulation is granted to the Ohio Environmental Protection Agency (EPA) under R.C. 6111.44 and 6112.02. The county commissioners, R.C. 6111.44, and the Public Utilities Commission, R.C. 6112.03, are also given express authority to act in the area of sewage disposal.

The areas of sewage system control in which the General Assembly has authorized branches of state government to act are so pervasively regulated as to make any action by local authorities in that area a conflict with general law. See generally R.C. Title 61; 3 Ohio Admin. Code Chapter 3745. A system of dual approval would allow a board of health to reject plans which had been accepted by the EPA and to require different information than that required by the EPA. In light of the pervasive nature of state regulation in the area of sewage disposal and treatment facilities, it is obvious that local boards of health are preempted from taking action with regard to any matter in which a state agency has been given the power to act.

In Security Sewage Equipment Co. v. Beeke, 5 Ohio Misc. 178, 214 N.E. 2d 853 (1965), the court stated at 857:

> In the area of sanitation the State of Ohio has exercised pre-emptive authority to promulgate regulations over the design and specifications of semi-public sewage treatment plants by virtue of Chapters 6112. and 3701., Revised Code. The State Department of Health is the sole authority vested with power to prohibit or allow such installations. The approval of the Department of Health is the only ultimate prerequisite to the utilization of specific design in the county and the Board of County Commissioners and its Sanitary Engineer may not prohibit such utilization once a design has received the approval of the State Department of Health.

Under R.C. Chapter 6111, the EPA now possesses all powers with regard to the approval of sewage systems which were previously vested in the Department of Health under R.C. Chapter 343. Therefore, it is clear that the EPA now has the same preemptive authority over plan approval which the Department of Health previously possessed.

The basic provision authorizing the EPA to act in the area of sewage treatment works and sewage disposal systems is R.C. 6111.44. It reads in pertinent part:

> No municipal corporation, county, public institution, corporation,

> or officer or employee thereof, or other person shall provide or install sewerage or treatment works for sewage disposal, or make a change in any sewerage or sewage treatment works until the plans therefor have been submitted to and approved by the director of environmental protection. Sections 6111.44 to 6111.46 of the Revised Code shall apply to sewerage and treatment works for sewage of a municipal corporation or part thereof, an unincorporated community, a county sewer district, or other land outside of a municipal corporation or any publicly or privately owned building or group of buildings or place, used for the assemblage, entertainment, recreation, education, correction, hospitalization, housing, or employment of persons, but do not apply to sewerage or treatment works for sewage installed or to be installed for the use of a private residence or dwelling, or to animal waste treatment or disposal works and related management and conservation practices subject to rules adopted pursuant to division (E)(4) of section 1515.30 of the Revised Code and involving less than one thousand animal units as animal units are defined in the United States environmental protection agency regulations. This exclusion does not apply to animal waste treatment works having a controlled direct discharge to waters of the state. (Emphasis added.)

R.C. 6111.01(I) defines "person" for purposes of Chapter 6111 as "the state, any municipal corporation, political subdivision of the state, person as defined in section 1.59 of the Revised Code, or interstate body created by compact." R.C. 1.59(C) defines "person" as "an individual, corporation, business trust, estate, trust, partnership, and association." Thus, R.C. 6111.44 requires virtually everyone to obtain EPA approval prior to installing or changing a sewage disposal system or treatment works. Persons installing "private commercial facilities"—however that term is defined—are not exempted from obtaining EPA plan approval. The only exceptions apply to persons installing sewage disposal facilities for a private residence or animal waste disposal or treatment works which do not have a "controlled direct discharge into the waters of the state."

The exemption for animal waste treatment facilities found in R.C. 6111.44 make reference to rules adopted pursuant to R.C. 1515.30(E)(4). R.C. 1515.30(E)(4) requires the Chief of the Division of Soil and Water Districts of the Department of Natural Resources (DNR) to establish standards "to achieve a level of management of concentrated animal feeding operations on farms, which will abate the degradation of the waters of the state." The rules promulgated under this authority appear at 2 Ohio Admin. Code 1501:15-5-01 to 1501:15-5-10. The Department of Natural Resources has preempted the area of animal waste treatment facilities in much the same manner as the EPA has preempted sewage treatment facilities under R.C. 6111.44 and 6112.02.

As discussed above, the statutory scheme authorizing the EPA and DNR to regulate sewage systems operates to preempt the authority of local boards of health to act in such matters. Thus, under existing law, local boards of health have no authority to require their own permits or plan approval for any sewage system which is regulated by EPA or DNR. R.C. 6111.44 clearly requires EPA approval of all facilities not specifically exempted. No exception is provided for private commercial facilities; hence, local boards of health may not regulate such facilities. The only area in which local regulation of sewage facilities has not been preempted by the state is with respect to sewage treatment works for the use of a private residence or dwelling, and this is the only area in which local boards of health may still act.

Since no state agency has been empowered to deal with sanitary systems for private residences, I conclude that local boards of health may impose requirements for such systems.

The five questions presented by your letter all deal with the authority of a local board of health to regulate separate commercial facilities. Because I have

concluded that current law permits a local board of health to regulate only those disposal systems serving a private residence, I find it unnecessary to address each of your questions individually. I overrule 1964 Op. No. 978 to the extent it concludes that a board of health has the authority to regulate disposal systems for the use of separate commercial facilities.

Therefore, it is my opinion, and you are advised, that, a local board of health may regulate only those sewage disposal systems which serve a private residence. (1964 Op. Att'y Gen. No. 978, p. 2-142 overruled in part.)