



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD



**FRIENDS OF HIGH POINT LAKE**

**v.**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and PENNSYLVANIA FISH  
AND BOAT COMMISSION, Permittee**

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**EHB Docket No. 2025-102-W**

**Issued: October 6, 2025**

**OPINION AND ORDER ON  
MOTION TO DISMISS**

**By MaryAnne Wesdock, Judge**

**Synopsis**

In this appeal involving a permit to fully drawdown a reservoir/lake which was reviewed by both the Department of Environmental Protection and the Fish and Boat Commission, and which is signed by both agencies, the Department's motion to dismiss on jurisdictional grounds is denied. A motion to dismiss may only be granted where a matter is free from doubt.

**OPINION**

**Introduction**

This matter involves a notice of appeal filed with the Pennsylvania Environmental Hearing Board (Board) by Friends of High Point Lake (the Appellant) challenging an authorization to drain High Point Lake in Somerset County. The Appellant also filed an Application for Temporary Supersedeas and Petition for Supersedeas. A temporary supersedeas was granted on September 30, 2025, and a hearing on the Petition for Supersedeas has been scheduled for October 8-9, 2025.

The matter currently before the Board is a motion to dismiss filed on September 25, 2025 by the Department of Environmental Protection (Department), asserting that the Board does not

have jurisdiction to hear this appeal. The Appellant responded to the motion on September 26, 2025, and the Department filed a reply on October 2, 2025. The Pennsylvania Fish and Boat Commission filed a concurrence to the Department's motion on September 29, 2025. Due to the impending supersedeas hearing, the motion has been given expedited consideration.

## **Background**

Based on the parties' filings, the background of this matter is as follows: The Pennsylvania Fish and Boat Commission (the Commission) owns and operates High Point Lake Dam (the dam) in Somerset County pursuant to a permit issued in March 1963 by the Water and Power Resources Board, a predecessor of the Department. (Ex. A to Motion, para. 7.) The reservoir associated with the dam is known as High Point Lake. The Appellant is an association consisting of over 170 individuals who enjoy recreational activities and the scenic environment of High Point Lake, including boating, fishing, bird watching and wildlife appreciation. (Appellant's Statement of Facts in Support of Petition for Supersedeas, para. 1.)<sup>1</sup> According to the notice of appeal, the Appellant was formed after members learned of plans to drain High Point Lake in connection with a rehabilitation project proposed for the dam.

On August 11, 2025, Ruth Hocker, a Senior Civil Engineer with the Commission, submitted to the Commission an "Application to Draw Off Water from Impoundments" (drawdown application) in connection with the planned full dewatering of High Point Lake.<sup>2</sup> (Ex. 2 to Appellant's Opposition to DEP Motion.) Data from the drawdown application was transmitted

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<sup>1</sup> The Appellant incorporates its Statement of Facts in Support of Petition for Supersedeas into its response to the Department's motion to dismiss. (Appellant's Response to Motion, para. 2.)

<sup>2</sup> During a conference call held with the Board on September 24, 2025, counsel for the Commission explained that it is standard practice for an application for a permit such as the one at issue here to be submitted to the Commission by an employee of the Commission. Additionally, the Commission's Reply in Opposition to Petition for Supersedeas and Temporary Supersedeas provides helpful insight into the Commission's procedure for handling applications to draw off water from an impoundment.

to the Department for review by virtue of a spreadsheet that is accessible by staff of both the Commission and the Department's Division of Dam Safety. Two days later, on August 13, 2025, a Permit to Draw Off Water from Impoundments (the permit) was signed by Kirk Kreider, Chief of the Department's Division of Dam Safety. (Ex. to Notice of Appeal.) On August 19, 2025, the permit was signed by Commission Fisheries Biologist Benjamin D. Lorson. (*Id.*) According to the Commission and Department, the drawdown of High Point Lake, which was originally scheduled to begin in the Spring of 2026, was commenced in August 2025 due to what the Commission and the Department contend are safety concerns with the dam.

The Department has moved to dismiss the appeal on the grounds that there is no "action" of the Department and, therefore, the Board lacks jurisdiction to hear the appeal. It is the Department's contention that the permit is solely an action of the Commission, with the Department playing only an advisory role.<sup>3</sup> In response, the Appellant asserts that the permit was issued jointly by the Department and the Commission, and it is asking the Board to review the Department's approval of the permit. The Commission concurs with the motion filed by the Department.

### **Standard of Review**

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, and there are no material facts in dispute. *Heights Plaza Materials, Inc. v. DEP*, EHB Docket No. 2024-170-BP, slip op. at 3 (Opinion and Order on Motion to Dismiss and Petition to File an Appeal Nunc Pro Tunc issued Jan. 28, 2025); *Kelosky v. DEP*, 2024 EHB 662, 664. The

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<sup>3</sup> According to the Department and the Commission, the Commission is both the permittee, i.e., the holder of the permit, as well as the issuer of the permit.

Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Bernstein v. DEP*, EHB Docket No. 2023-090-BP, slip op. at 2 (Opinion and Order on Motion to Dismiss issued June 16, 2025); *Lizabella Mining, LLC v. DEP*, 2024 EHB 783, 785. *See also Carlisle Pike Self Storage v. DEP*, 2022 EHB 25 (denying a motion to dismiss arguing that the Board lacks jurisdiction because it was not clear as a matter of law); *Perano v. DEP*, 2010 EHB 439 (denying a motion to dismiss arguing lack of jurisdiction because the facts must be viewed in the light most favorable to the non-moving party).

For the purposes of resolving motions to dismiss, the Board accepts the non-moving party's version of factual events as true. *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W, slip op. at 3 (Opinion and Order on Motion to Dismiss issued July 1, 2025); *Protect PT v. DEP*, 2024 EHB 154, 156. Importantly, motions to dismiss will be granted only when a matter is free from doubt. *River Hill Coal Company, Inc. v. DEP*, EHB Docket No. 2024-173-CS, slip op. at 2 (Opinion and Order on Motion to Dismiss issued May 16, 2025); *Clean Air Council v. DEP*, 2023 EHB 203, 206; *Scott v. DEP*, 2023 EHB 138, 140; *Popovich v. DEP*, 2023 EHB 35, 36. *See also Downingtown Area Regional Authority*, 2022 EHB 153 (denying a motion to dismiss on jurisdictional grounds because the matter is not free from doubt).

### **The Board's Jurisdiction**

The Board's jurisdiction is established by statute and regulation. *Tighe v. DEP*, 2024 EHB 451, 457. The Board is authorized by the Environmental Hearing Board Act to hold hearings and issue adjudications "on orders, permits, licenses or decisions of the [D]epartment." 35 P.S. § 7514(a). No action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board. *Id.* at § 7514(c). An

“action” of the Department is defined 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 including, but not limited to, a permit, license, approval or certification.” 25 Pa. Code § 1021.2 (definition of “action.”) There is no bright line rule for determining what constitutes an “action” of the Department. *HJL, LLC v. Department of Environmental Protection*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008). The appealability of Department decisions needs to be assessed on a case-by-case basis. *Carlisle Pike Self Storage*, 2022 EHB at 29.

## **Discussion**

The Department argues in its motion that there is no action by the Department that provides the Board with jurisdiction in this matter. In determining whether there has been an action of the Department, we shall first consider the language of the permit itself. *See, e.g., Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121 (In determining whether a communication is an action of the Department, “[w]e always start with the wording...”). The permit is entitled “Permit to Draw Off Water from Impoundments,” below which it reads “Commonwealth of Pennsylvania” and then “Fish and Boat Commission – Department of Environmental Protection.” (Ex. to Notice of Appeal.) The first paragraph of the permit states, “Information submitted by the applicant has been reviewed by the Pennsylvania Fish and Boat Commission (PFBC) and Department of Environmental Protection – Division of Dam Safety (DEP), and upon approval, becomes a permit under Section 3506 of the Fish and Boat Code, Title 30 Pa. C.S. and Section 51.81 of the Fishing and Boating Regulations, Title 58, Pa. Code.” (*Id.*)

The body of the permit states, “This permit is subject to the specifications listed above and the conditions and requirements indicated below. Failure of the permittee or agents acting on behalf of the permittee to follow approved specifications, conditions and requirements

immediately renders this permit null and void.” (*Id.*) Below that statement, the permit is signed by the Department’s Chief of the Division of Dam Safety, Kirk Kreider, and dated August 13, 2025. Below Mr. Kreider’s signature are set forth conditions, including “The permittee must follow DEP’s best management practices for ‘Minimizing Sediment Pollution to Downstream Channels During Impoundment Dewatering.’” (*Id.*) Below this section of the permit is a section that is signed by the Commission’s Fisheries Biologist, Benjamin D. Lorson, dated August 19, 2025. There is an “X” under the designation “Approve.” (*Id.*)

It is the Appellant’s contention that the issuance of the permit was a joint action by the Department and the Commission, and, by this appeal, the Appellant is seeking review of the Department’s approval of the lake drawdown. The Appellant argues that the proper forum for this review is this Board. The Appellant points out that, while the Commission has a procedure for challenging decisions of the Commission, it is an internal review and does not involve the type of due process safeguards that are present in a proceeding before the Environmental Hearing Board. 58 Pa. Code §§ 51.44 and 51.45.

It is the Department’s position that the permit was issued solely by the Commission. It specifically points to the language of the permit, stating that the permit is issued “under Section 3506 of the Fish and Boat Code, Title 30 Pa. C.S. and Section 51.81 of the Fishing and Boating Regulations, Title 58, Pa. Code.” Section 3506 of the Fish and Boat Code states that “[n]o person shall draw off dam waters inhabited by fish without first applying for written permission from the [C]ommission...” 30 Pa. C.S. § 3506(a). Section 51.81 of the Fishing and Boating regulations contains similar language, stating that a permit from the Commission is required under Section 3506 of the Fish and Boat Code to draw down impounded waters inhabited by fish. 58 Pa. Code § 51.81.

The Department argues that its role here was that of providing consultation and input, and the Commission is free to include its recommendations or not, at its sole discretion. The Department asserts that the only time its permission is needed for the drawdown of an impoundment is where the drawdown will exceed one foot per day, citing 25 Pa. Code § 105.96(c). Here, the Commission has stated that the drawdown will not exceed one foot per day, and the Appellant has not disputed this statement. The Department finds further support in Section 105.122 of its Dam Safety regulations, which states, “Impounded waters which are inhabited by fish may not be drawn down except with the written approval of the Fish and Boat Commission under 30 Pa. C.S. § 3506.” The Department views the agencies’ approval functions for drawdown as being bifurcated: a permit is required from the Commission where fish are present in the impoundment and prior approval is required from the Department if the drawdown will proceed faster than one foot per day. Where the second prong of the process is not present, it is the Department’s position that only the Commission is the decision-maker. The Department argues that the inclusion of Mr. Kreider’s signature on the permit is largely ministerial. According to Mr. Kreider, his signature is affixed electronically by the Commission following the Department’s review and submission of recommendations. (Ex. A to Motion, para. 14.)

The Commission concurs with the Department’s motion that the Board lacks jurisdiction to hear this appeal. It describes the Department’s role as “provid[ing] comments at the request of the Commission in order to help the Commission be fully aware of any other water-related regulation that may be indicated during a drawdown process” and “to ensure there is not some additional dam safety regulation that may need to be considered in conjunction with the drawdown of water.” (Commission Concurrence, para. 5 and 6.)

In response, the Appellant argues that both agencies play a role in the permitting process, and the approval is not limited to the Commission. It asserts that Mr. Kreider's signature on the permit was more than merely a rubber stamp indicating that the application had been reviewed, as asserted by the Department. Rather, the Appellant argues that Mr. Kreider was actively involved in the decision to allow a full drawdown of the lake, as evidenced by copies of emails submitted with the Appellant's response. The Appellant further argues that the Department's involvement in this matter included the decision to incorporate permit conditions which, according to the language of the permit, would render the permit "null and void" if not followed by the Commission. (Ex. to Notice of Appeal.)

We agree that the Department appears to have played an active and important role in the decision to issue the permit that goes beyond simply giving advice that the Commission was free to ignore. Notably, the Department's signature appears on the permit, indicating its approval of the action authorized by the permit. Secondly, the Department included conditions in the permit which, according to the language of the permit itself, were mandatory. On its face, the permit indicates that the Department was clearly and actively involved in the issuance of the permit.

As to the Department's argument that it merely played an advisory role, we recognize that it is not unusual for Commonwealth agencies to consult with other government agencies in the issuance of a permit. Indeed, in many cases before the Board, the record shows that the Department has consulted with other agencies, such as the Department of Transportation as to truck safety before issuing a permit for a landfill, mining operation or oil and gas well, or the Department of Health before issuing a permit that could have an impact on public health in the surrounding community, or any number of other agencies whose input is critical to determining whether the Department should issue a particular permit. However, in none of those instances are we aware of

the permit being co-signed by *both* the Department and the “consulted” agency, nor does the language of the permit give the appearance that it is a joint permit of both agencies.

The Department acknowledges that the format of the permit gives the impression that it is a permit issued jointly by both it and the Commission. However, it argues that the appearance of the document should not be controlling and we should look beyond it in determining whether there has been an action by the Department. We agree that the wording of a document is not necessarily determinative of whether an action has been taken by the Department, but it is certainly one factor that must be considered. *See Borough of Kutztown*, 2001 EHB at 1121 (in determining whether a letter from the Department was an appealable action, the Board stated that one factor to consider was the wording of the letter.) The Department argues that we should look beyond the format of the permit and consider the actions taken in this matter. Specifically, it relies on the affidavit of Dam Safety Division Chief, Kirk Kreider. Mr. Kreider states that the Commission is free to disregard the Department’s recommendations. (Ex. A to Motion, para. 15.) However, this statement is countered by the very language of the permit itself which states that the “[f]ailure of the permittee ... to follow approved specifications, conditions and requirements immediately renders this permit null and void.” (Ex. to Notice of Appeal.) It is important to keep in mind that the Commission is the permittee here, and therefore, any failure on its part to follow the conditions set forth by the Department renders the permit null and void.

Mr. Kreider further states that the Commission merely affixed his signature to the permit following the Department’s review and that neither he nor anyone at the Department approves or denies drawdown applications. (Ex. A to Motion, para. 13.) However, the record indicates that the Department, and particularly Mr. Kreider, was actively involved in this matter, and there is no indication that the Commission would have gone forward with the drawdown of High Point Lake

without the Department's consent. If the Department had disagreed with the decision to fully drawdown High Point Lake, we question whether the Department's signature would have appeared on the permit.

In addition to the wording of the document being one of the factors that the Board considers in determining whether the document constitutes an action of the Department, the Board also considers the practical impact of the document in question. *Borough of Kutztown, supra*. Here, Mr. Kreider's signature on the permit leads to the logical conclusion that the Department approved the permit. At a minimum, it raises doubt as to the Department's argument that the Department played no role in the decision to issue the permit.

The Department argues that it could not possibly have played a role in the issuance of the permit because there is no regulatory scheme that requires action by the Department with regard to the drawdown of an impoundment.<sup>4</sup> However, Section 51.84 of the Fishing and Boating regulations specifically requires review by both the Commission and the Department for the issuance of a drawdown permit. That section states, "A permit application *will* be reviewed by the Commission's Division of Environmental Services and by the Department of Environmental Protection, Bureau of Dams and Waterways Management." 58 Pa. Code § 51.84 (emphasis added). Although the Department states that the permit may be issued even without the Department's approval, that is not clear from the language of this regulation.

The Department relies on the second sentence of Section 51.84 which states, "The Division of Environmental Services will issue permits for the Commission." The Department views this as evidence that the issuance of the permit is solely within the domain of the Commission. However,

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<sup>4</sup> As noted earlier, the Department acknowledges that it must approve drawdowns of greater than one foot per day, but there has been no allegation that the current drawdown exceeds this limit.

we read this language as clarifying who issues drawdown permits for the Commission, not as excluding the Department's role in the process. The language of the permit itself indicates that the Department's approval is required before the permit can be issued. The permit states "Information submitted by the applicant has been *reviewed by the Pennsylvania Fish and Boat Commission (PFBC) and Department of Environmental Protection – Division of Dam Safety (DEP), and upon approval*, becomes a permit..." (Ex. to Notice of Appeal.) This language creates the impression that approval of both agencies is needed for issuance of the permit. Likewise, the drawdown application states, "The application *will be reviewed jointly* by the Pennsylvania Fish and Boat Commission (PFBC) and the Department of Environmental Protection (DEP) Bureau of Waterways Engineering *and if acceptable*, a permit will be issued under the PFBC Fishing and Boating Regulations..." (Ex. 2 to Appellant's Opposition to Motion.) Reading Section 51.84 in conjunction with the language of the permit and application reasonably leads to the conclusion that, upon review *and approval* by the Department (and the Commission), a drawdown permit may be issued.

The Appellant asserts that the Department's own regulations provide support for the conclusion that the Department's role here was more than merely advisory. The Appellant directs us to Section 105.131(b) of the Department's Dam Safety regulations which states that "[a] permittee or owner of a dam or reservoir may not modify or cease implementation of all or part of the approved plans and methods of operation or monitoring without the prior approval of the Department by permit, Letter of Amendment, or Letter of Authorization." 25 Pa. Code § 105.131(b). The Department counters that the facts of this case do not fall under subsection (b) but rather subsection (c) of Section 105.131 which states that "routine maintenance" of a dam or reservoir's design storage capacity does not require authorization, except that the drawdown of

impounded waters inhabited by fish requires written approval of the Commission. 25 Pa. Code §§ 105.131(c) and 105.122. In response, the Appellant argues that “[t]he sudden and full drawdown of a long-valued, unique public lake with an abundance of fish and wildlife resources” cannot be seen as normal and routine dam operations and therefore it invokes the need for the Department’s prior approval.<sup>5</sup> (Appellant Response, para. 1.) We see merit to both parties’ arguments. However, while the Department’s regulations state that routine maintenance, including the drawdown of water in an impoundment, does not require Department approval, it is not clear that the long-term,<sup>6</sup> full drainage of an impoundment used as a lake constitutes routine maintenance. Without further information, it is unclear what approval may or may not be necessary.

Finally, the Department argues that there is no relief that the Board can provide. We agree that the Board has no authority to overturn a decision of the Fish and Boat Commission. However, to the extent that the issuance of the permit required the approval of the Department, that approval is subject to the Board’s review and can be overturned if the Board finds that the Department acted unreasonably or contrary to law or its action is not supported by the facts. *Liberty Township v. DEP*, 2024 EHB 36, 76, *rev’d on other grounds*, 107 CD 2024 (Pa. Cmwlth. Aug.7, 2025).

While the Department and Commission have raised a number of strong arguments in support of their position, the Appellant has also raised compelling arguments in favor of finding that this appeal involves an action of the Department over which the Board has jurisdiction. At a

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<sup>5</sup> In its response, the Appellant references the file name attributed to the electronic copy of the permit application, “High Point Lake Drawdown Permit Modification 48-25,” as evidence that the permit is a modification issued pursuant to Section 105.131(b). However, we believe that the reference to “modification” in the title of the application pertains to the fact that the permit modifies an earlier drawdown permit.

<sup>6</sup> The Appellant avers that the lake will remain dry for an extended period of time, likely years, while the rehabilitation work to the dam is being completed. The parties’ filings state that no permit has yet been issued for the dam rehabilitation work, and, therefore, there is no indication as to when this work would begin or be completed.

minimum, it is unclear that the Board does *not* have jurisdiction over this appeal. We are hesitant to dismiss an appeal on the basis of jurisdiction where the matter is not entirely free from doubt.

As we held in *Downingtown Area Regional Authority*, 2022 EHB at 155:

The requirement that the matter be free from doubt applies to jurisdictional disputes such as the one raised by the Department in this case. The Board is in most cases the only forum where aggrieved parties can find due process. We should hesitate to dismiss appeals on jurisdictional grounds when the matter is not free from doubt.

This is especially true here where, under the scenario propounded by the Department and the Commission, the Commission serves three roles: the permit applicant, the permit issuer, and the reviewing authority in the case of a challenge to the permit.

Where the permit in question contains the name and signature of the Department, as well as mandatory conditions imposed by the Department, it is reasonable to conclude that the issuance of the permit constitutes an action of the Department. At a minimum, it raises questions which prevent us from granting the Department's motion.<sup>7</sup> Where it is unclear that the Board is *not* the proper forum to hear this appeal, we must err on the side of caution, deny the motion to dismiss and allow the appeal to proceed.

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<sup>7</sup> While there are matters in dispute that prevent the granting of the motion to dismiss, we do not intend the parties to address those matters at the supersedeas hearing to be held on October 8-9, 2025. Rather, the purpose of the hearing is to address the issues raised in the Appellant's Petition for Supersedeas and the Department's and Commission's responses thereto.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

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| <b>FRIENDS OF HIGH POINT LAKE</b>       | : |                                  |
|                                         | : |                                  |
| <b>v.</b>                               | : | <b>EHB Docket No. 2025-102-W</b> |
|                                         | : |                                  |
| <b>COMMONWEALTH OF PENNSYLVANIA,</b>    | : |                                  |
| <b>DEPARTMENT OF ENVIRONMENTAL</b>      | : |                                  |
| <b>PROTECTION and PENNSYLVANIA FISH</b> | : |                                  |
| <b>AND BOAT COMMISSION, Permittee</b>   | : |                                  |

**ORDER**

AND NOW, this 6<sup>th</sup> day of October, 2025, it is hereby ordered that the Department's Motion to Dismiss is **denied**.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock  
**MARYANNE WESDOCK**  
**Judge**

**DATED: October 6, 2025**

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