



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIGHTS PLAZA MATERIALS, INC.	:	
	:	
v.	:	EHB Docket No. 2024-170-BP
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: January 28, 2025
PROTECTION	:	

**OPINION AND ORDER ON
APPELLEE DEPARTMENT OF ENVIRONMENTAL PROTECTION’S
MOTION TO DISMISS AND APPELLANT HEIGHTS PLAZA MATERIALS, INC.’S
PETITION TO FILE AN APPEAL *NUNC PRO TUNC***

By Paul J. Bruder, Jr., Judge

Synopsis

The Environmental Hearing Board (“Board”) grants Appellee Commonwealth of Pennsylvania, Department of Environmental Protection’s (“Department”) Motion to Dismiss and denies Appellant Heights Plaza Materials, Inc.’s (“Heights Plaza” and “Appellant”) Petition to File an Appeal *Nunc Pro Tunc*. The Board does not have jurisdiction over an untimely appeal, even if it is filed one day late, and there is no evidence of fraud, a breakdown in the Board’s administrative operations, or any other unique and compelling circumstances to warrant *nunc pro tunc* relief.

OPINION

Background

This appeal centers around a Department Compliance Order dated October 7, 2024 (“Order”) issued to Appellant Heights Plaza Materials, Inc. The Order was served on Heights Plaza via hand delivery on October 16, 2024 to John E. Marino, President and Owner of Heights Plaza by Ryan Fuller, Investigator for the Pennsylvania Department of Environmental Protection,

Bureau of Investigations, Office of Chief Counsel.

Heights Plaza appealed the subject Order by sending a notice of appeal to the Board via facsimile and mail. The appeal was mailed express through United States Postal Service on November 16, 2024, and was delivered to the Board on November 18, 2024. The Board received the appeal documents via facsimile on November 16, 2024.¹

On December 9, 2024, the Department filed a Motion to Dismiss the appeal for being untimely. In response, on January 10, 2025, Appellant filed a Petition to File an Appeal *Nunc Pro Tunc*, requesting the Board hear the untimely appeal because the Department “negligently and fraudulently” advised Appellant of the wrong appeal deadline. On January 13, 2025, Appellant filed a Response to the Motion to Dismiss re-stating substantially the same arguments contained within its Petition to Appeal *Nunc Pro Tunc*, but relying on the principles of equitable estoppel. On January 17, 2025, the Department filed its Response to Appellant’s Petition for *Nunc Pro Tunc* Relief.

On January 17, 2025, Appellant contacted the Board and stated that there were factual inaccuracies in its Petition to File an Appeal *Nunc Pro Tunc* and requested leave to file an amendment. On January 17, 2025, the Board issued an Order allowing Appellant until January 21, 2025 to file an Amendment and the Department until January 24, 2025 to Respond. On January 21, 2025, Appellant filed said Amendment. On January 22, 2025, the Department filed its Response to the Amendment.

¹ Further proof of this timeline is exhibited in an email from John E. Marino to Peter Burch dated November 20, 2024, Mr. Marino writes: “Saturday morning I emailed you a copy of my appeal forms and overnighted, the appeal documents to both the appeal board and legal counsel in Harrisburg.” (See Heights Plaza’s Response to the Board’s Order to Perfect e-filed on December 10, 2024). Mr. Marino acknowledges this to be true in his signed Declaration provided with his Petition to Appeal *Nunc Pro Tunc*. (See Declaration e-filed on January 10, 2025).

Both Appellant and the Department have submitted affidavits/declarations and exhibits with their pending motions and responses. The notice of appeal and amended notices of appeal also contain various documents as exhibits. The Board has noted that “as a matter of practice, the Board has authorized motions to dismiss as a ‘dispositive motion’ and has permitted the motion to be determined on facts outside of those stated in the appeal when the Board’s jurisdiction . . . is in issue.” *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7 (citing *Florence Twp. v. DEP*, 1996 EHB 282, 302). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties’ filings. Because the Motion to Dismiss and Petition to Appeal *Nunc Pro Tunc* involve the same issues of fact and law, we will address them both in this Opinion and Order.

For the reasons that follow, we grant the Department’s Motion to Dismiss and deny Appellant’s Petition to File an Appeal *Nunc Pro Tunc*.

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 Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff’d*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Winner v. DEP*, 2014 EHB 135, 136-37. 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*, 2015 EHB

at 54. As a matter of practice, where there are no facts at issue that touch jurisdiction, a motion to dismiss may be decided on the facts of record without a hearing. *Beaver v. DEP*, 2002 EHB 666, 671 n. 4. *See also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994).

Discussion

Jurisdiction of the Board

According to the Board’s regulations governing the timeliness of an appeal, “jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner . . . within 30 days after [the person to whom the action of the Department is directed] has received written notice of the action.” 25 Pa. Code § 1021.52(a)(1). The only exception to this rule is if a different time period is provided for by statute. *Id.* at § 1021.52(a); *Olympic Foundry, Inc. v. DEP*, 1998 EHB 1046, 1048. The date that the Board receives a notice of appeal determines its timeliness, not the date of postmark or the date that delivery is anticipated. *Spencer v. DEP*, 2008 EHB 573, 575-76. If by facsimile, it is the date the Board receives the fax. 25 Pa. Code § 1021.32(d)(2) (“The date of facsimile filing is the date the document is received by the Board”). The Board lacks jurisdiction over untimely appeals and will grant a motion to dismiss where an appeal in question has in fact been filed after the deadline set. *Ametek v. DEP*, 2014 EHB 65; *Spencer v. DEP*, 2008 EHB 573.

Although the untimeliness of an appeal generally deprives the Board of jurisdiction, in very limited circumstances we may grant permission to appeal *nunc pro tunc* upon written request and for good cause shown. 25 Pa. Code § 1021.53a. “[T]he standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.” *Id.* at § 1021.53a(a). To prevail on a *nunc pro tunc* petition,

The party seeking *nunc pro tunc* filing must show 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-

negligent circumstances related to the party, its counsel or a third party, caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.

Hudson v. DEP, 2022 EHB 375, 376 citing *Feudale v. DEP*, 2016 EHB 774, 776 (quoting *Bureau Veritas N. Am., Inc. v. DOT*, 127 A.3d 871, 879 (Pa. Cmwlth. 2015)). See also *Bass v. Cmwlth.*, 401 A.2d 1133 (Pa. 1979); *Grimaud v. DER.*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Barchik v. DEP*, 2010 EHB 739, 742; *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391. As the Pennsylvania Supreme Court has recognized, “an appeal *nunc pro tunc* is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances.” *Commonwealth v. Stock*, 679 A.2d 760, 764 (Pa. 1996). Appellant has a heavy burden to show it is entitled to *nunc pro tunc* relief as the Board rarely grants *nunc pro tunc* petitions. See, e.g., *McCauley v. DEP*, 2020 EHB 305 (lack of understanding of the legal process or failure to check the Pennsylvania Bulletin is not a sufficient basis for granting a petition to appeal *nunc pro tunc*); *Ametek v. DEP*, 2014 EHB 65 (Department’s alleged agreement to toll the appeal period and/or extend the litigation schedule did not provide a basis for allowing appeal to proceed *nunc pro tunc*); *Spencer v. DEP*, 2008 EHB 573 (Board’s receipt of notice of appeal one day beyond the appeal period, even though Department received it within the appeal period, was not a sufficient basis for allowing the appeal to proceed *nunc pro tunc*); *Greenridge Reclamation, Inc. v. DEP*, 2005 EHB 390 (inadvertently mailing a notice of appeal to the Department instead of the Board did not constitute grounds for granting a petition to appeal *nunc pro tunc*); *Pedler v DEP*, 2004 EHB 852 (starting a new job and being out of state did not constitute good cause for allowing an appeal *nunc pro tunc*); *Ziccardi v. DEP*, 1997 EHB 1 (appellants’ confusion regarding permits did not provide a basis for allowing an appeal *nunc pro tunc*); cf. *Freyer Excavating, LLC v. DEP*, 2020 EHB 270, 273-4 (finding that the global pandemic of COVID-19 mandating the

closing of all non-life sustaining businesses was an unforeseeable and unavoidable event to warrant “extraordinary circumstances” necessary to warrant *nunc pro tunc* relief). “In the absence of fraud or breakdown in the Board’s operation, the circumstances justifying the grant of an appeal *nunc pro tunc* must be extraordinary and compelling.” *Freyer*, 2020 EHB at 273-74.

The Parties’ Arguments

The Department argues in its Motion to Dismiss that Appellant’s appeal should be dismissed because it was filed after the 30-day deadline. 25 Pa. Code § 1021.52(a)(1). In support of its position, the Department directs the Board’s attention to the case of *Spencer v. DEP*, 2008 EHB 573.

In *Spencer*, Appellant Spencer received a Department Order on July 10, 2008. *Spencer*, 2008 EHB at 574. On August 9, 2008, Spencer mailed copies of his appeal first-class mail to both the Department and the Board. *Id.* Although the Department received Spencer’s appeal on August 11, 2008, the Board did not receive the appeal documents until August 12, 2008, one day after the appeal deadline. *Id.* The Department filed a motion to dismiss, arguing the appeal was untimely, and Spencer filed a request to be heard *nunc pro tunc*. *Id.* at 573-74. The Board held that the Board’s rules and regulations as well as the Clean Streams Law and Dam Safety and Encroachments Act all require 30-day appeal deadlines; thus, it must receive appeal documents within that 30 day deadline to have proper jurisdiction. *Id.* 574-75. The Board also denied Spencer’s petition for *nunc pro tunc* relief because there was no fraud, breakdown in the Board’s operations, or other unique and compelling circumstances to warrant *nunc pro tunc* review. *Id.* In fact, the Board found that Spencer could have checked with the Board to ensure his appeal was received within the 30-day time period allotted or faxed the appeal to ensure its timeliness. *Id.* at 574-76.

In its Response to the Motion to Dismiss, Appellant argues it is entitled to equitable relief because Appellant relied upon the Department’s “representations and erroneous guidance” that the compliance issues could be worked out, and that the appeal deadline was November 16, 2025. (*See* Appellant’s Response to Motion to Dismiss at pgs. 3-4). Appellant asserts that this reliance created “active interference” with its timely filing an appeal with the Board. (*See* Appellant’s Response to Motion to Dismiss at pgs. 4-7). Appellant further argues that it acted in good faith attempting to remediate the issues outlined in the Order and a one-day delay in filing a timely appeal is a *de minimis* violation; thus, its appeal should not be dismissed. (*Id.* at pgs. 7-9).

Appellant makes similar arguments in its Petition to Appeal *Nunc Pro Tunc*. Specifically, Appellant argues that the Department’s Inspector Peter Burch engaged in “negligent actions” and “misrepresentations” to Appellant regarding the ability to resolve the issues in the Compliance Order and advised him of the wrong appeal deadline. (*See* Appellant’s Petition to File Appeal *Nunc Pro Tunc*). These actions, argue Appellant, constitute “extraordinary circumstances beyond [Appellant’s] control” and warrant *nunc pro tunc* relief. (*Id.* at pg. 1).

In sum, Appellant argues that it did not timely file an appeal because (1) it believed it could resolve, or had resolved, the issues outlined in the Compliance Order and (2) it relied upon Peter Burch’s oral statements that November 16, 2024 was the appeal deadline.

In support of its position, Appellant relies on few Board cases, but does cite *Hudson v. DEP*, 2022 EHB 375 (*citing Criss v. Wise*, 781 A.2d 1156, 1160 (Pa. 2001), *Marshall v. DEP*, 2020 EHB 60, *B&R Resources, LLC v. DEP*, 2020 EHB 40, and *D.F. Bart Bartholomew, Jr. v. DEP*, 2020 EHB 22 to support its position that it is entitled to equitable or *nunc pro tunc* relief. (*See* Petition to File an Appeal *Nunc Pro Tunc* at pgs. 4, 5, 7, 8 & Response to Motion to Dismiss at pgs. 4 & 9). The Board has reviewed these cases and finds that although some of them involve

petitions for *nunc pro tunc* relief, none support Appellant's position.² In fact, many of the cases hold the exact opposite outcome Appellant is requesting.

The Department responded to Appellant's Petition by arguing that (1) prior Board case law holds that reliance on the Department's statements regarding settlement or the appeal deadline are not sufficient reasons for the allowance of a *nunc pro tunc* appeal; (2) The Compliance Order provided express written appeal rights to Appellant, and therefore, no administrative breakdown occurred; and (3) concepts of equitable fairness provide no grounds for a *nunc pro tunc* appeal. (See the Department's Response to Petition for *Nunc Pro Tunc* e-filed on January 17, 2025). The Department also cites numerous Board case law in support of its position. See e.g., *Simons and J.J.H. Maguire, Inc. v. DEP*, 1998 EHB 1131 (holding that statements made by the Department advising Appellant that there was no need to file an appeal was not sufficient to qualify for *nunc pro tunc* relief); *Johnston Laboratories, Inc. v. DEP*, 1998 EHB 695 (holding that attempts to negotiate settlement of a dispute with the Department are not grounds for the allowance of an appeal *nunc pro tunc*); *Ziccardi v. DEP*, 1997 EHB 1, 8 (equitable estoppel does not apply in determining whether an Appellant is entitled to *nunc pro tunc* relief for an untimely appeal as it involves a jurisdictional defect). Upon review of the cases, we agree this case law is applicable to the current matter at hand.

² In fact, both *Hudson* and *Criss* involved petitions for *nunc pro tunc* relief that were denied. In *Hudson*, this Board found failure to properly read the Pennsylvania Bulletin was not sufficient reasoning for *nunc pro tunc* relief. *Hudson*, 2022 EHB at 379. In *Criss*, the Pennsylvania Supreme Court reversed the Superior Court's grant of *nunc pro tunc* relief by finding that an appeal sent 6 days before the deadline and the court's receipt 2 days after the deadline did not consist of the extraordinary circumstances necessary to warrant *nunc pro tunc* relief. *Criss*, 781 A.2d at 1160. The Board is perplexed by the additional cases cited by Appellant, as they do not involve issues of *nunc pro tunc* relief nor do they support the arguments that Appellant sets forth. It is particularly difficult to determine where the cited arguments come from as Appellant does not provide pin cites.

The Board's Findings

There is no dispute that Heights Plaza received the Compliance Order on October 16, 2024, making the 30-day deadline to file an appeal end on Friday November 15, 2024.³ In a Declaration filed by John Marino, Appellant states that on October 29, 2024, Mr. Marino discussed the Compliance Order with Peter Burch, Department Inspector. (*See* John Marino Declaration filed on January 13, 2025). At this time, according to Mr. Marino, Mr. Burch assured him that the compliance issues could be resolved collaboratively and without the need for an appeal.⁴ (*See* Amended Response to Motion to Dismiss e-filed on January 21, 2025 at ¶ 2). As such, a site inspection was scheduled for November 7, 2024; however, on this date, it was rescheduled due to a Department Engineer having a conflict. (*See* John Marino Declaration filed on January 13, 2025).

On November 15, 2024 at 3:04 p.m., an email was sent from Mr. Marino to Mr. Burch stating:

Hello Peter, as a follow up to our conversation on October 29 and my submission of my completion and evidence documents and videos forwarded to you showing the time frame discrepancies in the Compliance violations orders, we discussed

³ “[J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute...” 25 Pa. Code § 1021.52(a) (emphasis added). Our rule provides a default provision for timely appeals, but that default can be supplanted if a statute provides otherwise. *McCarthy v. DEP*, 2019 EHB 406, 407. However, there is no language in the Clean Streams Law that extends or modifies the time period for appeal of an order issued pursuant thereto, as is the case in this appeal. 35 P.S. § 691.7; *Spencer v. DEP*, 2008 EHB 573, 574 (explaining that the Clean Streams Law defers to the Board’s rules).

⁴ Although Appellant does not elaborate on his phone conversation with Mr. Burch, Mr. Burch has provided a Declaration stating: “[d]uring the October 29, 2024 call, Mr. Marino inquired as to whether the deadline for the appeal of the Compliance Order could be extended. I explained to Mr. Marino on October 29, 2024 that it was not possible to extend the appeal deadline for the Compliance Order.” Mr. Burch also stated: “Mr. Marino brought up the deadline for the appeal by stating his belief that it was thirty days from the Compliance Orders issue date of October 7, 2024. I explained to Mr. Marino on October 29, 2024, that the thirty-day appeal period for the Compliance Order began with his receipt of the Compliance Order, via hand delivery, on October 16, 2024.” (*See* the Department’s Response to Petition to Appeal Nunc Pro Tunc at Exhibit “B”).

the time frame extension requirements for me to appeal the charges, we were tentatively trying to set up a site inspection for November 7, which had to be canceled due to your engineer being tied up in Harrisburg for CE classes and that I originally had until November 17th which is this Sunday unless it could be extended until the proper site inspections were completed. Can you please advise me on my options for appeal? Thanks John Sent from my iPhone

(See the Department’s Response to Petition to Appeal *Nunc Pro Tunc* at Exhibit “C”).

At 3:17 p.m., Mr. Burch replied to Mr. Marino stating: “Please give me a call With regards to your appeal options, they are specified on the first page of the compliance order under the header ‘appeal options’.” (See *id.*). Mr. Marino further asserts that on November 15, 2024, during a telephone conversation with Mr. Burch, Mr. Burch advised Mr. Marino the deadline to file an appeal was November 16, 2024.⁵ (See Amended Response to Motion to Dismiss e-filed on January 21, 2025 at ¶ 2). Appellant argues that this factual background documenting erroneous guidance by Mr. Burch is the reason for the late appeal.

Based on the documents and declarations submitted, the Board finds that at the very least, Appellant was aware it needed to file an appeal on October 29, 2024.⁶ Appellant had ample time

⁵ Mr. Burch has denied making this comment. Specifically, Mr. Burch has stated that Mr. Marino told him that he intended to file an appeal and was attempting to contact the Board. Mr. Burch has stated that he did not provide Mr. Marino a date for his appeal deadline, but did advise him to attempt to contact the Board and to file his appeal “as soon as possible.” (See the Department’s Response to Petition to Appeal *Nunc Pro Tunc* at Exhibit “B”). However, for purposes of determining a motion to dismiss, the Board evaluates the contents 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 Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff’d*, 129 A.3d 28 (Pa. Cmwlth. 2015); *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.

⁶ Even assuming *arguendo* the Board did find that Appellant relied upon misinformation provided by Mr. Burch, Mr. Burch’s email was sent mid-afternoon on November 15, 2024. Mr. Marino was made aware at this time to review the Order for his appeal options. If he would have checked the document, he would have had time to fax over a basic appeal form to preserve a timely appeal. Indeed, the initial appeal submitted by Mr. Marino was Ordered to be perfected twice before it was accepted by the Board.

to review the Order and speak with its attorney regarding its appeal rights.⁷ Indeed, the Board finds there was ample express written notice to the Appellant of the 30-day appeal deadline. The Board’s notice of appeal form, as well as the Department’s Order, contain this information in clear, capitalized font. Specifically, the first page of the subject Compliance Order issued to Heights Plaza states:

APPEAL NOTICE

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, 717-787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, 800-654-5984, Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board’s rules of practice and procedure may be obtained from the Board. . . .

IF YOU WANT TO CHALLENGE THIS ACTION OF THE DEPARTMENT, YOUR APPEAL MUST BE FILED AND RECEIVED BY THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD; HOWEVER, BECAUSE IMPORTANT LEGAL RIGHTS ARE AT STAKE, YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. . . .

(See October 7, 2024 Compliance Order, pg. 1).

Additionally, the first page of the notice of appeal form completed by Appellant states:

NOTICE OF APPEAL

Pages 1 through 4 of the following form and any required attachments must

⁷ Mr. Marino himself declared that he has over 50 years working with the Department. He also stated that he has ongoing litigation in the Allegheny County Court of Common Pleas, GD 24-3650, regarding excessive storm water on his property and he has been in communications with the Department regarding this matter. (See December 6, 2024 letter included in Response to Order to Perfect e-filed on December 10, 2024). Due to these statements, we believe Appellant had ample implied knowledge to learn of its own appeal rights or speak with an attorney regarding such rights.



be received by the Environmental Hearing Board within 30 days after your receipt of notice of the action of the Department that you are appealing. You may mail, fax, or hand-deliver your Notice of Appeal to:

**ENVIRONMENTAL HEARING BOARD
Rachel Carson State Office Building – 2nd Floor
400 Market Street, P.O. Box 8457
Harrisburg, PA 17105-8457
Fax: (717) 783-4738**

You may wish to send your appeal to the Environmental Hearing Board by certified mail, return receipt, so that you know your appeal was received within the required time.

(See notice of appeal form located at <https://ehb.pa.gov/forms>).

In addition to the above, the Board also has a citizen’s guide on its website that includes detailed information on the process for timely filing an appeal. There are a multitude of sources that specify the appeal period is 30 days, but specifically, if Appellant reviewed the “Filing of the Notice of Appeal” guide, the following information was presented in bold ink:

QUICK LOOK: FILING A NOTICE OF APPEAL

If you are affected by an action of the Department of Environmental Protection, you can appeal that action. To begin the appeal process, you must file a Notice of Appeal, which formally asks the Environmental Hearing Board to review the action. Your Notice of Appeal must be filed within 30 days of when you first become aware of the action. To file you must complete a Notice of Appeal Form, file it with the Environmental Hearing Board, and send copies of it to the Department of Environmental Protection and any other directly affected person, business, or municipality. If the action requires you to pay a penalty, you are still responsible for payment while you appeal the action.

WHEN TO FILE YOUR NOTICE OF APPEAL

You only have 30 days to file a Notice of Appeal, starting from the date you became aware of the Department’s action. If you do not file a Notice of Appeal within those 30 days, the action may no longer be appealable.

The 30-day period begins in one of three ways:

1. You receive written notice of the Department’s action, which is directed at you or issued to you;

2. The Department publishes notice of its action in the Pennsylvania Bulletin; or
3. You receive actual notice of a Department action that was not published in the Pennsylvania Bulletin.

(See Citizens Guide, pgs. 8-9 located at https://ehb.pa.gov/_files/ugd/ad7b29_dd563d3a9ed1459baaee0bbb3a6afac4.pdf).

The Board finds that Appellant had ample written notice of when the 30-day deadline expired. We also agree with the Department that Appellant has not met its heavy burden to prove that it is entitled to *nunc pro tunc* relief. The Board finds the facts of this case to be directly analogous to *Ametek v. DEP*, 2014 EHB 65.

In *Ametek*, the Department issued a remediation Order to Ametek. *Id.* Certified mail receipts confirmed Ametek received the Order on October 16, 2013. *Id.* at 65-66. Following the issuance of the Order, the parties engaged in continued negotiations regarding the Order and allegedly the Department discussed tolling the time period for pursuing an appeal before the Board. *Id.* at 66. Ametek filed a timely Notice of Appeal with the Department but inadvertently failed to timely file a Notice of Appeal with the Board. *Id.* at 67. Ametek filed a petition for *nunc pro tunc* relief alleging that the Department had consented to Ametek delaying the filing of the appeal pending the outcome of negotiations over the transfer of the site to the Bucks County Redevelopment Authority. *Id.* at 67-68. The Board found Ametek’s arguments did not meet the heavy burden of justifying *nunc pro tunc* relief. The Board stated:

Ametek asserts that there is an equitable basis for allowing the appeal based on the Department’s alleged representations to Ametek that it was agreeable to extending the time for filing an appeal of its order. Even if the Department led Ametek to believe that the period for filing an appeal with the Board could be tolled, the Department has no legal authority to extend the deadline for filing an appeal with the Board. The appeal period is statutorily prescribed and is jurisdictional. The Department has no more authority to lengthen the appeal period than does the Board itself. Moreover, the duty was on Ametek to ensure that it was in compliance with the law and to file a timely appeal. As we held in *Rhodes v. DEP*, 2009 EHB 599, 615 “Even in those cases where a Department employee gives a clear but wrong legal opinion, responsibility for compliance with the law ordinarily rests with the

regulated party.”

Id. at 73.

As in *Ametek*, the Board finds that it was up to Heights Plaza alone to determine when that 30-day appeal deadline ended. “[N]either negligence nor a mistake on the part of an appellant is an excuse for late filing.” *McCauley v. DEP*, 2020 EHB 305, 312. “As former Environmental Hearing Board Chairman Maxine Woelfling has recognized, “the Board and the appellate courts have had little sympathy” for litigants who fail to make themselves aware of the statutory requirements or rely on the Department to make them aware of the appeal procedures.” *Freyer*, 2020 EHB 270, 274 (*quoting Fisher v. Dep’t of Envtl. Res.*, 1993 EHB 425, 428). Moreover, this Board has held that an appellant’s discussions with the Department regarding settlement or tolling of the appeal period do not meet the criteria of fraud or an administrative breakdown to warrant the granting of a *nunc pro tunc* appeal. *See Simons and J.J.H. Maguire, Inc. v. DEP*, 1998 EHB 1131 (holding that statements made by the Department advising Appellant that there was no need to file an appeal was not sufficient to qualify for *nunc pro tunc* relief); *Johnston Laboratories, Inc. v. DEP*, 1998 EHB 695 (holding that attempts to negotiate settlement of a dispute with the Department are not grounds for the allowance of an appeal *nunc pro tunc*).

Although the Board agrees with Appellant that the Department is not prejudiced by the untimeliness and the appeal was filed a short time after the deadline, only 1 day after, these factors are irrelevant as the Board does not find any extraordinary circumstances, fraud, or breakdown in the Board’s administrative process to warrant *nunc pro tunc* relief. Additionally, as this is a jurisdictional issue, equitable principles of fairness do not apply in the analysis of whether Appellant may file of an appeal *nunc pro tunc*. *See Ziccardi v. DEP*, 1997 EHB 1, 8.



Conclusion

Therefore, for the above stated reasons, we grant the Department's Motion to Dismiss the appeal for being untimely and deny Appellant's Motion to file an Appeal *Nunc Pro Tunc*.

Accordingly, we issue the following order:



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIGHTS PLAZA MATERIALS, INC. :
 :
 v. : EHB Docket No. 2024-170-BP
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION :

ORDER

AND NOW, this 28th day of January, 2025, it is hereby **ordered** that Appellee Commonwealth of Pennsylvania Department of Environmental Protection’s Motion to Dismiss is **granted** and Appellant’s Petition to File an Appeal *Nunc Pro Tunc* is **denied**. The appeal is 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/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Judge

* Judge Sarah L. Clark is recused in this matter and did not participate in the decision.



DATED: January 28, 2025

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

For the Commonwealth of PA, DEP:
Christopher L. Ryder, Esquire
Melanie Seigel, Esquire
(via electronic e-filing)

For Appellant:
Anthony E. Patterson, Esquire
(via electronic e-filing)