



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAURA M. TIGHE AND MATTHEW A. TIGHE	:	
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	:	
v.	:	EHB Docket No. 2023-046-B
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: July 11, 2024
	:	

**OPINION AND ORDER ON
DEPARTMENT’S MOTION TO DISMISS**

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board dismisses an appeal of a Department letter for lack of jurisdiction. The letter does not require any action from the Appellants and does not affect the Appellants’ personal or property rights, privileges, immunities, duties, liabilities or obligations.

OPINION

Introduction

This appeal concerns a letter sent by the Department of Environmental Protection (“the Department”) to Appellants, Laura and Matthew Tighe (collectively, “the Tighes”). The Tighes reside on Crane Road in Washington Township, Erie County, Pennsylvania. Based on our reading of the filings in this matter, the Tighes apparently own property adjacent to Lovett’s Mobile Home Park located on Lisa Lane in Washington Township (“LMHP”). The Tighes are concerned with earthmoving and stormwater issues at LMHP. LMHP has been inspected repeatedly by staff from both the Department and the Erie County Conservation District (“ECCD”). On February 24, 2023, ECCD staff conducted an inspection at LMHP. The observations and findings of that inspection are contained in a Chapter 102 inspection report dated March 3, 2023 (“March 2023 Report”). An

informal hearing was held concerning the March 2023 Report at the request of the Tighes pursuant to 25 Pa. Code § 102.32(c), which allows for persons aggrieved by a conservation district action to request an informal hearing with the Department.¹ Following the informal hearing, the Department sent a letter dated April 19, 2023 (“April 2023 Letter”) to the Tighes. The April 2023 Letter states in pertinent part:

This letter is in response to the informal hearing on April 13, 2023 held by the [Department] pursuant to 25 Pa. Code § 102.32(c). You requested the informal hearing to challenge [March 2023 Report] summarizing the inspector’s observations in response to a complaint at the [LMHP] in Washington Township, Erie County.

The Department has reviewed the substantive language of the [March 2023 Report] and the information and materials provided by you during the informal hearing. The Department has determined that the [March 2023 Report] is informative in nature and merely records the inspector’s observations. The [March 2023 Report] is descriptive and advisory and not prescriptive or imperative. Accordingly, the [March 2023 Report] is not a challengeable action. See *Karnick v. DEP*, 2016 EHB 1.

During the informal hearing you also raised various other concerns beyond the observations set forth in the [March 2023 Report]. The Department will follow up and conduct a full site inspection of [LMHP] in response to your expressed concerns. The Department will then proceed accordingly with any necessary further action to ensure compliance with National Pollutant Discharge Elimination Permit No. PAC250067 and all applicable statutes and regulations.

(Tighes’ Notice of Appeal, at 8).

The Tighes’ filed their appeal with the Environmental Hearing Board (the “Board”) on May 18, 2023. Included in their Notice of Appeal, the Tighes attached the April 2023 Letter (along with an email transmittal from the Department and an email response from the Tighes), a copy of

¹ Neither party discussed why the Department granted the Tighes’ request for an informal hearing and whether they were aggrieved by the actions of the conservation district as those terms are used in the regulation. We make no decision about whether the Tighes were sufficiently aggrieved to require the granting of an informal hearing pursuant to 25 Pa. Code § 102.32(c).

the March 2023 Report, the first page of the coverage approval letter addressed to LMHP for the PAG-02 General Permit dated February 17, 2021, and the first page of the General Permit with a start date of February 17, 2021 and an expiration date of December 7, 2024. In their Notice of Appeal, the Tighes state the subject of their appeal as follows:

We are appealing the final determination from the [D]epartment's informal hearing conducted April 3, 2023, (see attached letter dated April 19, 2023) in accordance with a Chapter 102.32(c) request. The Department's final determination that the inspector's report of Lovett's mobile Home Park dated February 24, 2023 was only informative in nature and merely recorded the inspectors' observations did not address the numerous violations and evidence provided at the hearing. We contend the inspection report of the informal hearing was prescriptive, imperative and accordingly an appealable action. The Appellants will argue this report cannot be disguised as anything other than false and subject to the provisions of the Clean Streams Laws under Section 611 as: Unlawful Conduct. In addition, the Department stated in its April 19, 2023 letter that a full site inspection of the development at the Lovett's Mobile Home Park would commence, but failed to respond to a following email, (see attached copy) requesting when the full site inspection would occur and if we would have access to it after its completion within our 30 day time limit to file another chapter 102.32(c) request for an informal hearing. We will also argue the Department's failure to address these violations in accordance with Section 601(d), Section 609, and Section 611 of the Clean Streams Law shows an indifference unbecoming of the Department and is inconsistent with the clear intent of the Clean Streams Law.

(Tighes' Notice of Appeal at 1).

Additionally, the Tighes set forth five numbered objections in their Notice of Appeal alleging the following: 1) At the start of the informal hearing, the Department stated that the prior inspections were undertaken because of complaints and denied that any earthmoving activities had commenced; 2) The March 2023 Report, as well as older inspection reports, failed to note numerous violations they produced evidence for during the informal hearing; 3) The statement in the March 2023 Report that provides "Continue work as per approved plans" wrongly permits LMHP to continue work where there are outstanding violations; 4) Due to ongoing violations of

the Washington Township Storm Water Management Ordinance and inaccurate information provided by LMHP, the ECCD should not have provided LMHP coverage under the PAG-02 General Permit. Additionally, because the placement of the outlet of a storm sewer pipe was not in compliance with engineering plans, best management plans necessary to control erosion were not in place; and 5) the Department's statement at the informal hearing whereby it asserted that it had no jurisdiction over uncontrolled releases from a beaver lake even though, according to the Tighes, the released water enters the storm sewer pipe and has caused flooding of the cartway of State Highway Route 99.²

Discovery has been ongoing, and the Board has ruled on discovery issues arising from the Tighes' service of subpoenas on both parties and non-parties to this case. The Board quashed the subpoena directed to Washington Township staff and denied requests to quash subpoenas directed at a former ECCD employee, a current ECCD employee and Department staff. We placed certain limits on the three depositions we allowed to proceed regarding the length and subject matter of the proposed depositions. The Department filed its Motion to Dismiss ("Motion") and its Memorandum of Law in Support thereto on March 6, 2024. The Tighes filed a Response in Opposition to the Department's Motion ("Response") and a Memorandum of Law in Opposition to the Motion on April 22, 2024.³ The Department filed its Reply to the Tighes' Response on May 24, 2024. The deadline for discovery, May 28, 2024, passed shortly after we received the

² The length and wording of the Tighes' stated objections in their Notice of Appeal are difficult to parse out and cohesively summarize for the purposes of this Opinion. We have summarized their five objections in this opinion for the sake of our reader, but the Board considered the full text of the stated objections in reaching this decision.

³ The Tighes' Response also included two cross-motions requesting that we: 1) compel the Department to provide sufficient and proper discovery responses to the Appellants' previously served discovery demands and interrogatories; and (2) conduct a site inspection. (Response at 1). Because we grant the Department's Motion to Dismiss in this Opinion and Order, the Tighes' cross-motions are moot and are, therefore, dismissed without further consideration by the Board.

Department's Reply and neither party requested a further extension prior to that time. We are prepared to rule on the Department's Motion.

Standard of Review

A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015). The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Latkanich v. DEP*, 2023 EHB 299, 302; *Ongaco v. DEP*, 2023 EHB 239, 241; *Scott v. DEP*, 2023 EHB 138, 139-40; *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol*, 2015 EHB at 54; *Winner v. DEP*, 2014 EHB 135, 136-37. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Scott*, 2023 EHB at 140. A motion to dismiss generally does not involve an evaluation of the merits or strength of the appellant's claims; rather, the "operative question is: even assuming everything the non-moving party states is true, can – or should – the Board hear the appeal." *Protect PT v. DEP*, 2023 EHB 191, 198, citing *Consol*, 2015 EHB at 55.

Analysis

In its Motion, the Department sets forth two reasons why the Board should dismiss the Tighes' appeal. First, the Department argues that the Board lacks jurisdiction over the appeal because the April 2023 Letter is not an appealable action. (Motion ¶ 45 at 9). The Department's second argument is that the appeal is not justiciable because it is aimed at Department inactions and the Board cannot offer meaningful relief. (Motion ¶ 46 at 10). In response to the Department's

position, the Tighes offer three arguments. First, the Tighes state the Motion is fatally flawed and exceeds the proper scope of a motion to dismiss because the Department included an affidavit from Tom McClure as an exhibit to the Motion which contains factual testimony and inherently creates a question of fact.⁴ In their second argument, they assert that the March 2023 Report and the April 2023 Letter are appealable because of what they argue is a directive to LMHP in the March 2023 Report to “[c]ontinue work as per the approved plans.” The Tighes assert that this language requires LMHP to act and that this action will affect their rights. Lastly, the Tighes argue that questions of fact exist as to whether the Department has abused its discretion by issuing what the Tighes allege is a false report and taking an action that is not supported by the facts. The primary basis for this argument is the Tighes’ contention that in reaching its determination, the Department failed to acknowledge and/or consider violations, illegal conduct, and deviations from the approved plans and specifications.

The Board has not previously considered 25 Pa. Code § 102.32(c), the regulation that is at the center of this case. Section 102.32(c) provides as follows:

A person aggrieved by an action of a conservation district under this chapter shall request an informal hearing with the Department within 30 days following the notice of the action. The Department will schedule the informal hearing and make a final determination within 30 days of the request. Any final determination by the Department under the informal hearing may be appealed to the EHB in accordance with established administrative and judicial procedures.

25 Pa. Code § 102.32(c).

In this case, the final determinations that the Department made pursuant to the Section 102.32(c) informal hearing are set forth in the second paragraph of the April 2023 Letter, whereby

⁴ In arriving at our holding in this Opinion and Order, the Board did not consider the affidavit that the Department included in its Motion. Therefore, because the Board did not accord any weight to the affidavit, any question of fact that could have arisen from the affidavit’s contents is a non-issue.

the Department concludes that the March 2023 Report was 1) informative in nature and merely recorded the inspector's observations; 2) descriptive and advisory and not prescriptive or imperative; and 3) not a challengeable action. The Department argues that the right to appeal to the Board provided for in Section 102.32(c), does not make all final determinations by the Department following an informal hearing automatically appealable. Instead, it asserts that the right to appeal is qualified by the language "may be appealed [...] in accordance with established administrative and judicial procedures." 25 Pa. Code § 102.32(c). Specifically, the Department contends that Section 102.32(c) does not expand the Board's jurisdiction and that the Board only has jurisdiction if the Department's final determination following the informal hearing otherwise satisfies our statutory jurisdiction. After reviewing the arguments of the parties, we agree with the Department and hold that 25 Pa. Code § 102.32(c) does not expand our jurisdiction by making final determinations reached by the Department after an informal hearing automatically appealable to the Board. If the issue of the Board's jurisdiction is challenged in a Section 102.32(c) appeal, we must still evaluate the specifics of the Department's decision to determine if it meets our jurisdictional requirements.⁵

The Board's jurisdiction is limited by statute and regulation. We only have jurisdiction over final actions of the Department affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514 and 25 Pa. Code § 1021.2(a). Here, if the Department's final determination in the April 2023 Letter satisfies this language outlining our

⁵ Often, Department letters contain appeal paragraphs provided for in boilerplate language, which frequently state something to the effect that "any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514." We have held that such paragraphs do not in and of themselves transform a non-appealable action into an appealable action. See, *Ballas v. DEP*, 2009 EHB 652, 655; *Law v. DEP*, 2008 EHB 216, 217; *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404, 415; *Eljen Corp v. DEP*, 2005 EHB 918, 927. While the present appeal involves an appeal-paragraph contained in a regulation rather than a Department letter, the precedent pertaining to Department letters helps guide our decision.

jurisdiction, then the April 2023 Letter is appealable, but if it does not, then the determination is not appealable. There is no rigid rule we apply that makes a Department letter either appealable or non-appealable. Instead, the question of jurisdiction over a Department letter must be made on a case-by-case basis and certain factors such as: the wording of the Department communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and the relief, if any, the Board can provide, guide our determination. See *Northhampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86, citing *Merck*, 2015 EHB 543, 545-46; *Teska*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59 and; *Borough of Kutztown*, 2001 EHB 1115 at 1121-24. “In short, we ask whether a Department decision adversely affects a person.” *Northhampton Bucks Cnty. Mun. Auth.* at 86, citing 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

While the Department action under appeal is specifically the April 2023 Letter, in their Response, the Tighes frequently either confuse or conflate the March 2023 Report as the action under appeal. However, because the March 2023 Report underlies the April 2023 Letter and was the basis for the informal hearing which ultimately gave rise to the Letter, we begin our discussion by briefly addressing the March 2023 Report. Even if the March 2023 Report was the action the Tighes appealed, we still would lack jurisdiction to review that matter. Inspection reports are not ordinarily appealable to the Board unless they direct an action or impose some obligation on a person.⁶ See *Robert K. Goetz, Jr. d/b/a Goetz Demolition v. DEP*, 2000 EHB 840. The Tighes are neither the subject of the March 2023 Report nor is there any action directed at them or required

⁶ Under the Board’s rules, a “person” is defined as “[a]n individual, partnership, association, corporation, political subdivision, municipal authority or other entity.” 25 Pa. Code § 1021.2.

of them.⁷ As such, the Tighes could not have directly appealed the March 2023 Report itself. Instead, the Tighes requested an informal hearing with the Department concerning the March 2023 Report, the avenue made available to them through Section 102.32(c).

Turning to the April 2023 Letter, the actual Department communication that is on appeal, after careful evaluation, we find that this specific document falls outside our jurisdiction. While a letter from the Department may under certain circumstances constitute an appealable action, generally, comment letters are not reviewable. See *Ballas v. DEP*, 2009 EHB 652, and; *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333. A letter that does not 1) create rights or obligations; 2) requires anyone to alter their conduct; or 3) direct action from anyone and is merely an interpretation of the law, is typically not appealable. *Lower Salford Twp. Auth.*, 2011 EHB at 340. The April 2023 Letter’s wording and substance simply does not rise to the level of an appealable action of the Department. The first paragraph sets out basic information about the hearing process provided under the governing regulation and confirms the subject of the informal hearing. It does not set forth any decisions by the Department and does not adversely affect the Tighes. The last paragraph is forward looking and simply advises the Tighes that the Department will follow up on the other concerns raised by them beyond the March 2023 Report. As noted above, the operable language in the April 2023 Letter is found in paragraph two in which the Department sets forth its opinion that the language used in the March 2023 Report is “informative in nature[,]” is “descriptive and advisory and not prescriptive and imperative[,]” and that it “is not a challengeable action.” The substance of these statements demonstrates that the Department’s communication is confined to an opinion of its legal position with respect to the March 2023 Report and we do not

⁷ The March 2023 Report was directed at LMHP and did not note any violations nor directed LMHP to undertake any action.

see how these statements have any practical impact on the Tighes. Like the March 2023 Report, the April 2023 Letter does not mandate the Tighes (or LMHP) to perform a specific course of conduct, it does not impose obligations that subject the Tighes to liability, and it does not make any directives changing the status quo. Moreover, the language does not indicate any apparent finality. The April 2023 Letter strikes us as the type of advisory communication from the Department that the Board has routinely found to not provide a basis for appeal. We do not see what relief the Board can provide to the Tighes since the letter imposes no requirements on them. We find that the April 2023 Letter is simple a statement of the Department’s interpretation of the March 2023 Report and the law governing inspection reports. See *Bucks Cnty. Water & Sewer Auth. V. DEP*, 2013 EHB 659 (a letter that merely advises an applicant of administrative incompleteness and does not order an action is not a final Department action and was merely an interim decision and not appealable by the third-party appellant or applicant); *Chesapeake Appalachia, LLC v DEP*, 2013 EHB 447, aff’d 89 A.2d 724 (Pa. Cmwlth. 2014) (A Department letter that does not affect Chesapeake’s rights, obligations, or liabilities does not constitute an appealable action); *Perano v. DEP*, 2011 EHB 750 (A Department letter that does not in and of itself require anything and does not impose new or different obligations is not appealable.).

In their Response, the Tighes specifically challenge the Department’s legal opinion set forth in the April 2023 Letter that the March 2023 Report was “descriptive and advisory and not prescriptive or imperative.” The Tighes argue that the statement “[c]ontinue work as per the approved plans” found in the March 2023 Report under the heading “Compliance Assistance Recommendations,” directed LMHP to take an action and that this directive affected their own rights and those of the public at large. Therefore, they argue, the March 2023 Report was actually prescriptive and/or imperative and the Department’s decision otherwise is wrong. We disagree

with the Tighes' interpretation of the language in the March 2023 Report. To us, the phrase "continue work as per the approved plans" does not convey that the Department is ordering LMHP to act, but rather appears to merely confirm LMHP's existing obligation to comply with its permit.⁸ The language in and of itself does not require anything of LMHP and does not impose new or different obligations than those that already pre-existed in its permit. But more importantly, for the purposes of this Motion, we again cannot agree with the Tighes' position that somehow the Department's interpretation that the March 2023 Report, including the compliance assistance recommendation section, was "descriptive and advisory" has any impact on them or their rights and thereby makes the April 2023 Letter appealable.

The Tighes' remaining issues and objections are not directed at the April 2023 Letter on appeal but are aimed at what the Tighes contend is the Department's overall inaction at the LMHP site. As such, it is not clear that these issues are even properly in front of the Board in this appeal. However, in order to be as complete as possible, we will briefly address them. In their remaining issues, the Tighes assert that there were violations that should have been noted in the inspection reports and that the Department made statements indicating that it did not have jurisdiction to address an alleged release of water from the breach of beaver dam.⁹ These are the types of

⁸ The Board and the Commonwealth Court have repeatedly stated that a Department communication that affirms the status quo is not an appealable action. See *Glahn v. DEP*, 2021 EHB 322, aff'd 298 A.3d 455, 460 (Pa. Cmwh. 2023).

⁹ As summarized above, in their Notice of Appeal, the Tighes set forth two objections concerning oral statements made by the Department during the informal hearing. In the first statement, the Tighes allege the Department announced that the informal hearing was being held due to complaints, which, according to the Tighes, implied that the Department denied LMHP engaged in earthmoving activities. The second communication the Tighes challenge concern the Department's statement that it did not have jurisdiction over a water release. Oral statements made by Department employees are generally not appealable unless the statement meets the definition of an appealable action. See *City of Allentown v. DEP*, 2017 EHB 908, 920 and *Medusa Aggregates Company v. DER*, 1995 EHB 414, 421-22. Because neither of these statements involve an order or directive but are merely advisory and/or the Department's own interpretation of its jurisdiction, they are not appealable.

inactions by the Department that the Board has routinely stated do not fall under the Board’s jurisdiction. In *Glahn v. DEP*, 2021 EHB 322, aff’d 298 A.3d 455 (Pa. Cmwth. 2023), the Board once again made clear that it cannot force the Department to address violations nor require the Department to take action in the face of Department inaction. The Board has repeatedly held that the Department’s enforcement discretion is not subject to judicial review by the Board and that its enforcement discretion

derives from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators. Accordingly, it is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. **Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department. Similarly, when the Department performs an investigation of a complaint and concludes that there are no violations, that decision, too, will generally remain undisturbed.**

Ballas v. DEP, 2009 EHB 652, 654, citing *Law v. DEP*, 2008 EHB 216 (footnotes omitted), (emphasis added).

The Tighes also raise an objection to coverage approval under the PAG-02 Permit issued to LMHP. The permit coverage was issued in February 2021 and cannot be appealed by the Tighes in a Notice of Appeal filed in May 2023. The time to appeal that permit has long since passed. Moreover, we are unable to grant the relief sought by the Tighes in their appeal. The Tighes ask the Board “to review the facts at issue involved in this appeal and determine that the Department abused its discretion by failing to prosecute [LMHP] for permit non-compliance and/or violations.” (Tighes’ Memorandum at 9). The relief sought by the Tighes is once again asking us to address Department inaction and its exercise of enforcement discretion. The only conceivable relief we could offer is an order directing the Department to take enforcement action against LMHP (who is not a party to this appeal) which, as explained above, is not something we have the authority to

do as the case law has made clear. See *Glahn v. DEP*, 2021 at 329 (“[the Board] cannot order the Department to issue violations [...]”). Even if these issues were before the Board, we would not have the jurisdiction to address them.

Conclusion

The April 2023 Letter is not an appealable action. It does not require any action by the Tighes and does not impact any of their rights, privileges, immunities, duties, liabilities or obligations. Nothing about the language in 25 Pa. Code § 102.32(c) changes our analysis. That regulation may create the opportunity for a party to appeal a determination by the Department following an informal hearing, but it does not obviate the need for there to be an appealable Department action consistent with Board statutes, regulations and jurisprudence. The Tighes’ appeal of the April 2023 Letter should be dismissed. Therefore, we issue the following Order:



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAURA M. TIGHE AND MATTHEW A.
TIGHE

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2023-046-B

ORDER

AND NOW, this 11th day of July, 2024, it is hereby ORDERED that the Department’s Motion is **granted** and the Appellants’ appeal is hereby **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Judge

s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Judge

Judges Clark and Wesdock concur in the result.

s/ Sarah L. Clark

SARAH L. CLARK
Judge

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge



DATED: July 11, 2024

c: DEP, General Law Division:
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(via *electronic mail*)

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