



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



NATHAN EACHUS

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and MOXIE FREEDOM, LLC,
dba CAITHNESS MOXIE FREEDOM,
Permittee

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EHB Docket No. 2025-131-L

Issued: February 11, 2026

**OPINION AND ORDER ON
MOTION TO DISMISS**

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

Synopsis

The Board denies a motion to dismiss an appeal of a renewal of a Title V air quality permit because it is not clear and free from doubt that the appeal is untimely in consideration of the provisions of the Air Pollution Control Act and the air quality regulations and in light of apparent deficiencies in the regulatorily-required public notice published in a newspaper.

OPINION

Nathan Eachus, proceeding *pro se*, has appealed the renewal of Title V Operating Permit No. 40-00129 issued to Moxie Freedom, LLC (“Moxie”) by the Department of Environmental Protection (the “Department”). The permit is for the emissions associated with a natural gas electricity generation station owned and operated by Moxie in Salem Township, Luzerne County. The permit was issued on August 13, 2025. Notice of the permit being issued was published in the *Pennsylvania Bulletin* on August 30, 2025. 55 Pa.B. 6348 (Aug. 30, 2025). The 30-day appeal period would have normally run until September 29, 2025. Mr. Eachus hand-delivered his notice of appeal on December 1, 2025.

On January 2, 2026, Moxie filed a motion to dismiss this appeal, arguing that the appeal is untimely. We issued an Order on January 2 holding Mr. Eachus’s previously-filed petition for supersedeas in abeyance pending resolution of the motion to dismiss. On January 7, Mr. Eachus filed “Appellant’s Objection to Motion to Dismiss or Hold in Abeyance.” Although not clearly titled as a response to Moxie’s motion, Mr. Eachus asks us in this filing to deny Moxie’s motion to dismiss, so we have interpreted the filing as his response. Moxie filed a reply brief in support of its motion on January 22.

Moxie argues that Mr. Eachus’s appeal was filed beyond the 30-day timeframe to appeal an action to the Board, and therefore, the Board has no jurisdiction over the untimely appeal. In his response, Mr. Eachus argues that Moxie failed to follow mandatory regulations regarding publishing notice of the Department’s intent to issue the permit in a newspaper of general circulation for three days. He says that Moxie only published notice on one day, and therefore, the permit should have never been issued. One would have thought that the Department would want to weigh in on this important issue, but somewhat to our surprise, it chose to not file a substantive response to the motion to dismiss. Instead, the Department only filed a letter stating that it did not object to Moxie’s motion. The Department has not provided any argument or explained any of the factual context concerning the public notice for the permit renewal.

The issue for our current purposes is not whether the lack of complete newspaper notice before the issuance of the permit justifies any corrective action vis-à-vis the permit. Rather, the issue is whether the lack of complete newspaper notice excuses what would otherwise be an untimely appeal. There is no dispute about the notice published in the *Pennsylvania Bulletin* advising people of the *issuance* of the permit, which would ordinarily trigger the beginning of the appeal period, only the notice of the *intent* to issue the permit for the solicitation of public

comments. Moxie focuses on the notice of issuance and asserts that any alleged deficiencies in the notice for the comment period are irrelevant to determining whether or not Mr. Eachus's appeal is timely. We are not convinced at this juncture that that is true.

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party, which in practical terms means the Board must accept 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. *Friends of High Point Lake v. DEP*, 2025 EHB 672, 675; *HD Holdings v. DEP*, 2025 EHB 662, 664; *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335. The Board will only grant a motion to dismiss where the matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517.

Under the Board's Rules, our jurisdiction does not attach to an appeal unless it is filed with the Board in a timely manner. 25 Pa. Code § 1021.52(a). For third parties appealing a Department action, a timely appeal must be filed with the Board within 30 days of notice of the Department action being published in the *Pennsylvania Bulletin*, or within 30 days of actual notice if notice of the action is not published in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2). However, the default time to appeal in our Rules can be supplanted if a different time to appeal is provided by statute. 25 Pa. Code § 1021.52(a); *Heights Plaza Materials, Inc. v. DEP*, 2025 EHB 36, 44 n.3.

Many environmental statutes have their own appeal provisions, which often somewhat generically provide that an action taken pursuant to the statute may be appealed to the Environmental Hearing Board without affecting the time to appeal or our general jurisdiction. *See, e.g.*, 35 P.S. § 691.7 (Clean Streams Law); 35 P.S. § 750.16(b) (Sewage Facilities Act); 52 P.S. § 30.55(i) (Coal Refuse Disposal Control Act). The Air Pollution Control Act, 35 P.S. §§ 4001 –

4015, on the other hand, contains a rather unique appeal provision that grants standing to anyone who participated in the public comment process for a permit or plan approval:

Any person aggrieved by an order or other administrative action of the department issued pursuant to this act or any person who participated in the public comment process for a plan approval or permit shall have the right, within thirty (30) days from actual or constructive notice of the action, to appeal the action to the hearing board....

35 P.S. § 4010.2. The air quality regulatory program then affords special notice to people who participate in the public comment process. Persons who file a “protest” with the Department during the public comment period under 25 Pa. Code § 127.426 are entitled to receive actual notice of the Department’s action on an operating permit under 25 Pa. Code § 127.431 (“Each protestant who has submitted a comment within the time period in § 127.426 (relating to filing protests) will be notified personally or by mailing a copy of the plan approval disposition to the address set forth in the protest.”).¹ Since it is not clear to us how a protest differs from any other comment made in opposition to the noticed action, we have interpreted the regulations as entitling all commenters to actual notice of the Department’s action. *PennEnvironment v. DEP*, 2021 EHB 17, 23 n.4.

Mr. Eachus argues that the notice of the public comment period for Moxie’s permit renewal was defective because it was not published in the newspaper for three days as required by the regulations. He points to the public notice provisions in 25 Pa. Code § 127.44, which govern plan approvals, but Moxie tells us that the public notice provisions in 25 Pa. Code §§ 127.424 and 127.521 apply to the renewal of its Title V operating permit. Section 127.424 provides, among other things, that notice of the Department’s intended action on an operating permit must be published in a newspaper of general circulation on three separate days:

¹ Although the regulation refers to a “plan approval disposition,” the title of Section 127.431 is “Operating permit disposition.”

(a) Except as provided in § 127.462 (relating to minor operating permit modifications), the Department will prepare a notice of action to be taken on applications for an operating permit.

(b) For sources identified in § 127.44(b)(1)—(5) (relating to public notice), the notice required by subsection (a) will be completed and sent to the applicant, the EPA, any state within 50 miles of the facility and any state whose air quality may be affected and that is contiguous to this Commonwealth. The applicant shall, within 10 days of receipt of notice, **publish the notice on at least 3 separate days in a prominent place and size in a newspaper of general circulation in the county in which the source is to be located.** Proof of the publication shall be filed with the Department within 1 week thereafter. An operating permit will not be issued by the Department if the applicant fails to submit the proof of publication. The Department will publish notice for the sources identified in § 127.44(b) in the *Pennsylvania Bulletin*.

(c) If the Department denies an operating permit, written notice of the denial will be given to requestors and to the applicant and will be published in the *Pennsylvania Bulletin*.

(d) In each case, the Department will publish notices required in subsection (a) in the *Pennsylvania Bulletin*.

(e) The notice will state, at a minimum, the following:

- (1) The location at which the application may be reviewed. This location shall be in the region affected by the application.
- (2) A 30-day comment period, from the date of publication, will exist for the submission of comments.
- (3) Permits issued to sources identified in § 127.44(b)(1)—(5) or permits issued to sources with limitations on their potential to emit used to avoid otherwise applicable Federal requirements may become a part of the SIP and will be submitted to the EPA for review and approval.

25 Pa. Code § 127.424 (emphasis added). As we read the regulation, the Department prepares notice of its intended action—in this case a notice of its intent to issue the renewal permit—the Department sends the notice to the permit applicant, and the permit applicant, Moxie, publishes that notice in a newspaper on at least three separate days. The Department then publishes that same notice in the *Pennsylvania Bulletin*. In both cases, the notice advises people of a 30-day public comment period.

Section 127.521 contains some additional public notice provisions that are particular to Title V facilities. This regulation also requires publication of notice in a newspaper of general

circulation by the permit applicant, but it does not specify how many days of newspaper notice are required:

(a) In addition to the other requirements of this chapter, permit proceedings for Title V facilities shall follow the provisions of this section related to public notice.

(b) Notice shall be given by publication by the permit applicant in a newspaper of general circulation in the area where the source is located and by the Department in the *Pennsylvania Bulletin* and to persons on a mailing list developed by the Department, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public.

(c) The notice shall identify:

- (1) The Title V facility.
- (2) The name and address of the applicant or permittee.
- (3) The name and address of the Department regional office processing the permit.
- (4) The activity involved in the permit action.
- (5) The emissions change involved in a permit modification.
- (6) The name, address and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, relevant supporting materials and other materials available to the Department that are relevant to the permit decision.
- (7) A brief description of the comment procedures required by this article.
- (8) The time and place of a hearing that may be held, including a statement of procedures to request a hearing, unless a hearing has already been scheduled.

(d) The Department will provide the notice and opportunity for participation by affected states as is provided by § 127.522 (relating to operating permit application review by the EPA and affected states).

(e) The Department will provide at least 30 days for public comment and will give notice of a public hearing at least 30 days in advance of the hearing.

(f) The Department will keep a record of the commentators and also of the issues raised during the public participation process so that the Administrator of the EPA may fulfill his obligation under section 505(b)(2) of the Clean Air Act (42 U.S.C.A. § 7661d(b)(2)) to determine whether a citizen petition may be granted. The records will be available to the public.

25 Pa. Code § 127.521 (emphasis added). Beyond the newspaper notice requirement, the regulation also requires notice to be provided to persons on a mailing list developed by the Department and “by other means if necessary to assure adequate notice to the affected public.”

The Department published notice in the *Pennsylvania Bulletin* of its intent to issue the renewal of Moxie’s Title V permit on June 14, 2025. 55 Pa.B. 4079 (June 14, 2025). That notice triggered the start of a 30-day public comment period. 55 Pa.B. 4076. According to Section 127.424(b), Moxie was supposed to publish this notice in a newspaper for at least three days and submit proof of publication to the Department within a week. It is not clear from the parties’ papers when the one day of newspaper notice was published or where it was published or what was contained in the notice, although presumably it mirrored the *Pennsylvania Bulletin* notice. However, apparently as a result of Mr. Eachus submitting comments to the Department via email on November 5, 2025, well after the permit was issued, the Department became aware that Moxie did not publish notice in a newspaper on three days as required. Instead, the Department, in responding to Mr. Eachus, acknowledged that Moxie had only published notice in a newspaper on one day. (See Exhibit A to Mr. Eachus’s Petition for Supersedeas, referenced in his response to the motion to dismiss.) The Department then directed Moxie to publish notice in a newspaper as a “courtesy” in response to Mr. Eachus’s concerns, which occurred on November 18, 19, and 20, 2025 in The Citizens Voice newspaper.

The Department apparently accepted comments during this new 30-day period, but none were filed, a point Moxie highlights. Indeed, Moxie simultaneously faults Mr. Eachus for submitting comments both too late for the original comment period and too early for the belated comment period. Nevertheless, the lack of comments after the November notice does not necessarily mean that no comments would have been received during an initial public comment

period that complied with the law. Although there was notice published in the *Pennsylvania Bulletin*, the obvious objective of also publishing notice in a newspaper of general circulation is to apprise the people most likely to be affected by a source of air pollution of the Department's intended action.²

While this might normally be a straightforward determination, the structure of the Air Pollution Control Act and the air quality regulations, along with the standard for granting a motion to dismiss, prompt us to refrain from dismissing this appeal. Taken together, the Air Pollution Control Act and the regulations provide notice not only for purposes of soliciting comments on an operating permit or plan approval but also for purposes of giving commenters actual notice of the final action and the potential to file an appeal if dissatisfied with the result. If the public notice of

² It goes without saying that public notice and comment is important to the permit review process. As we said in *Throop Property Owner's Association v. DEP*, 1998 EHB 618 in the context of an appeal of a major modification to a solid waste permit:

The municipal waste regulations at 25 Pa. Code § 271.141(a) require a permit applicant to publish notice of the filing of the application "once a week for 3 consecutive weeks...in a newspaper of general circulation in the area where the facility or proposed facility is located." This type of public notice is mandated by many environmental statutes as an additional requirement to the notice published by the Department in the *Pennsylvania Bulletin*. The obvious purpose is to inform local citizens, who are likely to experience the greatest impact from the permitted activity, that an application has been filed.

....

The right of the public to comment and be heard under these regulations is consequential. It may convince the Department to hold a public hearing and force the Department to respond in writing to every issue raised at the hearing. In the process, the Department will have to focus on the citizen concerns and satisfy itself that the permit, in its final form, addresses those it finds to be legitimate. The Department is not required to adopt the comments, but it is required to consider them. *Somerset County Commissioners v. DEP*, 1996 EHB 351. The end result is bound to be a better Department action because it will be based on an expanded review.

Id. at 623-24 (footnote omitted). See also *Zlomsowitch v. DEP*, 2004 EHB 756, 793 ("notice rules are intended to provide interested stakeholders with adequate information regarding the proposed conduct of a permit applicant so those stakeholders have an opportunity to protect their own interests through comment, objection or appeal."). The importance of the public notice provisions at issue here is underscored by the fact that the Department is supposed to not proceed with issuing an operating permit absent proof of publication of newspaper notice by the permit applicant. 25 Pa. Code § 127.424(b).

the comment period is defective and it affects the ability of someone to provide public comments, then a would-be commenter who would have been entitled to actual notice of the permitting action would never get it. In other words, under the air program a defective public comment notice has the potential to suppress appeal rights. *Compare Bartholomew v. DEP*, 2020 EHB 19 (granting a motion to dismiss an untimely appeal of an update to a township's Act 537 plan because there was no indication that a provision of the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, or the sewage planning regulations would excuse the otherwise untimely filing).

Motions to dismiss are only to be granted when the matter is free from doubt. *Downingtown Area Regional Auth.*, *supra*, 2022 EHB at 155. Here, we do not have before us the notice that was published on only one day in a newspaper of general circulation. We do not know what Moxie sent to the Department to certify that the newspaper notice had been published, as required by the regulations. While we do have proof of publication of the after-the-fact notice by way of an attachment to a separate motion to deny Mr. Eachus's petition for supersedeas without a hearing filed by the Department, (DEP Motion to Deny Supersedeas, Exhibit E), that notice does not acknowledge that the permit had already been issued three months earlier and is instead written as if that decision is still forthcoming. The notice still advises people of a 30-day public comment period "from the date of this publication." Only one notice is included in the exhibit, so it seems as if the 30-day comment period runs from each date of publication. Taking 30 days from the date of the third day of publication in *The Citizens Voice* puts the comment period closing on December 20, 2025. Mr. Eachus's appeal was filed well within the new comment period.

No one has said what would happen if someone had commented during the new comment period. Would the Department then have provided the commenter actual notice of the permit having been issued months earlier? Would that actual notice have triggered a separate appeal

period for that person? Admittedly, we do not know if a proper newspaper notice would have alerted Mr. Eachus and others to the intended issuance of the permit renewal or if Mr. Eachus or others would have submitted comments during the public comment period and been entitled to actual notice of the permit renewal. The point is we should not have to wonder for purposes of a motion to dismiss.

As mentioned above, we unfortunately do not have any insight from the Department on these issues. The fact that the Department merely filed a letter saying it “did not object to the motion to dismiss” and then instead filed a separate motion to deny the supersedeas perhaps signals that the Department itself is less than confident that the Board lacks jurisdiction in this case. We do not know the Department’s programmatic interpretation of the notice regulations or the Air Pollution Control Act. For instance, in terms of Section 127.521, the parties have not explained how the Department develops the mailing list required under Subsection (b) or how it developed the mailing list in this case for the renewal of Moxie’s permit or how many people were on that mailing list and how they apparently received direct notice from the Department under that regulation. The parties have also not explained what it means to provide notice “by other means if necessary to assure adequate notice to the affected public.” We do not have any explanation of why the Department apparently issued the renewal permit without there having been notice published for three days in a newspaper. All of this is to say, the matter is not clear and free from doubt as required for granting a motion to dismiss.

In situations where a motion to dismiss addresses our jurisdiction, we often exercise restraint in being quick to dismiss an appeal. Typically this arises when there is a challenge to the appealability of a Department action and there has not been an adequate explanation or context provided by the parties. *See, e.g., Hordis v. DEP*, 2020 EHB 383 (denying motion to dismiss appeal

of an email where parties did not adequately explain the permitting and inspection history leading up to the email and how it affected the permit); *Plainfield Twp. v. DEP*, 2019 EHB 157 (denying motion to dismiss appeal of a Department letter where the moving party had not provided sufficient contextual information for us to assess the effect of the letter); *Diehl v. DEP*, 2016 EHB 853 (denying motion to dismiss appeal of a letter where the limited record before the Board did not provide adequate context for the appeal and left us with uncertainty regarding the Department's legal authority). We think it is best to be similarly cautious here.

Accordingly, we issue the Order that follows.



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EHB Docket No. 2025-131-L

ORDER

AND NOW, this 11th day of February, 2026, it is hereby ordered that the Permittee's motion to dismiss this appeal is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 11, 2026

c: DEP, General Law Division:
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