COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2020-082-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	**Issued: March 8, 2024**

OPINION AND ORDER ON
MOTIONS TO DISMISS AND MOTION TO STRIKE

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

Synopsis

The Board denies a motion to dismiss an appeal of an internal Department memorandum where the Department was required by stipulation of the parties to make the decision contained within the memorandum. The Board denies an appellant's motion to dismiss a third party from the appeal where the appellant has not shown as a matter of law that the third party lacks standing or that the failure to strictly adhere to the Board's rules on intervention warrants dismissing the party at this point in the proceedings. The appellant's motion to strike is denied.

O P I N I O N

Montgomery Township Friends of Family Farms ("Montgomery Friends") has appealed an August 14, 2020 memorandum written by a professional engineer at the Department of Environmental Protection (the "Department"). The memorandum appears to be internal to the Department. It memorializes an evaluation of information provided by Herbruck's Poultry Ranch, Inc. ("Herbruck's") assessing air emissions for what was then a proposed egg laying and processing farm in Montgomery Township, Franklin County. We are told the egg laying and

processing farm is currently in operation. The memorandum says the Department agrees with Herbruck's conclusion that Herbruck's operation qualifies as the "production of agricultural commodities" as defined under Section 4.1(b) of the Air Pollution Control Act, 35 P.S. § 4004.1(b), and thus qualifies for an exemption under Section 4.1(a), 35 P.S. § 4004.1(a).[1] The effect of qualifying for the exemption, according to the memorandum, is that Herbruck's does not need to apply for a plan approval or a permit under the Air Pollution Control Act for the air emissions generated by its facility.

The history leading up to this memorandum extends back to an earlier appeal filed by Montgomery Friends in 2017 and docketed at EHB Docket No. 2017-080-R. In that appeal, Montgomery Friends appealed both the Department's issuance of a water quality management (WQM) permit to Herbruck's and the Department's authorization to Herbruck's for coverage under the PAG-12 general NPDES permit for Concentrated Animal Feeding Operations. The dispute in that appeal centered on air emissions issues. When Herbruck's was seeking the WQM permit and PAG-12 coverage, it answered in the negative a question on a Department form asking whether or not the project would involve operations that produce air emissions. *See Montgomery Twp. Friends of Family Farms v. DEP*, 2018 EHB 749 (Opinion and Order denying motion for summary judgment filed by Montgomery Friends and motion to dismiss filed by the Department). Herbruck's, therefore, did not submit to the Department any information on the type or amount of

[1] The Department memorandum twice cites 35 P.S. § 7004.1, which is not a provision of the Air Pollution Control Act. Section 4.1(a) of the Air Pollution Control Act provides:

> (a) Except as may be required by the Clean Air Act or the regulations promulgated under the Clean Air Act, this act shall not apply to the production of agricultural commodities and the Environmental Quality Board shall not have the power nor the authority to adopt rules and regulations relating to air contaminants and air pollution arising from the production of agricultural commodities.

35 P.S. § 4004.1(a).

air emissions from its operation. Montgomery Friends alleged in that appeal that this was an error and that the Herbruck's operation would likely generate significant emissions of particulate matter and volatile organic compounds.

In the course of the first round of dispositive motions filed in that appeal, the Department admitted that Herbruck's response to the air emissions question on the form was incorrect and the operation would in fact produce air emissions. *Id.*, 2018 EHB at 751. Following our 2018 Opinion and Order denying the parties' dispositive motions, Herbruck's submitted to the Department the air emissions information required by the form. *Montgomery Twp. Friends of Family Farms v. DEP*, 2019 EHB 430, 432 (Opinion and Order denying motion for partial summary judgment filed by Montgomery Friends). As of July 2019, the Department was still evaluating the information submitted by Herbruck's and trying to decide whether or not Herbruck's would need to obtain an air quality plan approval and Title V permit. *Montgomery Twp. Friends of Family Farms v. DEP*, 2019 EHB 437, 439 (Opinion and Order denying the Department's and Herbruck's motions to dismiss certain objections in the notice of appeal).

In November 2019, Herbruck's, Montgomery Friends, and the Department filed with the Board a joint stipulation of settlement in EHB Docket No. 2017-080-R. Relevant to the memorandum at issue in the current appeal, the joint stipulation provided, in part, that Herbruck's would submit information to the Department on the "production of agricultural commodities" exemption in Section 4.1 of the Air Pollution Control Act, and the Department would review that information and make a determination on the applicability of the exemption to the Herbruck's facility:

> 1. Herbruck's will submit to the Department, within a reasonable period of time after the execution of this Stipulation, sufficient information to allow the Department to determine whether Herbruck's can avail itself of the exemption provided in Section 4.1 of the Pennsylvania Air Pollution Control Act, 35 P.S. §

> 4004.l, or should apply for an air quality plan approval or permit under the Pennsylvania Air Pollution Control Act;
>
> **2. The Department will review the information submitted and come to its conclusion within a reasonable period of time after Herbruck's submits sufficient information;**
>
> 3. Except for information which may be determined by the Department to be confidential business information under the Air Pollution Control Act, the Department will provide a copy to Appellant [Montgomery Township Friends of Family Farms] of the information Herbruck's submits to the Department pursuant to Paragraph 1, above, and the Department will provide a copy to Appellant of any written comments or requests for additional information the Department sends to Herbruck's in response to Herbruck's submission.

(EHB Docket No. 2017-080-R, Docket Entry 65 (emphasis added).) On November 25, 2019, former Chief Judge Renwand issued an Order approving the parties' joint stipulation of settlement and retaining jurisdiction for the purpose of the enforcement of the joint stipulation. (EHB Docket No. 2017-080-R, Docket Entry 66.)

According to the parties' papers in the instant motions under consideration, in March 2020, the Department provided Montgomery Friends with a redacted copy of Herbruck's assessment of air emissions. In July 2020, Herbruck's submitted to the Department an assessment by Herbruck's concluding that its facility qualified for the production of agricultural commodities exemption in the Air Pollution Control Act. On August 14, 2020, the Department prepared the memorandum that is currently under appeal memorializing the determination required by the stipulation. In the current appeal, Montgomery Friends disagrees with the conclusion that the Herbruck's facility is exempt from the permitting and plan approval process. Montgomery Friends asserts that the agricultural commodities exemption does not apply to operations that are a major source of pollutants under the federal Clean Air Act, 42 U.S.C. §§ 7401 – 7671q.

Now, three and a half years after this appeal was filed, Herbruck's has moved to dismiss the appeal, and Montgomery Friends has moved to strike Herbruck's motion to dismiss while also arguing that Herbruck's has never been a proper party to this appeal and Herbruck's lacks standing.

Herbruck's argues in its motion that the Department's memorandum is not an appealable action. Herbruck's says that, when the Department merely expresses agreement that a facility meets statutory or regulatory definitions qualifying for an exemption from permitting, it is not a decision that affects any party's rights, duties, or obligations under the law. Montgomery Friends opposes Herbruck's motion to dismiss. The Department has not expressed any agreement in Herbruck's motion. The Department has simply filed a letter stating it would not be filing a response to the motion.

In its own motion, Montgomery Friends argues that (1) Herbruck's never properly intervened in the appeal under the Board's rules and is not a proper party in the appeal, and (2) Herbruck's transferred its interest in the facility property by way of deed and it no longer has standing. Montgomery Friends says that, because Herbruck's is not an appropriate party in this appeal, Herbruck's motion to dismiss should be stricken and Herbruck's itself should be dismissed from the appeal. Both Herbruck's and the Department oppose Montgomery Friends' motion.

For the reasons explained below, we deny the parties' motions.

Herbruck's Motion to Dismiss

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. *Protect PT v. DEP*, EHB Docket No. 2023-025-W, slip op. at 2 (Opinion and Order, Jan. 10, 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 Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. 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; *Dobbin v. DEP*, 2010 EHB 852, 858; *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 the recipient'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; *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*, EHB Docket No. 2022-093-C, slip op. at 5 (Opinion and Order, July 14, 2023).

Herbruck's relies heavily on cases where we have found that a Department determination that a certain facility does not need to obtain a permit is not an appealable action. For instance, Herbruck's cites *Clean Air Council, supra*, a case where we granted a motion to dismiss an appeal of a Department letter stating that a facility qualified as an "advanced recycling facility" under the definitions in the Solid Waste Management Act. In *Clean Air Council*, we relied on a line of cases

holding that Department letters or communications are generally not appealable actions when they indicate that a proposed facility or activity meets a certain statutory or regulatory definition and does not require a permit under the law. *See Borough of Glendon v. DEP*, 2014 EHB 201; *Gordon-Watson v. DEP*, 2005 EHB 812; *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174.

However, importantly for our purposes here, in *Clean Air Council* we contrasted that situation to ones where we have found a Department action to be appealable due to the Department being required to make a determination one way or the other, typically by way of statute or regulation. For instance, in *Love v. DEP*, 2010 EHB 523, we denied a motion to dismiss an appeal of the Department's refusal to process a subsidence damage claim under the Bituminous Mine Subsidence and Land Conservation Act where, under the Act, the Department has a mandatory duty to process such claims and make a decision on them one way or the other. *See* 52 P.S. § 1406.5e; 25 Pa. Code § 89.143a. We applied the same logic in *Kiskadden v. DEP*, 2012 EHB 171, where, under the Oil and Gas Act, the Department is required to investigate a claim of water supply contamination and make a determination whether or not an oil and gas operator is responsible for any contamination. In *Kiskadden*, we denied a motion to dismiss an appeal where the Department, following its investigation, found an operator was not responsible for any contamination to the appellant's water supply. We also found the situation in *Clean Air Council* different than ones where the Department follows a defined regulatory process for determining the applicability of an exception or exemption. *See Winner v. DEP*, 2014 EHB 135 (denying motion to dismiss where Department is required to act within 30 days of a sewage facilities planning exception request under 25 Pa. Code § 71.55); *Stern v. DEP*, 2001 EHB 628 (denying motion to dismiss appeal of Department letter granting an exemption from full sewage facilities planning pursuant to the regulatory process established in 25 Pa. Code § 71.51(b)).

We fail to see any meaningful difference between the Department being required to make a determination by statute or regulation and the Department being required to make a determination under the provisions of a joint stipulation for the settlement of an appeal before this Board. By stipulation of the same parties to the current appeal, the Department was *required* to make a determination one way or the other on the applicability of the exemption based on air emissions information *required* to be submitted by Herbruck's. The Department committed to making a determination under a stipulation that was signed off on by the Board. That determination is contained in the memorandum that Montgomery Friends has appealed. Herbruck's motion to dismiss is inconsistent with the stipulation to which Herbruck's itself agreed and presumably helped draft. Notably, the Department has said it would not file a response to Herbruck's motion, which signals that the Department does not endorse Herbruck's position, as it should not. The situation here falls in line with *Love*, *Kiskadden*, *Winner*, and *Stern*. As in those cases, we deny Herbruck's motion to dismiss.

Montgomery Friends' Motion to Strike / Motion to Dismiss

Montgomery Friends' motion to strike does not only seek to strike Herbruck's now-denied motion to dismiss. Montgomery Friends' motion challenges both Herbruck's standing and whether the proper procedures were followed under our rules for Herbruck's to become a party to this appeal. Montgomery Friends first argues that Herbruck's never properly intervened in this appeal. For certain types of appeals, some persons are designated under our rules as a party to an appeal and other persons may become a party to an appeal without needing to petition to intervene. This process begins with an appellant serving a copy of its notice of appeal on certain classes of persons (other than the Department) as required by our rules. In cases where an appellant is appealing a "permit, license, approval, certification or order" that was issued to someone other

than the appellant, the appellant must serve its notice of appeal on the recipient of that Department action. 25 Pa. Code § 1021.51(f)(1)(iv) and 1021.51(h)(1). Service of the notice of appeal upon the recipient of a permit, license, approval, certification, or order then "subject[s] the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene…." 25 Pa. Code § 1021.51(i). The Board commonly refers to these recipients as "permittees" and adds them to the caption at the beginning of a case.

The Board's rules also require service of the notice of appeal on certain other entities whose interests may be affected by an appeal. For instance, in appeals of decisions under Sections 5 or 7 of the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.5 and 750.7, service is required on any affected municipality, municipal authority, or the proponent of the decision. 25 Pa. Code § 1021.51(h)(2). In appeals involving a claim of subsidence damage, water loss, or contamination, service is required on any mining company, well operator, or owner or operator of a storage tank. 25 Pa. Code § 1021.51(h)(3). Those entities, as well as any other interested party as ordered by the Board, 25 Pa. Code § 1021.51(h)(4), may intervene in the appeal as a matter of course within 30 days of service of the notice of appeal by simply filing a notice of appearance instead of a petition to intervene. 25 Pa. Code § 1021.51(j). Those entities are not added as a party to the appeal until they file a notice of appearance.

Montgomery Friends identified Herbruck's as a permittee in the caption of its notice of appeal and served a copy of the notice of appeal on Herbruck's. Two days after the appeal was filed, Herbruck's prior counsel entered his appearance in this matter. Approximately one and a half months after the appeal was filed, Montgomery Friends, the Department, and Herbruck's jointly filed a statement averring that they had conferred about settlement of the appeal on October

26, 2020 and that they would continue to consider the issues raised in the appeal and would promptly notify the Board if the appeal, or a portion thereof, had been resolved. In that joint statement, the parties also informed the Board that the name the Board used for Herbruck's in the caption, Herbruck's Poultry Farm, was incorrect and it should refer to Herbruck's Poultry Ranch, Inc. The Board issued an Order on the same day correcting the caption. Now, three and a half years later, Montgomery Friends says that it only served Herbruck's a copy of the notice of appeal and identified Herbruck's as a permittee in the caption of the notice of appeal as a mere courtesy.

As far as we can tell, Herbruck's is not the recipient of the internal Department memorandum under appeal. Nor is it clearly within the parties who get to participate in the appeal by filing a notice of appearance. However, our rules are to be interpreted to reach a just result. 25 Pa. Code § 1021.4. Herbruck's has participated in this appeal for more than three years without Montgomery Friends raising any issue with Herbruck's participation. During this time the parties have jointly filed nearly 20 documents providing the Board with status reports or requesting extensions. Herbruck's says Montgomery Friends has conducted extensive discovery on Herbruck's. This appeal is now scheduled for a merits hearing later this year. To the extent the styling of Montgomery Friends' notice of appeal caused the Board to misinterpret Herbruck's as a "permittee" when the appeal was filed and Herbruck's did not follow the appropriate procedures to intervene, we nevertheless have no difficulty concluding now that Herbruck's has been an interested party in this appeal within the meaning of 25 Pa. Code § 1021.51(h)(4) and thus a proper party to this appeal.

Turning to Herbruck's standing, Montgomery Friends attaches to its motion a deed dated January 7, 2021 between Herbruck's Poultry Ranch, Inc. (the party to this appeal) and Herbruck's of Pennsylvania, LLC that conveys the property of the site at issue from Herbruck's Poultry Ranch,

Inc. to Herbruck's of Pennsylvania, LLC. Devoting a single paragraph of its memorandum of law to addressing Herbruck's standing, Montgomery Friends summarily concludes that Herbruck's Poultry Ranch no longer has an ownership or operational interest in the facility and therefore Herbruck's does not have standing. In response, Herbruck's points to a portion of the deed that says the current owner of the property, Herbruck's of Pennsylvania LLC, is a partially owned subsidiary of Herbruck's Poultry Ranch, Inc. Herbruck's says, therefore, it continues to have a substantial, direct, and immediate interest in the appeal sufficient to confer standing.

In a reply brief Montgomery Friends has filed in support of its motion to strike / motion to dismiss, Montgomery Friends says the Herbruck's entity that currently owns the site is a separate legal entity from the Herbruck's entity that has participated in this appeal, and that Herbruck's Poultry Ranch has not done enough to establish its continued standing. Montgomery Friends never contested the standing of Herbruck's Poultry Ranch when it apparently still owned the property at issue. There is no allegation in Montgomery Friends' motion that Herbruck's did not have standing in this appeal prior to the transfer of property interest. Standing among the Herbruck's entities is not an either-or affair. Both Herbruck's Poultry Ranch, Inc. and Herbruck's of Pennsylvania, LLC may potentially have standing in this appeal. Even if there is a need to substitute parties, *see* 25 Pa. Code § 1021.83 (substitution of parties), which has not been established by Montgomery Friends, we can overlook a departure from our rules given Herbruck's original standing.

Further, to the extent that Montgomery Friends' motion to strike is really just window dressing for its motion to dismiss Herbruck's, in evaluating a motion to dismiss based on standing we accept as true all of the non-moving party's allegations. *See Ritsick*, 2022 EHB at 285 (citing *Giordano v. DEP*, 2000 EHB 1184, 1187). The onus is on Montgomery Friends, as the moving party, to make a colorable case that Herbruck's does not have standing. The bottom line is that

Montgomery Friends has not provided us with sufficient information to conclude that Herbruck's Poultry Ranch no longer has standing in this appeal or shown in its motion that Montgomery Friends is entitled to judgment as a matter of law on the issue of Herbruck's standing.

Accordingly, we issue the Order that follows.

E-FILED
03/08/2024
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
	:	
v.	:	**EHB Docket No. 2020-082-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 8th day of March, 2024, it is hereby ordered as follows:

1. Herbruck's Poultry Ranch, Inc's Motion to Dismiss is **denied**.

2. Montgomery Township Friends of Family Farms' Motion to Dismiss is **denied**.

3. Montgomery Township Friends of Family Farms' Motion to Strike is **denied**.

ENVIRONMENTAL HEARING BOARD

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

*** Board Member and Judge Paul J. Bruder, Jr. is recused in this matter and did not participate in the decision.**

DATED: March 8, 2024

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

For the Commonwealth of PA, DEP:
Alicia R. Duke, Esquire
(*via electronic filing system*)

For Appellant:
William J. Cluck, Esquire
(*via electronic filing system*)

For Permittee:
Robert D. Fox, Esquire
Carol F. McCabe, Esquire
Jessica D. Hunt, Esquire
(*via electronic filing system*)