



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 BY :  
AND THROUGH ITS TRUSTEE LAUREL A :  
HIRT and LAUREL A. HIRT, Individually :

v. :

EHB Docket No. 2025-005-W

COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION and ERIE COUNTY :  
CONSERVATION DISTRICT and :  
MILLCREEK TOWNSHIP SCHOOL :  
DISTRICT, Permittee :

Issued: July 1, 2025

**OPINION AND ORDER ON  
MOTION TO DISMISS OF THE DEPARTMENT OF ENVIRONMENTAL  
PROTECTION AND ERIE COUNTY CONSERVATION DISTRICT**

**By MaryAnne Wesdock, Judge**

**Synopsis**

The Department of Environmental Protection and Erie County Conservation District's motion to dismiss an appeal of a water obstruction and encroachment general permit issued by the Conservation District is denied. The Department and Conservation District assert that the Board lacks jurisdiction because an appeal must first go to the Department. Because there are a number of issues in dispute and this matter is not free of doubt, dismissal is not appropriate at this time.

**OPINION**

This matter involves a Notice of Appeal filed with the Environmental Hearing Board by Angela Cres Trust of June 25, 1998 by and through its trustee Laurel A. Hirt and Laurel A. Hirt, individually (collectively, the Trust). The appeal challenges a Chapter 105 Water Obstruction and Encroachment General Permit issued to Millcreek Township School District by the Erie County Conservation District in connection with a project known as the Asbury Storm Sewer Project.

## Background

On January 14, 2025, the Erie County Conservation District (Conservation District), by letter, acknowledged receipt of and registered the Millcreek Township School District's (School District) notification to use General Permit No. GP042500225-001 (Permit), a water obstruction and encroachment general permit, for its Asbury Storm Sewer Project (Project). The Project involves the installation of a 24-inch stormwater pipe directing stormwater to property adjacent to that owned by the Trust. The Conservation District authorized the Permit pursuant to authority delegated to it by the Department of Environmental Protection (Department) under the Pennsylvania Dam Safety and Encroachments Act, Act of Nov. 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27 (Dam Safety Act); 25 Pa. Code Chapter 105; and the Chapter 105 Permitting Program. On February 5, 2025, the Trust filed an appeal of the issuance of the Permit with the Environmental Hearing Board (Board). That appeal was docketed at EHB Docket No. 2025-005-W.

On April 10, 2025, the Conservation District, by letter, approved modifications to the previously authorized Permit (the Modified Permit). On April 18, 2025, the Trust filed an appeal of the Modified Permit at EHB Docket No. 2025-022-W.<sup>1</sup> On May 6, 2025, the Trust filed an “informal mandatory appeal” of the Modified Permit with the Department, and an informal hearing was scheduled for May 30, 2025. (Memorandum in Reply to Motion to Dismiss, p. 4.)<sup>2</sup>

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<sup>1</sup> The Conservation District's April 10, 2025 approval letter states that the revisions covered by the Modified Permit “supersede” the previously approved design. During a conference call held on April 24, 2025, the Board asked the parties whether the approval of the modified design superseded the January 14, 2025 approval of the original design. The School District answered that only one permit existed, i.e., the Modified Permit, while the Trust argued that there were two permits. This question was not addressed in the parties' filings.

<sup>2</sup> The Trust submitted the request for informal hearing in Docket No. 2025-022-W after the Department and Conservation District filed the motion to dismiss that is the subject of this Opinion.

On April 23, 2025, the Department and Conservation District filed a motion to dismiss the matter at EHB Docket No. 2025-005-W on the basis that this Board lacks jurisdiction to hear the appeal. On May 23, 2025, the Trust filed a response to the motion to dismiss and on June 9, 2025, the Department and Conservation District filed a reply to the Trust's response to the motion to dismiss.<sup>3</sup> The School District did not weigh in on the motion.

### **Standard of Review**

A motion to dismiss is generally appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or other preliminary concern. *Protect PT v. DEP*, 2024 EHB 191, 193 (quoting *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015)). Here, the Department has filed its motion on the grounds that the Board lacks jurisdiction to hear this appeal. The Board evaluates motions to dismiss in the light most favorable to the non-moving party and accepts the non-moving party's version of events as true. *Kelosky v. DEP*, 2024 EHB 662, 664; *Latkanich v. DEP*, 2023 EHB 299, 302; *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt and the moving party is clearly entitled to judgment as a matter of law. *Montgomery Township Friends of Family Farms v. DEP*, 2024 EHB 240, 244; *Popovich v. DEP*, 2023 EHB 35, 36. 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." *Tighe v. DEP*, 2024 EHB 451, 455 (quoting *Protect PT v. DEP*, 2023 EHB 191, 198).

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<sup>3</sup> Because the motion was filed jointly by the Department and Conservation District and because both parties are being represented by the same counsel in this matter, we will simply refer to the "Department" when discussing the arguments made in the motion and reply.

## Discussion

Under Section 17(a) of the Dam Safety Act, the Department may delegate one or more of its regulatory functions, including permitting, to a county conservation district. 32 P.S. § 693.17(a). When acting pursuant to such a delegation, the county conservation district has the same powers and duties otherwise vested in the Department. *Id.*

Where a person is aggrieved by an action taken by a county conservation district pursuant to its delegated powers, Section 17(c) of the Dam Safety Act sets forth the process for challenging it:

Any provision of the “Local Agency Law,” notwithstanding, any person aggrieved by an action of a county conservation district or other agency pursuant to a delegation agreement may appeal such action to the department within 30 days following notice of such action. Any action of the department pursuant to such an appeal may be appealed to the Environmental Hearing Board in accordance with section 24.<sup>4</sup>

32 P.S. § 693.17(c).

The Department contends that, pursuant to the language of Section 17(c), the Trust was first required to appeal the Permit to the Department before filing its appeal with the Board. Because it failed to do so, the Department asserts that the Board has no jurisdiction to hear this appeal. In response, the Trust argues that the use of the word “may” in Section 17(c) implies that an appeal may be filed with either the Department or the Board. It argues that the language is discretionary rather than mandatory, and therefore, there is no requirement that appeals must first go to the Department before being taken to the Board.

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<sup>4</sup> Section 24(a) of the Dam Safety Act states, “Any person who shall be aggrieved by any action of the department under this act shall have the right within 30 days of receipt of notice of such action to appeal to the Environmental Hearing Board.” 32 P.S. § 693.24(a).

In addressing this issue, we turn to Pennsylvania’s Statutory Construction Act, which directs that “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage . . . .” 1 Pa. C.S. § 1903(a). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b).

Here, there is ambiguity surrounding the word “may” within Section 17(c). Generally, when the word “may” is used in the context of a statute, it confers discretionary power, and is permissive rather than mandatory. *Schindler Elevator Corp. v. Dep’t of Labor & Industry*, 303 A.3d 874, 881 (Pa. Cmwlth. 2023) (citing *Commonwealth v. Garland*, 142 A.2d 14, 17 n.5 (Pa. 1958); *Commonwealth v. A.M. Byers Co.*, 31 A.2d 530, 532 (Pa. 1943)). Here, however, it is unclear whether the word “may” connotes discretion as to whether one may file an appeal or the forum in which to file it.

When the words of a statute are ambiguous, the General Assembly’s intention may be ascertained by considering the following factors:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

1 Pa. C.S. § 1921(c).

There appears to be no Board case law directly on point.<sup>5</sup> Nor have we found any legislative history behind this particular provision explaining the General Assembly's use of the word "may." Therefore, we turn to the other factors outlined above, including the object to be obtained, the consequences of a particular interpretation, and other relevant statutes.

The Department asserts that Section 17(c) of the Dam Safety Act must be read *in pari materia* with Section 4 of the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516, at § 7514, which establishes the Board's jurisdiction. Under the EHB Act, the Board "has the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). The Department points out that Section 4(a) of the EHB Act refers specifically to 2 Pa. C.S. Ch. 5 Subch. A, which governs the practice and procedure of Commonwealth agencies, such as the Department, whereas 2 Pa. C.S. Ch. 5 Subch. B, which governs the practice and procedure of local agencies, such as the Conservation District, is not mentioned. The Department argues that when Section 17(c) is read in conjunction with Section 4(a) of the EHB Act, the logical conclusion is that an appeal from an action of a county conservation district under the Dam Safety Act cannot go directly to the Board; rather, it must first go to the Department, and only after the Department acts may an appeal go to the Board. It also points out that Section 17(b) of the Dam Safety Act gives the Department the

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<sup>5</sup> The Department relies on *McKeesport Municipal Water Authority v. DER*, 1987 EHB 775. In that case, the Board cited to 32 P.S. § 693.17(c) and noted that the Dam Safety Act "expressly provides for a review mechanism for actions taken by delegated local agencies." 1987 EHB at 779–80. The *McKeesport Municipal Water Authority* case concerned a civil penalty issued by a county health department to a municipal water authority under the Safe Drinking Water Act. The Board referenced the review mechanism for actions taken by delegated agencies outlined in the Dam Safety Act because the Safe Drinking Water Act was entirely silent as to a right of review for delegated actions. As such, the Board was merely using 32 P.S. § 693.17(c) as an example of a statute that does provide such a review mechanism. The procedure to be followed pursuant to that review mechanism, however, was not discussed by the Board.

authority to “monitor and supervise” the activities of county conservation districts conducted pursuant to a delegation agreement. 32 P.S. § 693.17(b). The Department argues that this includes the right to review those activities pursuant to an appeal by an aggrieved party.

In reviewing this matter, we are guided by the Board’s holding in *Tighe*, 2024 EHB at 457: “The Board’s jurisdiction is limited by statute and regulation.” The Environmental Hearing Board Act provides us with jurisdiction over “final actions of the Department affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations.” *Id.* (citing 35 P.S. § 7514 and 25 Pa. Code § 1021.2(a).) When Section 17(c) is read *in pari materia* with Section 4(a) of the EHB Act, it is clear that the General Assembly intended the Board to have jurisdiction over actions of the Department. This is further supported by Section 24 of the Dam Safety Act, which provides: “Any person who shall be aggrieved by any action of the department under this act shall have the right within 30 days of receipt of notice of such action to appeal to the Environmental Hearing Board.” 32 P.S. § 693.24(a).

Thus, a reasonable reading of Section 17(c) is that the General Assembly intended to provide the Department with an opportunity to weigh in on delegated actions of county conservation districts prior to an appeal to the Board. However, the Trust argues that these appeals to the Department do not happen in practice. It asserts that the *de facto* practice that has developed is that appeals of county conservation district actions have gone directly to the Board without a prior appeal to the Department or that appeals to the Board have been filed at the same time as appeals to the Department. According to the Trust, the “acknowledged procedure before the Board is to name both the Conservation District and the Department, given the fact that the District is the agent of the Department for these processes.” (Memorandum in Reply to Motion to Dismiss, p. 12.) The Trust asserts that this practice has developed with the knowledge and acquiescence of

the Department. To the Trust's knowledge, this is the first time the Department has sought to have an appeal before the Board dismissed pursuant to Section 17(c).

The Trust further points out that when the Department publishes notices of general permit authorizations by county conservation districts in the Pennsylvania Bulletin, the notices state that appeals should be filed with the *Board*, not the Department. Specifically, the Trust directs our attention to the May 3, 2025 issue of the Pennsylvania Bulletin, in which notice of two general permits issued by the Erie County Conservation District was published. The notice states that persons aggrieved by these actions "may appeal such action to the Environmental Hearing Board." (Ex. 5 to Trust's Reply to Motion to Dismiss.) Thus, even the Department appears to believe that appeals of these actions should go to the Board.<sup>6</sup>

We note that the Pennsylvania Bulletin notices and appeals referenced by the Trust do not involve general permits issued under the Dam Safety Act; rather, they involve general permits issued by a delegated agency under the Clean Streams Law and Chapter 102 of the Department's regulations. However, the appeal language for such permits, set forth at 25 Pa. § 102.32(c), is similar to that of Section 17(c) of the Dam Safety Act except that Section 102.32(c) states that a person aggrieved by an action of a county conservation district *shall* request an informal hearing with the Department:

A person aggrieved by an action of a conservation district under this chapter [25 Pa. Code Chapter 102] 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

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<sup>6</sup> We were unable to locate any Pennsylvania Bulletin notice for the Permit issued in this matter. It is our understanding that such notices are to be published pursuant to 32 P. S. § 693.7(d) and 25 Pa. Code § 105.446(a)(1). If a notice were published and if it directed aggrieved parties to file an appeal with the Department, we believe the Department would have stated so in its reply.



appealed to the EHB in accordance with established administrative and judicial procedures.

25 Pa. Code § 120.32(c). Thus, even though this regulatory provision states that an informal hearing shall be requested with the Department, the Department's notices in the Pennsylvania Bulletin state that an appeal should be taken to the Board.

The Trust contends that this situation is compounded by the fact that there is no established regulatory procedure for appealing a delegated agency action to the Department. The Trust points to deposition testimony by Ron Lybrook, the Department's Program Manager for Waterways and Wetlands. Mr. Lybrook was asked about the process for appealing delegated agency actions to the Department pursuant to Section 17(c) of the Dam Safety Act:

Q Is there a procedure that the department requests when a person asks for an appeal?

A There is no formal procedure that I'm aware of.

Q ...Who do they write when they appeal the issuance of a general permit?

A We haven't received one, but I would expect that they -- the statute indicates that they write to the department, and I would suspect that they would write to me as the program manager.

Q So would they write to the regional office or the central office? And if they write to one of those offices, who do they send the letter to?

A They would write to the regional office and I would expect them to send that to me. Or perhaps it could be sent to our assistant regional director or our regional director who would provide --

Q There's no written procedure for that, in other words?

A No.

Q It doesn't say who gets the -- either the central office gets it or the regional --

A That's correct. That's correct.

Q Is there a form that should be used when a person appeals a general permit decision from the conservation district to the department?

A Not that I'm aware of.

(Ex. 4 to Trust Reply, p. 29-30.)

The Trust argues that dismissing its appeal for failing to meet undefined and unidentified appeal requirements violates its right to due process, especially here where it is now too late to appeal the Permit issuance to the Department. Given the lack of an established procedure, it argues that the service of its Notice of Appeal in *this* appeal should have constituted notice to the Department that the Trust wished to appeal the Conservation District's authorization of the Permit.<sup>7</sup>

We agree with the Trust that the Department's lack of a process for filing an appeal of a delegated agency action pursuant to Section 17(c) creates uncertainty for anyone wishing to challenge such actions. According to Mr. Lybrook's testimony, not only is there is a lack of procedure but it is unclear where such appeals should even go. There appears to be no process for where an appeal should be filed; what form it should take or what information it should contain; whether a hearing will be held; or whether there is a process for accepting an appeal *nunc pro tunc*. We find it noteworthy that, according to Mr. Lybrook, the Department has not received any appeals of a general permit under Section 17(c). (Ex. 4 to Trust Reply, p. 29, line 23.) Dismissing the Trust's appeal for failing to follow a procedure that does not exist seems to us to raise a question of fundamental fairness. This is especially true here where it is now too late for the Trust to appeal

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<sup>7</sup> The Trust also asserts that it requested a meeting with the Department regarding the Permit. However, that request was made by letter dated February 24, 2025, which was outside the 30 day-timeframe set forth in Section 17(c) for taking an appeal to the Department.

the Permit issuance to the Department, and dismissal of the appeal before the Board would leave the Trust without recourse. The only procedure that seems to exist is set forth in the Department's Pennsylvania Bulletin notices and it directs aggrieved parties to file appeals of county conservation district actions with the *Board*.<sup>8</sup> The Department does not address these issues in its reply. Without hearing from the Department on these fundamental issues leaves us with questions as to whether the Department's motion can be granted without violating the Trust's right to due process. Such unresolved issues must be weighed against the moving party, the Department.

We note that, once the Department learned that the Trust had filed an appeal of the Permit with the Board on February 5, 2025, the Department could have acted to advise the Board and the parties that an appeal first needed to be filed with the Department, particularly given the lack of an established procedure for filing such appeals with the Department. At the time the Trust filed its appeal with the Board, there were still nearly two weeks in which an appeal could have been filed with the Department.<sup>9</sup> However, the Department took no action until it filed its motion to dismiss on April 23, 2025, well outside the timeframe in which the Trust could have appealed the Permit to the Department.<sup>10</sup>

Finally, we note that even though the Trust did not appeal the issuance of the original Permit to the Department, it *did* appeal the issuance of the Modified Permit.<sup>11</sup> Thus, there is a

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<sup>8</sup> The Permit and cover letter are silent as to where appeals should be filed. (Ex. A to Notice of Appeal.)

<sup>9</sup> The Trust received notice of the Permit issuance on January 16, 2025. Under Section 17(c) of the Dam Safety Act, an appeal could have been filed with the Department up to February 18, 2025, accounting for the intervening weekend and Presidents' Day holiday.

<sup>10</sup> The Trust asserts that its counsel raised the question of jurisdiction on a conference call on March 24, 2025 and the Department stated it had no objection. (Trust's Memorandum in Reply, p. 3.)

<sup>11</sup> There appears to be no dispute that the Trust has appealed the Modified Permit to the Department. In its response, the Trust states that it notified the Department by letter on May 6, 2025 that it was seeking to appeal the Modified Permit and the Department held an informal hearing on May 30, 2025. The Department does not challenge these statements.

question as to whether the Department's motion to dismiss is now moot in light of the appeal of the Modified Permit. It is unclear to the Board whether the Modified Permit supersedes the original Permit. This issue was not addressed by the parties in their filings.

The Board is reluctant to grant motions to dismiss in all but the clearest of cases. *Thomas v. DEP*, 1998 EHB 93,98. See also *M&M Realty Partners v. DEP*, 2024 EHB 406, 410 (citing *Kopko v. DEP*, 2019 EHB 179) (Any doubt must be resolved in favor of the non-moving party) and *Kelosky*, 2024 EHB at 664 (When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true). Because the Department's motion leaves a number of questions unresolved, dismissal is inappropriate at this time.



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**ORDER**

AND NOW, this 1<sup>st</sup> day of July, 2025, the Motion to Dismiss of the Department of Environmental Protection and the Erie County Conservation District is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock  
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MARYANNE WESDOCK  
Judge

**DATED: July 1, 2025**

**c: DEP, General Law Division:**  
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