



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

<b>M &amp; M REALTY PARTNERS, L.P.</b>	:	
	:	
<b>v.</b>	:	<b>EHB Docket No. 2023-082-L</b>
	:	
<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:	
<b>PROTECTION and PARADISE TOWNSHIP,</b>	:	<b>Issued: June 10, 2024</b>
<b>Intervenor</b>	:	

**OPINION AND ORDER ON  
MOTION TO DISMISS**

**By Bernard A. Labuskes, Jr., Board Member and Judge**

**Synopsis**

The Board denies a motion to dismiss an appeal of a Department letter where it is not clear and free from doubt that the letter is not an appealable action.

**OPINION**

M&M Realty Partners, L.P. (“M&M Realty”) filed this appeal from a September 20, 2023 letter that counsel for the Department of Environmental Protection (the “Department”) sent to the solicitor of the Paradise Township Board of Supervisors (the “Township”). The Township has intervened in the appeal.

According to the parties, M&M Realty operates a long-term stay motel in the Township. Some of the motel buildings are served by on-lot sewage disposal systems that have been malfunctioning. M&M Realty apparently has been attempting to resolve the sewage issues at its motel buildings with the Township and the Department. The aforesaid letter provides, in its entirety:

Per your request, this is to advise the Paradise Township Board of Supervisors (“Township”) that the Commonwealth of Pennsylvania, Department of

Environmental Protection (“Department”) has determined that resolution of the sewage disposal issues at M&M Realty Partners L.P.’s (“M&M Realty”) properties located at 6315 Paradise Valley Road, Mount Pocono, Pennsylvania are required to be resolved through The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (“The Clean Streams Law”) and The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L.1535, *as amended*, 35 P.S. § 750.1-750.20 (“Sewage Facilities Act”) and underlying regulations. **Specifically, the Department has determined that M&M Realty must do planning for the entirety of their properties and that a repair permit from the Township is not appropriate for addressing the sewage issues.** Planning has never been done and while M&M Realty believes a repair permit is all that is required, the Department disagrees and has asserted the need for planning. As such, while the Township has a role in the process, it is the Department who will oversee and approve the various submissions required under the Sewage Facilities Act and underlying regulations.

As you are aware, M&M Realty has filed an appeal of the Department’s mailer, since amended, to the Pennsylvania Environmental Hearing Board (“EHB”), docketed at 2023-67-L (“Appeal”). The Township has been joined in the Appeal as a “necessary party”. Prior to filing said Appeal with the EHB, the Department and M&M Realty were in discussions regarding resolution of the matter. The Department is currently in process of drafting a Consent Order and Agreement (“CO&A”) between all parties to the appeal in order to resolve the matter. The CO&A is intended to ensure proper planning is completed and to allow for repair/replacement of the malfunctioning systems.

Should you have any questions regarding this correspondence, please do not hesitate to contact me at your convenience.

(Notice of Appeal, Ex. 1 (emphasis added).) It is not clear what request the Township may have made to prompt this letter from the Department.

The Township has now moved to dismiss this appeal.<sup>1</sup> The Township asserts that the letter does not embody an appealable action. The Department has filed a memorandum and a reply brief in support of the Township’s motion. M&M Realty opposes the motion.

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<sup>1</sup> The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082-L, slip op. at 5 (Opinion and Order, Mar. 8, 2024); *Ritsick v. DEP*, 2022 EHB 283, 284. For purposes of resolving motions to dismiss, the Board accepts the nonmoving party’s version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Twp. v. DEP*, 2008 EHB 563, 570.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of “action”); *Monroe Cnty. Clean Streams Coalition v. DEP*, 2018 EHB 798, 800; *Kennedy v. DEP*, 2007 EHB 511, 511-12. There is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep’t of Env’tl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep’t of Env’tl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Glahn v. DEP*, 2021 EHB 322, 326, *recon. denied*, 2021 EHB 347, *aff’d*, 298 A.3d 455 (Pa. Cmwlth. 2023); *Dobbin v. DEP*, 2010 EHB 852, 858; *Borough of Kutztown*, 2001 EHB at 1121. In determining whether a Departmental document constitutes a final, appealable action, we generally consider: the wording of the document; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the document; what relief, if any, the Board can provide; and any other indicia of the impact upon a person’s personal or property rights. *Hordis v. DEP*, 2020 EHB 383, 388 (citing *Merck v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB at 858-59; *Borough of Kutztown*, 2001 EHB at 1121). In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2; *Clean Air Council v. DEP*, 2023 EHB 203, 207. Importantly, we generally abhor piecemeal review of the various intermittent decisions made along the way during the Department’s review process, even if some of those decisions may bear some of the hallmarks of finality. *Monroe Cnty. Clean Streams*, 2018 EHB at 809-10; *Lower Salford Twp. Mun. Auth. v. DEP*, 2011 EHB 333, 338-39; *United Refining Co. v. DEP*, 2000 EHB 132, 133-34; *Phoenix Res., Inc. v. DER*, 1991 EHB 1681, 1684.

The Township recites the Board's general standard for determining whether a Department letter is an appealable action, but it does not spend much time actually addressing the factors that make up the standard. It never explains in a straightforward manner whether a Department letter stating that sewage planning is required for a particular situation can ever be a final action despite having the appearance of being something that would embroil the Board in piecemeal review. Instead, the Township's position is heavily reliant on an administrative finality argument. The Township says that the letter is not an appealable action because it merely reiterates what was established in earlier Department communications. The Township highlights at least three prior communications from the Department, which it claims informed M&M Realty that planning would be required. We are hesitant to believe that the parties' tortuous correspondence history could transmute an otherwise unappealable action into an appealable one, but putting that aside, the Township has failed to provide enough context and documentation to resolve all doubts in its favor to adequately support its motion to dismiss on this ground. Even if we assume *arguendo* that the Township's fundamental premise about the effect of the earlier correspondence has merit, we tend to agree with M&M Realty that it is not at all clear that the earlier correspondence did in fact mandate that sewage planning would be required.

The Township also points out that M&M Realty filed a separate appeal of one of the earlier letters at EHB Docket No. 2023-067-L. The Township says that M&M Realty's notice of appeal for that letter originally included objections to the alleged requirement for M&M Realty to conduct sewage planning, and that when M&M Realty amended its appeal, it removed those objections, leaving only objections to an alleged requirement to conduct a preliminary hydrogeologic study remaining. The Township reasons that this means M&M Realty abandoned any objection to the requirement to conduct sewage planning and that, since the appeal at EHB Docket No. 2023-067-L

has since settled and been closed, the planning requirement is now final and cannot be collaterally attacked through this appeal.<sup>2</sup> We cannot conclude that M&M Realty’s appeal of the earlier letter and subsequent withdrawal of objections has any effect on the appealability of the letter under appeal here.

In instances where there is clear doubt, a motion to dismiss must be denied. *See Kopko v. DEP*, 2019 EHB 179 (denying motion to dismiss where “considerable doubt” remained based on the incomplete record before the Board). The Township’s motion and the Department’s memoranda in support thereof leave us in doubt whether the letter under appeal embodies an appealable action.

Accordingly, we issue the Order that follows.

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<sup>2</sup> We are not entirely sure of the Department’s position regarding this letter. In the Stipulation of Settlement filed in the 2023-067-L appeal, the Department stipulated that the letter’s request to perform a preliminary hydrogeologic study was not a final, appealable action, but now it apparently supports the Township’s position that the letter’s supposed requirement to conduct planning was a final action.



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<b>Intervenor</b>	:	

**ORDER**

AND NOW, this 10<sup>th</sup> day of June, 2024, it is hereby ordered that Paradise Township’s motion to dismiss is **denied**.

**ENVIRONMENTAL HEARING BOARD**

s/ Bernard A. Labuskes, Jr.  
**BERNARD A. LABUSKES, JR.**  
**Board Member and Judge**

**DATED: June 10, 2024**

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