



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRENT KELOSKY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, and EUROVIA ATLANTIC
COAST, LLC d/b/a NORTHEAST PAVING,
Intervenor**

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EHB Docket No. 2023-055-BP

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

By Paul J. Bruder, Jr., Judge

Synopsis

The Board denies Intervenor Eurovia Atlantic Coast, LLC d/b/a Northeast Paving’s Motion to Dismiss an appeal of an Order issued by the Department of Environmental Protection (“Department”). The record is not yet complete, and dismissal is not appropriate for the reasons stated below. Upon further development of the record after discovery, a dispositive motion on the same or similar grounds may be more appropriate.

OPINION

Introduction

This third-party appeal centers around a Department order issued on June 8, 2023 (“Order”) to Eurovia Atlantic Coast, LLC (“Eurovia”) d/b/a Northeast Paving, a construction and maintenance company operating a fill storage area. According to the Order, since at least 2018, Eurovia has been the operator of a fill site located at 1793 Hartzel School Road in New Sewickley Township, Beaver County, Pennsylvania (“Fill Site”). Eurovia utilized the Fill Site for disposal of

fill materials, including sand, gravel, asphalt, and sediment (“Fill Material”) generated from a Pennsylvania Turnpike Project located in Beaver County and/or other locations. On February 23, 2018, the Beaver County Conservation District (“BCCD”) approved an Erosion and Sediment Control Plan (“E&S Plan”) for the Site. According to the approved E&S Plan, approximately 7,200 cubic yards of Fill Material were to be placed at the Fill Site on a steep slope.

According to the Order, from November 8, 2018 to April 6, 2023, the Department and the BCCD, either solely or jointly, conducted at least eighteen (18) inspections at the Fill Site to determine compliance with the Clean Streams Law and associated regulations. During this time period, the Order states that the Department identified a number of violations of the E&S plan, and Eurovia began implementation of a corrective action plan. On June 24, 2022, the Department approved Eurovia’s updated Steam Restoration Plan and E&S Plan. During the June 27, 2022 and March 10, 2023 inspections by the Department at the Fill Site, no violations were found. However, on or around March 16, 2023, the Order states that the Department found Eurovia’s pump had failed, creating sediment pollution to the unnamed tributary (“UNT”) to Connoquenessing Creek that impacted a downstream pond. Thereafter, the Department conducted at least three additional follow-up inspections at the Fill Site where it determined that Eurovia “failed to fully and properly implement the approved E&S plan.” *See* June 8, 2023 Order, ¶¶ AC-AE. As a result, the Department issued the subject June 8, 2023 Order requiring Eurovia, among other things, to “submit for review and approval a full and complete amendment to the approved Steam Restoration Plan and E&S Plan” that included “a long-term stabilization of disturbed areas in the stream channel” and “removal of the Fill Materials present within the upper reaches of the UNT to Connoquenessing Creek.” *Id.* at ¶ 1.

With respect to Mr. Kelosky, the Order states: “The Department is continuing its

investigation into the deposition of Fill Material into a wetland and pond located on property owned by Brent Kelosky.” See June 8, 2023 Order, ¶ AH. Mr. Kelosky’s Notice of Appeal (“NOA”) contends that the “Order is arbitrary, capricious, unreasonable, and inconsistent with the requirements of the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27, and the regulations promulgated pursuant to these statutes, in that the Order does not include any requirement that Eurovia address the Fill Material that has come to be located on the Kelosky Property.” See NOA, Exhibit 3 at ¶¶ C-D.

Standard of Review

A motion to dismiss is appropriate where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *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. Thus, 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 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). 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 5). A motion to dismiss “is ordinarily decided based solely upon the facts stated or otherwise apparent in the notice of appeal itself.” *Mayer vs. DEP*, 2012 EHB 400, 401. “We have specifically held on multiple occasions that an appellant is not required to aver facts sufficient to show that it has standing in a notice of appeal.” *Id.* (citing *Hendryx v. DEP*, 2011 EHB 127, 130; *Riddle v. DEP*, 2001 EHB 417, 419; *Ziviello v. State Conservation Commission*, 2000 EHB 999, 1003, *et. al*). Therefore, with these principals in mind, we evaluate Intervenor Eurovia’s Motion to Dismiss.

Discussion

Jurisdiction of the Board

The Environmental Hearing Board Act, Act of July 31, 1988, P.L. 530, as amended, 35 P.S. §§ 7511–7516 (“EHB Act”) empowers the Board to hear appeals of final Department actions. The Pennsylvania Code defines “action” as “[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person.” 25 Pa. Code § 1021.2(a).

Through its present Motion to Dismiss, Eurovia would ask the Board to differentiate the appealability of final Department actions; thus, limiting the jurisdiction of the Board to hear appeals of final actions depending upon *who* files an appeal. We not aware of controlling precedent whereby an order is final as to one party but not as to another, and we decline to make such a differentiation in this matter. The Order at issue is undeniably a final, appealable enforcement action. Anyone who perceives to be aggrieved by that action is permitted by the Environmental Hearing Board Act to file an appeal. *See* 35 P.S. § 7514; 2 Pa. C.S. § 702; Section 7(a) of The Clean Streams Law, 35 P.S. § 691.7(a); *Muth v. Department of Environmental Protection*, 315

A.3d 185, 195 (Pa. Cmwlth. 2024).

What we believe Eurovia is in fact arguing in its Motion to Dismiss is that Mr. Kelosky is not *aggrieved* by the action. In other words, Eurovia is saying that Mr. Kelosky has no *standing* to appeal because he is not impacted by the Order under appeal. There is abundant Board and appellate caselaw which lays out the test for determining the standing of an appellant, and the factors that are to be considered and balanced before one can say that an appellant does or does not have a direct interest in the action.

We need not do an analysis of Mr. Kelosky’s standing at this time, mainly because Eurovia has not argued his lack of standing or provided any facts or argument relating thereto. The Board does not typically raise dispositive issues *sua sponte*, and we decline to do so here. Even if the Board did entertain the standing argument, we would be limited in reviewing the notice of appeal itself, which does not require standing be addressed.¹ *Winner v. DEP*, 2014 EHB 135, 140 (*quoting Ziviello v. DEP*, 2000 EHB 999, 1003); *Mayer v. DEP*, 2012 EHB 400, 401; *Riddle v. DEP*, 2001 EHB 417, 419. The record in this matter is not fully developed, and at this stage of

¹ Under current law, in order to have standing to appeal an administrative decision, persons must have a “direct interest” in the subject matter of the case. *Muth v. Department of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (*citing Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). *See also, Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person’s interest. *Muth*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024).

For purposes of standing questions, the appropriate evidentiary standard for reviewing a challenge to standing depends on when standing is challenged. A motion to dismiss generally is not the proper vehicle for raising a challenge to standing. *Orenco Systems, Inc. v. DEP*, 2016 EHB 432, 434 (*citing Mayer v. DEP*, 2012 EHB 400, 401). A motion to dismiss is the “rough equivalent of a motion for judgment on the pleadings” in that the motion is decided based upon the facts stated or otherwise in the notice of appeal itself. *Mayer*, 2012 EHB at 401 (*citing Hendryx v. DEP*, 2011 EHB 127, 129; *Felix Dam Preservation Ass’n v. DEP*, 2000 EHB 409, 421 n.7). The limited exception to this rule is when the Board’s jurisdiction is at issue, and Pennsylvania law has made clear that standing is not a jurisdictional issue. *Hendryx*, 2011 EHB at 129; *See Beers v. Unemployment Compensation Board of 129 Review*, 633 A.2d 1158, 1160 fn. 6 (Pa. 1993) (Whether a party has standing to maintain an action is not a jurisdictional issue.)

litigation, the Board would need additional discovery and evidentiary support to aid in its consideration of any issues of standing. Therefore, determining whether Appellant has standing to bring this action needs further development.

Estoppel

Eurovia’s second argument in favor of dismissal centers upon the resolution of a private, civil case litigated in the Court of Common Pleas of Butler County. Mr. Kelosky initiated civil proceedings against Eurovia and other defendants in the Beaver County Court of Common Pleas in October 2019. *Kelosky v. Eurovia Atlantic Coast LLC, et al.*, No. 11374-2019. Pursuant to that civil litigation’s resolution, Mr. Kelosky signed a Confidential Settlement Agreement and Release (“Release”).

In the current matter, Eurovia contends that the Release estops Mr. Kelosky from bringing the subject appeal against the Department. Eurovia makes no reference to which theory of estoppel it is asserting; therefore, the Board is reluctant to speculate on the matter. Additionally, whether Mr. Kelosky is estopped in any way from bringing his appeal of the Department’s Order based upon a signed Release appears to be a question of material fact regarding, among other things, the scope of the Release, the parties involved and subject to that Release, whether the Board is the appropriate forum to adjudicate a dispute regarding a private Release agreement, and what relief Mr. Kelosky is seeking in his appeal. At this stage of litigation, we must accept Mr. Kelosky’s version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155; *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54 (citing *Ehmann v. DEP*, 2008 EHB 286, 390); *Lawson v. DEP*, 2018 EHB 513, 514-515. The claim that Mr. Kelosky is estopped from bringing this appeal is hardly free from doubt and requires further development. See *Borough of St. Clair v. DEP*, 2015 EHB 290, 310-11.



Conclusion

Therefore, for the above stated reasons, we must deny Intervenor Eurovia's Motion to Dismiss. Accordingly, we issue the Order that follows.



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ORDER

AND NOW, this 18th day of October, 2024, it is hereby order that Intervenor Eurovia Atlantic Coast, LLC d/b/a Northeast Paving’s Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Paul J. Bruder, Jr. _____
PAUL J. BRUDER, JR.
Judge

DATED: October 18, 2024

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