COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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MOUNTAIN WATERSHED ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 2026-020-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GULF GROUP, LLC, Permittee	:	**Issued: November 3, 2026**

OPINION AND ORDER ON
MOTION TO DISMISS

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

Synopsis

The Board grants a motion to dismiss an appeal of a Departmental letter responding to a complaint made by the appellant, in which the Department stated that certain timbering was not a regulated surface mining activity, primarily because the appeal seeks what is essentially declaratory relief and an advisory opinion.

O P I N I O N

Mountain Watershed Association ("Mountain Watershed") has appealed a letter from the Department of Environmental Protection (the "Department") dated February 4, 2026 sent to Stacey Magda of Mountain Watershed. The letter was sent in response to a complaint made by Mountain Watershed to the Department regarding timbering happening on a property located in Saltlick Township, Fayette County. Mountain Watershed suspected that the timbering was for purposes of preparing a site for future surface mining. According to the parties, in October 2025, Gulf Group, LLC submitted a surface mining permit "pre-application" to the Department for the property where the timbering occurred. The Department says a "pre-application" is a voluntary

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process provided by the Department as a courtesy to identify any issues that should be addressed before a permit application is submitted. The Department inspected the property on January 13, where inactive logging equipment was observed. The Department then contacted the landowner. The Department stated in its letter that, because "the landowner has indicated that the timbering is not being done exclusively to facilitate mining, it is not currently being considered a mining activity that would be regulated by the New Stanton District Mining Office." (MWA Ex. A.) Mountain Watershed argues in its amended notice of appeal that the Department's investigation was cursory and inadequate, that Gulf Group's timbering falls within the regulatory definition of "surface mining activities," and that, even if the timbering were not "surface mining activities," Gulf Group is still conducting earth disturbance as part of a common plan of development that needs to comply with the Chapter 102 erosion and sediment control regulations and implement erosion and sediment control best management practices.

The Department has filed a motion to dismiss, arguing that its letter is not a final, appealable action. Gulf Group filed a joinder in the Department's motion. Mountain Watershed opposes the motion, arguing that the letter is an appealable action because it closed out a complaint and made a determination of the regulatory status of the timbering activity. We grant the motion for the reasons explained below.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party, which means the Board accepts the nonmoving party's version of events as true. *BCD Properties, Inc. v. DEP*, 2025 EHB 761, 766 (citing *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155). The Board must only grant a motion to dismiss when the moving party is clearly entitled to judgment as a matter of law and the matter is free of doubt. *Friends of High*

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Point Lake v. DEP, 2025 EHB 672, 675; *HD Holdings v. DEP*, 2025 EHB 662, 664; *Bartholomew v. DEP*, 2019 EHB 515, 517; *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335.

The Board's jurisdiction is defined by the Environmental Hearing Board Act, 35 P.S. §§ 7511 – 7514. The Board has jurisdiction over final Departmental 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"); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750; *Kennedy v. DEP*, 2007 EHB 511, 511-12. There is no bright line rule for what constitutes a final, appealable action of the Department. *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 Departmental decisions needs to be assessed on a case-by-case basis. *Tighe v. DEP*, 2024 EHB 451, 458; *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86; *Dobbin v. DEP*, 2010 EHB 852, 858. "[A]lthough it is conceivable that a letter from the Department could constitute an action, communications from the Department that do not affect a party's personal or property rights, remedies, or avenues of redress are not appealable actions." *Glahn v. Dep't of Env't Prot.*, 298 A.3d 455, 460 (Pa. Cmwlth. 2023) (quoting *Chesapeake Appalachia*, 89 A.3d at 726 (quoting *Sayreville Seaport Assocs. Acquisition Co. v. Dep't of Envtl. Prot.*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012))) (internal citations and quotations omitted). "[A] letter that 'merely affirm[s] the status quo' is not a decision from which an appeal may be taken." *Glahn*, 298 A.3d at 460 (quoting *Pickford v. Dep't of Envtl. Prot.*, 967 A.2d 414, 420 (Pa. Cmwlth. 2008)).

In determining whether a Departmental letter constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief,

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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; *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Borough of Kutztown*, 2001 EHB at 1121. In other words, we ask whether a Departmental decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

Discussion

The key factor in our view in considering whether or not the Departmental communication in this case is an appealable action is the relief the Board can provide. *Borough of Kutztown*, 2001 EHB at 1124 ("analyzing whether the Board could offer any meaningful relief to a particular party with respect to a particular letter is helpful in assessing whether it constitutes an appealable action."). In terms of the relief we can provide in this appeal, Mountain Watershed's amended notice of appeal is a bit of a giveaway. In its request for relief, it asks the Board to "reverse the Department's February 4, 2026 determination, **declare the timbering to be regulated surface mining activity requiring a permit**, and grant such other relief as may be proper." (Amended NOA at 9 (emphasis added).) It is almost immediately clear based on this statement that Mountain Watershed is seeking declaratory relief or an advisory opinion.

The Pennsylvania Supreme Court has noted that the Board does not have the power to grant declaratory judgment and injunctive relief. *Empire Sanitary Landfill v. Dep't of Envtl. Res.*, 684 A.2d 1047, 1055 (Pa. 1996). *See also Costanza v. Dep't of Envtl. Res.*, 606 A.2d 645 (Pa. Cmwlth. 1992) (Board does not have the authority to grant declaratory relief); *Sayreville Seaport Assocs.*, 60 A.3d at 872 (same). Nor is the Board statutorily authorized to exercise judicial powers in equity. *Glahn*, 298 A.3d at 460; *Marinari v. Dep't of Envtl. Res.*, 566 A.2d 385, 387 (Pa. Cmwlth. 1989). *But see Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998) (the Board has the power

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to modify an action of the Department and to direct the Department in what is the proper action to be taken, and when the Board acts in this manner, it is not acting in equity). We also do not issue advisory opinions. *Nat'l Fuel Gas Midstream Corp. v. DEP*, 2014 EHB 914, 929.

Mountain Watershed asserts that the letter's determination "has practical impact on a proposed mine site," but Mountain Watershed does not clearly explain what that practical impact would be. Mountain Watershed does not explain what would happen after we were to "declare the timbering to be a regulated surface mining activity requiring a permit." Mountain Watershed says that the Board concluding that timbering is a regulated mining activity would not compel the Department to issue a notice of violation. Mountain Watershed says it is not asking that the Department issue a violation to Gulf Group or to conduct any enforcement action in this appeal. There is no indication that the letter would have any impact on any future permit application or the review thereof. It is not clear what practical effect our "declaration" would have other than expressing our view of the law. The letter does not direct any action or impose any obligation on anyone. The letter neither authorizes additional timbering activity nor imposes any restriction on timbering. *See Tighe*, 2024 EHB at 459 ("A letter that does not 1) create rights or obligations; 2) requires anyone to alter their conduct; or 3) direct action from anyone and is merely an interpretation of the law, is typically not appealable.").

Mountain Watershed does not identify any regulatory or statutory framework that requires the Department to investigate a complaint regarding timbering and make a determination one way or the other as exists in other contexts. *See* 58 Pa.C.S. § 3218 (water supply contamination complaint under the Oil and Gas Act); 52 P.S. § 1406.5e (mine subsidence claim under the Bituminous Mine Subsidence and Land Conservation Act); 35 P.S. § 691.604 (water pollution complaint under the Clean Streams Law). We have found appealable actions in those

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circumstances where the Department is legally required to make a determination under the law. *Carlisle Pike Self Storage v. DEP*, 2022 EHB 25 (Clean Streams Law water pollution complaint); *Kiskadden v. DEP*, 2012 EHB 171 (Oil and Gas Act water supply contamination complaint); *Love v. DEP*, 2010 EHB 523 (Bituminous Mine Subsidence and Land Conservation Act mine subsidence claim). In the absence of a duty to make a decision under the law, not every complaint and investigation by the Department triggers an appealable action when the complainant disagrees with the outcome of the investigation. Under the unique facts of this case, we decline Mountain Watershed's invitation to opine on the meaning of the law when we are not in a position to award any meaningful practical relief that would follow from the issuance of such an advisory opinion.

Mountain Watershed points to the Department's inclusion of language in the letter informing Mountain Watershed of the ability to appeal the letter to the Board, asserting that, while it is not the exclusive means for determining an appealable action, it supports the letter being a final, appealable action. "However, under the Board's caselaw, inclusion of an appeal paragraph in a letter does not in itself make a non-appealable communication appealable." *Jackson v. DEP*, 2010 EHB 288, 294 (citing *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404; *Eljen Corp. v. DEP*, 2005 EHB 918). The Board's jurisdiction is derived from the Environmental Hearing Board Act, as interpreted by the Board and the courts, not the inclusion of standard language advising persons of the ability to file an appeal with the Board that is included on almost every decision of the Department.

Accordingly, we issue the Order that follows.

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O R D E R

AND NOW, this 3rd day of November, 2026, it is hereby ordered that the Department's motion to dismiss is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Board Member and Judge

s/ Paul J. Bruder, Jr.
PAUL J. BRUDER, JR.
Board Member and Judge

DATED: November 3, 2026

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