

Insider's Guide to the Pennsylvania Environmental Hearing Board



Fox Rothschild LLP
ATTORNEYS AT LAW

Philip L. Hinerman, Esq.

215.299.2066

phinerman@foxrothschild.com

2000 Market St.

20th Floor

Philadelphia, PA 19103-3222

215.299.2000

www.foxrothschild.com



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- **History of the EHB**
- **Jurisdiction of the EHB**
- **What Is an Appealable DEP Action?**
- **When and How Do You Appeal?**
- **What Actions Can the Board Review?**
- **Procedure After the Notice of Appeal**
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Do you have a permit to be appealed, or has the Pennsylvania Department of Environmental Protection (DEP) assessed a fine? The proper appeal is to the Environmental Hearing Board (EHB), a uniquely Pennsylvania creation. The EHB is the quasi-judicial body within the DEP that hears appeals of final actions of the Department, including challenges to permit decisions, DEP enforcement actions and new regulations. This guide is intended to assist recipients of DEP actions to navigate through the complexities of the EHB



The EHB has a well-defined jurisdiction, unique powers with regard to the matters that are subject to its purview and its own set of procedural rules and precedents. The judges are generally selected from among DEP lawyers and/or experienced private practice lawyers from the Commonwealth's particularly cohesive environmental bar. Lawyers who appear before the EHB would do well to not only understand the substantive and procedural nuances of EHB practice but also to note the culture of professionalism and civility that has been engendered there, no doubt because the professional lives of many of the lawyer participants, including the judges, cross paths many times over the course of their careers.

What follows is a summary of some of the key characteristics of the EHB. Contact the author or other experienced EHB practitioner for more detail or assistance.

History of the EHB

The Pennsylvania EHB is a very unique type of "Board" that handles environmental administrative appeals. Its rules both parallel the state civil procedure rules and, in significant areas, are different. The current thought is that many of the issues in Marcellus Shale development will be decided by the EHB.

The EHB was originally created in 1971 as part of what was then called the Department of Environmental Resources. It became operational in February 1972.

The EHB was initially set up as an attempt to give the Department its own judicial arm. It was envisioned to make judicial decisions regarding interpretation of the actions of what is now the DEP. The Environmental Quality Board, also a unique Pennsylvania entity, was given the legislative power to adopt environmental regulations.

The original statute provided for three board members who served as judges. All of the judges appointed were to have a minimum of five years of legal experience. The intent was that persons appointed to the Board would have expertise in environmental matters.

In 1988, the enabling statute for the EHB was changed, and the EHB was completely independent of DEP. 35 Pa. Stat. § 7511-7516 sets out the statutory basis of the EHB.

In 1989, the number of board members was increased to five from three. All of the judges are full-time administrative law judges with a minimum of five years of legal experience.



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Jurisdiction of the EHB

The EHB's jurisdiction is limited. It can only review a final action of the DEP. However, the DEP has authority granted by more than 50 statutes. This means the EHB can hear numerous types of actions, including DEP complaints for civil penalties, DEP permit decisions and permitting for Marcellus Shale exploration and drilling.

Some of the most common statutes under which appeals are taken to EHB include:

1. Clean Streams Law – The EHB will review appeals from fines and penalties for contamination of water. Additionally, companies receiving permits for water discharges can appeal the conditions in those permits to the EHB.
2. Clean Air Act – The DEP's decisions regarding conditions and terms of air permits are reviewed.
3. Mining Statutes – EHB appeals relate to granting or modifying mining permits and bonding requirements. Marcellus Shale production permits usually include various mining statute provisions.
4. Wetlands Issues – Determinations of wetlands restrictions are often appealed. Marcellus Shale production issues related to wetlands and pad placements may also be appealable.

What Is an Appealable DEP Action?

In general, issuance of an order, permit, license, certification or any other DEP final decision can be appealed. The appeal may be taken within 30 days of the date of the decision. The DEP action must be a "final" action. Final DEP decisions have been interpreted to include letters and other written communication that require specific actions on the part of the recipient. *Borough of Kutztown v. DEP*, 2011, EHB 1115. The "finality" requirement has been the grounds of a number of adjudications.

To determine whether a decision is an appealable action, the EHB considers:

1. The wording of the decision;
2. The meaning and substance of the decision;
3. The practical impact of the decision;
4. Regulatory and statutory contexts;
5. Final actions required in the letter;
6. Relief the Board has available to it; and
7. Impacts on individual property rights.

Often, DEP letters make "decisions" and include disclaimers stating the letter is not a final action or appealable. Ultimately, however, "finality" is not DEP's determination. In fact, the EHB has decided several cases in which letters containing these disclaimers actually DO constitute final appealable actions. Attorneys must make a decision whether a DEP act is "final" and appealable.



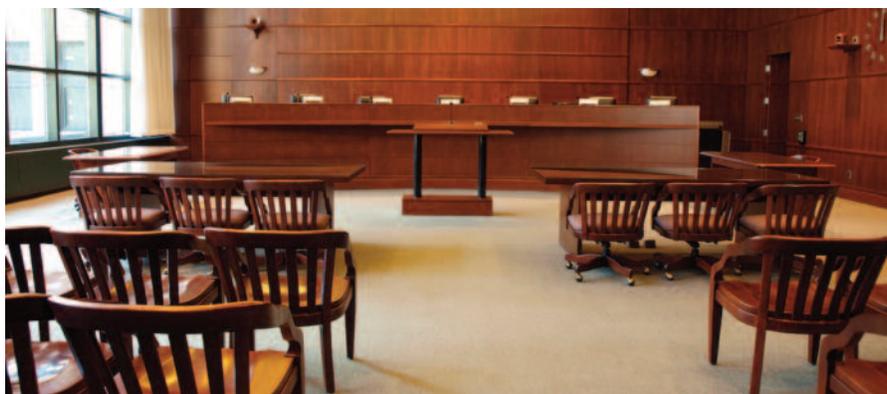
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Remember, courts are reluctant to hold government agencies to an earlier decision. This term is called “estopping” the government. Do not count on DEP’s statement in a letter that it is not final as binding or “estopping” the DEP.

In general, attorneys will review the nature of the decision. If it is a close call whether a decision is final, protective appeals are taken. Attorneys may take protective appeals if it is unclear as to whether an action is an appealable action.



When and How Do You Appeal?

Actions must be appealed within 30 days. Prior to appealing, you should consult 25 Pa. Code § 1021.1, *et seq.* for the full appeal procedure. Note that § 1021.21(a) requires the appearance of an attorney, except if individuals are appearing on their own behalf. Companies are to be represented by counsel. Attorneys are required to be admitted to Pennsylvania or admitted by motion *pro hac vice*.

Appeals can also be filed by mail or by fax. The EHB has been adamant about complying with the 30-day appeal deadline. The Board has dismissed cases that were appealed 31 or more days after the final action.

Most Pennsylvania attorneys practicing before the EHB are registered to file pleadings electronically. In the past, the Notice of Appeal was the one document that may not be filed electronically. Proposed changes to the rules will allow the Notice to be made electronically in the future.

A form for use as a Notice of Appeal is located at the EHB’s website: <http://ehb.courtapps.com/public/index.php>.

25 P.C. 1021.51 sets out the requirements for the content of an appeal. Several statutes require prepayment of penalties or posting of bonds. In those cases, the appealing party either submits the bond or payment to the Board or, if mandated by statute, to the DEP. You must review the statute to determine who receives the funds.

If a private party receives a permit and that permit is appealed by a third party, that third party is an “interested party” that is required to be served in the Notice of Appeal. Although there is no other requirement to participate, it is frequently the practice of the DEP to insist that a permittee, the most interested party in the permit, bear most of the burden in establishing the DEP’s case. These parties are frequently added by either the Board or on their own motion.



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Although any appeal can be amended as of right within 20 days of filing, other amendments can only be made after motion and upon EHB order. The EHB has been reluctant to allow extensive amendments after the 20-day period. To be sure you capture the essence of an appeal, identify all potential areas for which an appeal is to be taken and include all of those areas in the initial Notice of Appeal.

What Actions Can the Board Review?

The EHB has the power to hold hearings and issue adjudications. However, its authority is limited to reviewing "actions" of the Department. It does not have the full gamut of judicial powers. For example, the Board cannot enter a declaratory judgment nor can it enforce a settlement agreement or consent order.

However, the Board can decide any constitutional issues raised about regulations issued by the DEP. It cannot, however, review issues related to the statutory constitutionality. This is because a statute is not an agency action.

The EHB's scope of review is generally *de novo* – that is, whether the DEP action is supported by evidence or is a proper exercise of authority. It can substitute its own discretion for that of the DEP and make its own conclusions, rather than merely looking at facts initially presented to the DEP. The Board can modify or strike a DEP decision, remand an issue to the DEP or approve the DEP action.

The burden of proof in an EHB proceeding changes depending on the nature of the proceeding. The burden of proof is set out at 25 P.C. § 1021.122. The DEP has the burden of proof if (1) the matter is a penalty matter, (2) the DEP has filed a complaint or (3) the DEP revoked a license or permit or issued an order. The appealing party has the burden for (1) permit denials, (2) if a permit is protested by the recipient or (3) if a party appeals, objecting to a settlement between the DEP and another party.

The EHB has the authority to assess civil penalties, and to, on some occasions, award legal fees and expenses to litigants, without regard to the DEP's decisions. For example, the DEP can establish a penalty and present the penalty to the EHB. The EHB could consider factors that the DEP considered, or draw its own conclusions. Although seldom has an EHB decision increased the proposed penalties from the DEP, it is possible that, based on new evidence or consideration of new elements, the Board's award of penalties would exceed those originally assessed by the DEP.

Procedure After the Notice of Appeal

Following the Notice of Appeal, the EHB typically enters its normal prehearing order setting out several things:

1. Amendments to the Notice of Appeal of right are allowed within 20 days of the filing.
2. Matters are given 180 days for discovery, including interrogatories, requests for production and depositions.
3. Within 45 days of conclusion of discovery conclusion, parties are directed to meet and discuss possible settlement.
4. Dispositive motions are typically allowed within 210 days of the date of the prehearing order.



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5. Parties may, within 60 days, submit a different proposed case management order.
6. Any requests for continuances are to be made by formal motion, except if the parties consent. If there is consent, a letter is sufficient.

At this point, discovery would proceed as if the case is in litigation in the court system.

Supercedeas Petitions

The filing of a Notice of Appeal does not automatically stop or “stay” the enforcement of any DEP action. If the DEP has issued an enforcement order, if the recipient does not intend to comply, it must file a “supercedeas petition” before the order can be stayed. That petition requests the EHB to “supercede” the order issued by the DEP.

Petitions for supercedeas are governed by 25 P.S. § 1021.61- 64. They are allowed at any time during the appeal but are most frequently requested early, to stay operation of enforcement orders.

Under Rule 1021.64, an application can be made for temporary supercedeas if there is an “immediate and irreparable injury” that will occur before the Board can conduct a full hearing on a petition for supercedeas. In order to request a temporary supercedeas, the full petition for supercedeas must be filed. At that point, the EHB will determine whether there is an immediate and irreparable injury and consider (1) the likelihood that the public will suffer an injury while the supercedeas is in effect and (2) the length of time that will pass before a full hearing can be held.

Temporary supercedeas petitions are normally considered quickly. Typically, the Board will have a telephone conversation with the parties. A temporary supercedeas automatically terminates six business days after its issuance. This is a provision to give time for the EHB to hold a full supercedeas hearing.

EHB Hearing Procedures

Typically, the EHB will issue a pre-hearing memorandum requiring exchange of expert reports and setting a hearing date. All parties are required by Rule 1021.104 to file a detailed pre-hearing memoranda. Issues not raised in that memorandum may be determined to be waived, or in other words, you will lose the right to contest the issue.

Hearings are normally conducted in hearing rooms in offices of the Board in Harrisburg, Pittsburgh or Norristown. On occasion, when requested by the parties, the EHB has agreed to hear cases at other locations.

The EHB does encourage the use of written testimony when appropriate. In fact, Rule 1021.124 allows the testimony to be submitted with the pre-hearing memorandum, and this testimony may be used unless the opposing party objects within five days of the hearing.

The Board employs the normal Rules of Evidence in conducting a hearing. Objections should be grounded in principles of Pennsylvania Evidence Law. If there



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are objections in advance, the Board will allow Motions *in limine* to be filed and determined prior to the hearing.

Following the hearing, the Board typically requires post-hearing briefs after receipt of the transcripts. The party with the burden of proof generally files the first brief.

These post-hearing briefs should contain detailed proposed findings of fact with references in the transcripts and exhibits to the authority for the conclusion. Documents that are not offered into evidence may not be included in post-hearing briefs.

Appeals From the EHB Decisions

The EHB conducts its hearings just like a court. People file pleadings, motions and petitions; take discovery; have hearings; and submit briefs. The decisions of the EHB are circulated to subscribers, published at the EHB's website (<http://ehb.courtapps.com>) and made available on Westlaw and Lexis/Nexis.

Like a trial court, decisions of the EHB can be appealed to the Commonwealth Court, which has original jurisdiction of all civil actions or proceedings against the commonwealth government, including the DEP. It is one of two Pennsylvania intermediate appellate courts and has a nine-judge panel.

Final decisions of the Board must be appealed to Commonwealth Court within 30 days of entry of the Board's decision. Stay of the EHB's decision during appeal is not automatic. Any party seeking to stay a Board decision must request the stay by motion to the Board. See Pennsylvania Rule of Appellate Procedure 1781(a).

Following an appeal, Rule 1021.201 provides that the EHB will certify the record within 20 days of the filing of the Petition for Review. The record includes the adjudication, testimony, exhibits, post-hearing briefs, any petitions for reconsideration or reopening and other documents considered by the EHB.

All counsel should check to ensure that the Board record is complete. Pennsylvania Commonwealth Court decisions have held that an incomplete record is not sufficient to justify consideration of new documents after submitted on appeal.

Counsel Fees and Expenses

Several statutes allow prevailing litigants to recover costs and fees of an appeal. Previously, there were provisions in the Pennsylvania Costs Act. However, that Act has lapsed.

Now fees must be specifically provided for by statute. The most commonly used statute providing for fees is the Clean Streams Law and proceedings involving certain coal mining activities.

A petition for fees must be filed within 30 days of the final decision of the EHB. The petition may be filed by the prevailing party. If the matter was appealed in the Commonwealth Court, the Board typically stays the application pending the result of the appeal.



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Final Thoughts

The Environmental Bar in Pennsylvania is a close-knit community. Many of the EHB judges have been environmental attorneys and are well known to counsel. It is important to remember to exercise good judgment and respect the relationships that exist when you make your appearance.

About the Author

This guide was prepared by Philip L. Hinerman. Mr. Hinerman is a member of the EHB Rules Committee, which consists of judges and representatives of DEP and the regulated community. The guide is not legal advice and does not create an attorney client relationship.

For more information, please contact:

Philip L. Hinerman, Esq.

215.299.2066

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