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When a Bright Line Rule Cannot Be Found, Final Appealable Action of the Pennsylvania Environmental Hearing Board

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WHEN A BRIGHT LINE RULE CANNOT BE FOUND; FINAL APPEALABLE ACTION OF THE PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

I. INTRODUCTION

Pennsylvania’s Environmental Hearing Board (Board) was created in December 1970 as part of the Pennsylvania Department of Environmental Protection (Department).1 Eighteen years later, the Board separated from the Department through the Environmental Hearing Board Act and became an independent entity.2 The Board then became the judicial branch of Pennsylvania’s environmental regulations, and the Environmental Quality Board became the legislative branch; each branch acts independently of the other.3 As the judicial branch, the Board currently has the “sole power to hear and decide appeals from Department actions.”4

Possessing limited jurisdiction, the Board is capable of reviewing only those appeals arising from actions of the Department.5 Specifically, the Board can review “only final actions of the Department.”6 Although a seemingly uncomplicated statement of jurisdiction, over time the question of what constitutes a final appealable Department action that is reviewable by the Board has entered the forefront of many Board decisions.7

Appellates must be filed with the Board by the potentially aggrieved party within thirty days of the original notice of final ac-

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1. See Pennsylvania Environmental Hearing Board, History of the Environmental Hearing Board, http://ehb.courttapps.com/content/ehb_history.php (last visited Oct. 27, 2007) (describing creation of Environmental Hearing Board). Prior to 1995, the Department of Environmental Protection was called the Department of Environmental Resources; the name was changed to the Department of Environmental Protection by Act No. 1995-18, creating at the same time the Department of Conservation and Natural Resources. Id.
2. See id. (noting change in structure of EHB).
3. See id. (describing EHB’s role in Pennsylvania’s environmental regulations).
4. Id. (detailing power delegated to EHB by Pennsylvania Legislators).
5. See id. (noting limited power of EHB to review).
Notice of final action usually comes in the form of a letter from the Department to the violating party. Unfortunately, the letter itself does not state the existence of a final appealable action; it is left up to the party who received the letter to determine if a final action was taken against them. The question of what constitutes a final action is particularly important because a potential appellant cannot bring a case against the Department unless an appealable action occurred. Adding to the confusion is the pertinent quandary that all cases decided by the Board have not been “perfectly consistent” in determining what constitutes an appealable action.

Although the Board stated that the “formulation of a strict rule is not possible and the determination must be made on a case by case basis,” this Comment attempts to clarify what constitutes a final appealable action for purposes of Board review of a Department action. Section II addresses the background of the Board’s jurisdictional power, the importance of complying with the thirty day requirement, and cases in which the Board discussed the meaning of a final appealable action. Section III describes the Board’s current interpretation of final appealable action, while Section IV attempts to provide guidance to help confused parties determine if they have an appealable action. In conclusion, this Comment discusses the importance of seeking immediate legal assistance when a

8. See 42 PA. STAT. ANN. § 5571(b) (West 2002) (mandating filing appeal with Board within thirty days of receipt of notice from Department).
9. See generally Kutztown, 2001 WL 1613480 (analyzing ability to appeal letters sent by Department to parties by addressing final action).
10. See id. at *5 (noting determinations of finality and appealability must be made on case-by-case basis and impossibility of painting bright line rule).
11. See 35 PA. STAT. ANN. § 7514(a) (West 1989) (requiring final action by Department before appeal can be filed with Board by party receiving letter from Department).
12. Id. (noting inconsistencies in case law surrounding final Department action).
14. For a further discussion of background, see infra notes 17-100 and accompanying text (reviewing Board’s jurisdiction, importance of appealing within thirty days, and cases involving final appealable action).
15. For a further discussion of current interpretation, see infra notes 101-64 and accompanying text (discussing Board’s most recent decisions involving final appealable action).
party receives a letter from the Department in order to protect the party's right of appeal.16

II. BACKGROUND

A. Environmental Hearing Board's Review of Departmental Actions

Section IV of the Environmental Hearing Board Act of July 13, 1988 states that the Board has jurisdiction over "orders, permits, licenses, or decisions of the Department."17 The Board, however, only has jurisdiction to hear appeals of final Department actions, filed within thirty days of the appellant's receipt of notice of such actions.18 The Board's jurisdiction attaches only over "adjudications."19

The Pennsylvania Administrative Code defines adjudication as "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations."20 The Board's interpretation of the Pennsylvania Code confers jurisdiction to the Board to review any Department actions that "affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person" including but not limited to a permit, a license, approval or certification.21

B. Importance of Ability to Appeal

In environmental cases, when a solution cannot be resolved directly with the Department, the Board has original jurisdiction over

16. For a further discussion of importance of using a lawyer, see infra notes 195-99 and accompanying text (discussing importance of hiring lawyer when confronted with potential appealable action).
17. 35 PA. STAT. ANN. § 7514(a) (West 1989) (granting jurisdiction to Board over Department actions).
18. 42 PA. CONS. STAT. ANN. § 5571(b) (West 2002) (emphasis added) (allowing thirty days for party to file appeal with Board).
a complaint filed by an aggrieved party against the Department. After a hearing before the Board, either party may appeal to the Pennsylvania Commonwealth Court, and ultimately to the Pennsylvania Supreme Court. A potentially harmed party must realize that the right to appeal an action by the Department exists; otherwise the failure to appeal may result in detrimental consequences.

The right to appeal to the Board within thirty days of receipt of the notice is statutorily attached to a notice of final agency action by the Department. Upon termination of the thirty day grace period, any form of notice becomes incapable of being appealed. This means that "any future action by [the Department] to enforce the order or to penalize the appellants for not complying with the order [cannot] be challenged," effectively forcing the appellant to comply with any future actions by the Department without any opportunity for appeal.

It is extremely important for persons or business entities wanting to challenge the Department's actions to do so within the allotted thirty days in order to preserve the opportunity to appeal. Loss of an opportunity to appeal could result in "dire consequences," including the loss of large amounts of time and money. In order to file the requisite appeal, however, the potential appellant must first recognize that the Department action was a final appealable action. This determination is not always easy to establish.

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22. See 35 PA. STAT. ANN. § 7514(c) (West 1989) (allowing appeals to Board before Department action must be complied with by party).
23. See Pennsylvania Environmental Hearing Board, supra note 1 (describing avenues of appeal after EHB decision).
25. See 42 PA. STAT. ANN. § 5571(b) (West 2002) (mandating filing of appeal with Board within thirty days of receipt of notice from Department).
26. See id. (determining Department action is not appealable upon reaching end of thirty days).
27. See Mun. Bethel Park, 1984 WL 19552, at *3 (discussing effect of allowing thirty day period to lapse).
28. Id. (asserting effect of allowing thirty day period to lapse).
C. Cases

1. Pennsylvania Environmental Hearing Board

For many years, the Board has determined the issue of what constitutes a final appealable Department action. Because of the varying circumstances of each case and the inconsistent language used in each Department communication, what constitutes a final appealable action has not been clearly interpreted. Although no bright line rule has emerged, the Board has consistently applied a number of defined factors to its analysis of each case.

a. Conclusive Rules

The main rule for determining whether a Department notification constitutes a final appealable action comes from the 1979 case Gateway Coal Co. v. Department of Environmental Resources (Gateway). Gateway Coal Company received initial approval from the Department to use a new roof support system to test for methane gas in one of its mines. After a review, the Department Commissioner sent a letter to Gateway that rescinded a portion of the approval and requested a response to the district mine inspector for the formulation of a plan that did not violate the Coal Mine Act. Gateway appealed the Commissioner’s decision that was presented in the letter, rescinding the prior approval.

The Board found that the letter constituted a final action, but Gateway failed to act within the thirty-day requirement, therefore losing the opportunity to appeal. On appeal, the Pennsylvania Commonwealth Court in Gateway determined the main concern was whether or not an action of the Department directs compliance with an Act and "imposes some liability or otherwise effects the obli-
gation or duties of the person.”

For a final appealable action to exist, the communication must direct compliance with a statute and impose liability upon the party or affect the party's obligation or duty. Here, the court found that the letter satisfied both conditions: it directed compliance with the Coal Mine Act, and it rejected Gateway's new system.

After Gateway, the Board attempted to define conclusive guidelines for final appealable action, but more often it defined what did not constitute an appealable action rather than making affirmative assertions. In Bender Coal Co. v. Department of Environmental Resources (Bender Coal Company), the Board found that notice that merely "warns of possible future Departmental action is not an appealable action." On its face, this suggests that an aggrieved party should examine the communication of a warning in order to assess a communication's appealability; however, this is not a simple task. The question of what constitutes a warning and other similar questions remain open. Although the Gateway decision offered some initial guidance to parties seeking an appeal, it did not clearly define a bright line rule for courts to follow in the future. Therefore, an examination of post-Gateway decisions and the factors the Board applied in each case is needed to further define the factors in making the determination.

b. Factors to Consider

To assess whether or not a Department action directs compliance with an Act and imposes some liability or otherwise affects the obligation or duty of the person, the Board determined that one

39. Gateway Coal Co., 399 A.2d at 804 (determining what needs to be addressed to determine if final appealable agency action occurred).
40. See id. at 802 (giving rule that letter must comply with statute and express liability).
41. See id. (reasoning there was imposition of compliance and change in status).
44. Id. at *5 (holding warnings are not appealable actions).
45. See id. (stating party should assess contents of communication to address appealability).
47. See id. at 804 (providing guidance on what constitutes final appealable action).
must examine the substance of the Department's action. There are a considerable number of factors, coming from numerous cases, which must be considered when examining the substance of a Department letter. The decision of Borough of Kutztown v. Department of Environmental Protection (Kutztown) was the first to attempt to identify one standard set of factors from the many previous holdings.

In Kutztown, the Board set forth some of the factors to consider when determining the existence of final appealable action by the Department. The Department sent a letter to the Borough of Kutztown after finding that Kutztown's wastewater treatment facility was "projected to become organically overloaded." To correct this impending problem the Department required Kutztown to submit a Corrective Action Plan (CAP). The CAP needed to explain the steps Kutztown would take to avert the wastewater problem. In response to the Department's letter, Kutztown appealed to the Board. To finally arrive at the factors for determining the existence of final appealable action, the Board looked at over twenty years of previous findings. The Board announced that in examining the substance of the notice it was important to consider the "specific wording of the communication argued to be final action, the purpose and intent of the communication, the practical impact of the communication, the apparent finality . . . and the relief the board can provide." Each of these factors will be discussed further with the pertinent cases addressed in Kutztown.


51. See id. (elaborating on factors to consider when assessing final appealable action).

52. See id. (stating factors requiring consideration when examining communication for final appealable action).

53. Id. at *1 (describing contents of letter informing Kutztown of potential overloading in wastewater treatment facility).


55. See id. (noting requirement by Department to include steps).

56. See id. (giving reason for appealing decision).

57. See id. at *2-5 (discussing many cases decided by Board in prior years).

58. Id. at *5 (naming factors to use when determining appealable actions).
Specific Wording of the Communication

Board decisions have held that the language of the communication is the dominant factor to consider when looking for final appealable action. In 202 Island Car Wash v. Department of Environmental Protection (202 Island), the Board stated the starting point of this determination should always be the actual language of the communication.

In 1988, the Board in Hatfield Township Municipal Authority v. Department of Environmental Resources (Hatfield) declared that if the letter contained language that “directed compliance with the law and imposed liability upon [the] appellant[,]” the action would be a final action. The issue in Hatfield also involved the appealability of a letter that the Hatfield Township received from the Department regarding the projected overloading of the sewage treatment facility. The Department wanted the Township to comply with Pennsylvania’s Sewage Facilities Act, and instituted a limitation on new connections to the sewage facilities plant. The Board found these demands affected the obligations and duties of the Township, and created a final appealable action.

In Kutztown, the Borough of Kutztown was directed to plan how it would reduce the organic overload at the wastewater treat-
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The language of the letter did not request, but rather told the Borough how to act. The Board concluded that the Department in Kutztown “imposed a requirement in no uncertain terms.” The Board also found, however, that the letter contained some tentative language, some language that “read like a request[,]” and some language providing “legal interpretation[,]” which demonstrated the ambiguity as to the letter’s compulsory nature. The Board declared that “such qualified findings, simple requests or findings, and legal interpretation are indicative of a nonappealable act.”

The most compelling language making the letter appealable was the order to begin planning a solution to the overloading problem. Kutztown’s analysis points out that an interpretation of the content of the letters is “not bound by the actual words that happen to be chosen by the letter writer.”

ii. Purpose and Intent of Communication

The Board has also held that the purpose and intent of the communication should be considered when determining whether a final appealable action exists. The Board in Kutztown considered if the Department required immediate response when addressing the purpose and intent of the communication. The Department wanted the Borough of Kutztown to immediately begin planning for the alleged overloading situation; if Kutztown failed to act the Department would impose consequences. Additionally, the Department’s use of a single enforcement measure, a deadline, reinforced the conclusion that a request was not present, and that the specific intent of the letter was to induce action on the part of the Borough of Kutztown.

68. See id. (describing commanding nature of letter).
69. Id. at *5 (stating requirement to begin planning for alleged overloading situation).
70. Id. (pointing out tentative language).
72. See Kutztown, 2001 WL 1613480, at *1 (explaining compelling language found within letter sent by Department).
73. Id. at *5 (finding interpretation of letters not bound merely by words included).
74. See id. (resolving purpose and intent of letter)
75. See id. (finding immediacy of requirements expressed in letter).
76. See id. at *6 (determining use of deadline important to case).
The Board stated that the letter was not "just descriptive, it [was] prescriptive[,]" the purpose and intent of which was action, and included the specific kind of action required.\textsuperscript{77} The Department did not intend for the letter to provide an interpretation of the law, nor was it intended to present "helpful suggestions."\textsuperscript{78} Without action by the Borough of Kutztown, consequences would follow.\textsuperscript{79} Therefore, purpose and intent are important factors to consider in analyzing a letter for final agency action.\textsuperscript{80}

### iii. Practical Impact of Communication

A party must also consider the practical impact of the communication, and maintain an "eye to what actions a reasonably prudent recipient of the letter would take in response to the letter."\textsuperscript{81} In \textit{Kutztown}, the Board inferred that "no reasonably prudent municipality would simply file the letter away and wait for the other foot to fall."\textsuperscript{82} The Board assumed a reasonably prudent municipality would make plans to comply with the letter and take reasonable steps to ensure the continuation of the business.\textsuperscript{83} Therefore, if Kutztown were prudent, planning would already be underway and would be consuming considerable amounts of Kutztown's time and money.\textsuperscript{84}

The Board also found that the letter "[made] it official."\textsuperscript{85} The context of the letter made an "official" finding about the status of the Borough of Kutztown's sewage treatment facility being overloaded; the letter did not merely suggest that there was the possibility of overloading the system.\textsuperscript{86} This was a statement about the municipality's status with the Department at that particular point in time.\textsuperscript{87} The position the Department had taken in the letter influ-

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\textsuperscript{77}. \textit{Kutztown}, 2001 WL 1613480, at *6 (emphasis added) (describing prescriptive nature of case).

\textsuperscript{78}. \textit{Id.} (determining intention of letter to be mandatory).

\textsuperscript{79}. \textit{See id.} (illustrating consequences of inaction).

\textsuperscript{80}. \textit{See id.} (stating importance of looking into purpose and intent).

\textsuperscript{81}. \textit{Id.} (discussing considerations of practical impact of communication).

\textsuperscript{82}. \textit{Kutztown}, 2001 WL 1613480, at *6 (describing reasonably prudent person in same situation).

\textsuperscript{83}. \textit{See id.} (reasoning what municipality would do in response to communication).

\textsuperscript{84}. \textit{See id.} (reasoning municipality might save time and money by appealing).

\textsuperscript{85}. \textit{Id.} (describing status of letter as official).

\textsuperscript{86}. \textit{See id.} (determining letter made finding of overloading in sewage system).

\textsuperscript{87}. \textit{See Kutztown}, 2001 WL 1613480, at *6 (describing change in status because of letter).
enced the Borough of Kutztown's relationship with other parties. This demonstrated a clear change in the Borough of Kutztown's status as a result of the Department's letter. Therefore, the practical impact of the letter was to alter the Borough of Kutztown's status.

iv. Apparent Finality

Another factor to consider, according to Kutztown, is the apparent finality of the letter in question. The letter in Kutztown showed no indication of being "tentative, contingent, interim, or anything but final." The Department did not suggest a plan, but rather required action. The Department already determined that the sewer system would become overloaded; it did not ask the Borough of Kutztown to consider that it might become overloaded. The threat of liability showed finality in the letter because consequences would follow if actions were not taken.

v. Relief Board can Provide

The Board in Kutztown clarified that a court must address the practical value of immediate Board review when examining the communication. "Board review is unnecessary and inappropriate in academic disputes or in cases where a person does not have anything at stake." Some relief may be granted to the party, however, if the Board can review the action and make a finding that the Department was inaccurate or inappropriate in the actions taken against the aggrieved party. This may mean that a party's time and money could be saved when appealing the substance of the

88. See id. (establishing change in status occurred because of letter sent to party).
89. See id. (finding clear change in status resulting from receipt of letter).
90. See id. (claiming practical effect of letter changed status).
91. See id. at *5 (naming apparent finality as factor to consider when looking for final agency action).
93. See id. (determining requirement of action by Department).
94. See id. (describing wording of letter as proscriptive in nature, not merely suggestive).
95. See id. (determining threat of liability demonstrates finality).
96. See id. at *5 (noting factor of relief by Board).
98. See Kutztown, 2001 WL 1613480, at *6 (determining possibility of relief).
findings from a Department letter. Therefore, there may be a significant advantage to an appeal, enhancing the importance of appealing a letter.

In *Kutztown*, the Board stated that it might have found that the determination of overloading by the Department was inaccurate if the letter been reviewed in an appeal; therefore, potentially saving the Borough of Kutztown the time and money it would have expended in complying with the letter. The Board held the power to offer considerable relief to the party.

### III. Current Interpretation

The Board's current stance on what constitutes a final appealable action by the Department is an assorted gathering of pieces of seemingly hundreds of Board opinions spread over the preceding thirty-five years. The Board most recently addressed the issue of final agency action in *Eljen Corp. v. Department of Environmental Protection (Eljen)*, *Onyx Greentree Landfill LLC v. Department of Environmental Protection (Onyx)*, and *Corco Chemical Co. v. Department of Environmental Protection (Corco)* with varied results. Each case

99. See id. (discussing possibility of saving money by appealing substance of letter).
100. See id. (explaining significant advantages of appealing).
101. See id. (explaining possible relief that Board may have provided if able to rule on letter prior to action by party).
102. See id. (finding possibility of relief in saving considerable time and money for party).
arrived at a different conclusion about when final agency action exists.\textsuperscript{108}

A. \textit{Eljen Corp. v. Department of Environmental Protection}

In \textit{Eljen}, the Board decided that there was not an appealable action.\textsuperscript{109} Eljen was a corporation that manufactured an experimental on-lot wastewater treatment system.\textsuperscript{110} Eljen attempted to obtain approval for an alternative on-lot system in Pennsylvania and was awarded a temporary listing for experimental technology.\textsuperscript{111} In 2000, Eljen submitted the first data sets and requested approval from the Department.\textsuperscript{112} The Department subsequently exchanged a number of letters and emails with Eljen, including changes in the evaluation system of these requests; the Department delivered a "critical letter" to Eljen on November 23, 2004.\textsuperscript{113} The Department ultimately decided not to approve "the Eljen In-Drain system as an alternative technology in Pennsylvania" under the old evaluation system.\textsuperscript{114} The letter also stated that "any further evaluation of this experimental technology [would] be conducted under the new evaluation system."\textsuperscript{115}

Eljen continued to urge the Department to approve the request and reverse the denial communicated in the November 23, 2004 decision letter.\textsuperscript{116} Several interactions occurred between Eljen’s counsel and the Deputy Secretary for Water Management, in which counsel argued the Department’s decision was incor-

\textsuperscript{108} See \textit{Eljen Corp.}, 2005 WL 3872414, at *10 (holding final action did exist); see also \textit{Onyx Greentree Landfill, LLC}, 2006 WL 2025304, at *8 (holding no existence of final agency action).

\textsuperscript{109} See \textit{Eljen Corp.}, 2005 WL 3872414, at *10 (holding final appealable action did not exist).

\textsuperscript{110} See \textit{id.} at *2 (describing business Eljen participated in).

\textsuperscript{111} See \textit{id.} at *1-2 (giving facts of temporary award for listing of experimental treatment facility).

\textsuperscript{112} See \textit{id.} at *1 (requesting approval for experimental treatment facility from Department).

\textsuperscript{113} Id at *2-5 (describing changes in standards and notification of changes to party). Prior to 2004, the Department evaluated these requests for alternative on-lot systems under the Experimental Systems Guidance (ESG). \textit{See id.} In February of 2004, the Department published the intent to rescind ESG and replace it with Experimental On-Lot Wastewater Technology Verification Program (TVP). \textit{Id.}

\textsuperscript{114} \textit{Eljen}, 2005 WL 3872414, at *6 (describing decision by Department not to approve Eljen’s request).

\textsuperscript{115} Id. (announcing that further requests for approval of alternative on-lot waste systems by Eljen would be assessed under new evaluation methods).

\textsuperscript{116} See \textit{id.} (continuing to urge Department to reconsider decision about experimental facility).
Finally, Eljen's counsel wrote a letter stating: "if the Department is intent on 'maintaining its denial' [Eljen's counsel] would appreciate what he calls a 'formal communication' from [the Department]." According to Eljen's counsel, this would constitute "an unambiguously appealable decision." The Department's counsel sent a response letter, referring Eljen back to the November 23, 2004 letter and highlighted the lack of appeal by Eljen.

The Board stated "it is beyond dispute that a final decision of the Department rejecting Eljen's application to designate its on lot wastewater treatment system for use as an alternate technology is an appealable decision." The pertinent question was when the decision became effective. To make this determination the Board used the factors set forth in *Kutztown*.

First, the Board analyzed the language of the November 23, 2004 letter and determined this was where the final appealable action occurred. The language of the letter itself "unequivocally and unmistakably communicate[d] that the Eljen application is denied." This "clear" language of denial effectively demonstrated the intent of the Department.

Second, the Board found that "mirandization" was not a requirement for final appealable action to exist. By "mirandization" the Board meant that a letter did not need to explicitly state that the communication was a final appealable action. Furthermore, the addition of such language within the communication would not make it per se an appealable action, rather "the presence
or absence of a specific notice of appealability is but one factor in the analysis." 129

The letter included a statement advising Eljen to contact the Department with any further questions. 130 Eljen attempted to assert that this statement meant the letter could not be final and appealable. 131 The Board disagreed with Eljen and found that this inclusion did not contradict the clear final appealability of the communication and did not undo everything previously asserted by the Department. 132

In arriving at its conclusion, the Board considered external factors. 133 Specifically, the Board stressed the arrival of the letter after "public and particular notification" of the change in evaluation methods. 134 According to the Board, this demonstrated an understanding by Eljen, beyond that communicated in the letter, that they would have to proceed under new evaluation methods if approval was denied. 135

The Board found that the letter was a clear statement of the final denial of Eljen’s application, that there was no doubt as to the intent of the letter, and that no other possible conclusion could be drawn from the wording in the letter. 136 The presence of final appealable action was undeniable in the November 23, 2004 letter and therefore Eljen needed to appeal within thirty days of that communication. 137 This was not done, and the "dire consequences which Eljen will suffer result[ed] from its failure to both exercise its right and perform its obligation to appeal the Department’s decision on time." 138 The Board specifically asserted that the fault lied with Eljen, not the Board, for dismissal of the action. 139

129. Eljen, 2005 WL 3872414, at *6 (demonstrating addition of terms final appealable action would not necessarily make action appealable); see also Olympic Foundry, Inc. v. Dept’ of Envtl. Prot., No. 98-085-MG, 1998 WL 731690 (holding Department not obligated to inform of right to appeal).
130. See Eljen, 2005 WL 3872414, at *10-1 (describing contents of letter to Eljen).
131. See id. (asserting letter in question was not appealable).
132. See id. (asserting inclusion of contact information and allowing questions does not not invalidate all prior assertions to deny approval).
133. See id. at *7 (analyzing factors outside face of letter).
134. Id. (addressing announcement of changeover in evaluation methods).
135. See Eljen, 2005 WL 3872414, at *12 (noting understanding by Board).
136. See id. at *9 (finding no doubt concerning intent).
137. See id. (finding Eljen could and should have appealed decision).
138. Id. at *9 (determining failure to appeal will result in dire consequences).
139. See id. (stating consequences of situation rested on shoulders of Eljen, not Board).
B. Onyx Greentree Landfill v. Department of Environmental Protection

On November 21, 2005 Onyx, a landfill company, filed a "Petition for Refund" of disposal fees paid for non-resource recovery material. Onyx was one of many companies requesting refunds from the Department. The Department wrote a response letter on December 16, 2005, and included a notice stating: "anyone aggrieved by the action may appeal within thirty days of receipt of written notice." The letter also provided a description of the Department's payment to Onyx applied to the time between March 14, 2005 and November 21, 2005 when the petition was filed. Acknowledgment of the time period prior to March of 2005 was absent.

Onyx then filed an appeal on March 2, 2006. In response, the Department filed a motion to dismiss, which was based on the fact that the filing was outside the thirty day period. If the original letter was a final appealable action, then the appeal was filed too late. The Board found that the letter was not a final appealable action because the letter was ambiguous. The Department admitted that the letter did not contain everything that it should have contained. The ambiguity was specifically found present because the Department had the knowledge to create a letter that clearly expressed final action, as the Department sent many letters to other companies clearly showing final agency action. This knowledge was distinguished from Eljen where "the language communicated the denial, [leaving] no doubt as to the intent of the letter, no other conclusion could be drawn."

140. See Eljen, 2005 WL 3872414, at *2 (describing filing of petition for refund).
141. See id. (determining dates applicable to petition for refund).
142. See id. (explaining numerous companies requesting refund from Department).
143. Id. (asserting response to requests for refund by Department).
144. See Onyx, 2006 WL 2025304, at *2 (providing description of payments made to Department during asserted period of time).
145. See id. (recognizing period of time missing from Department's letter).
146. Id. at *2 (giving date of appeal).
147. See id. (describing assertion by Department that appeal was filed outside time allowed).
148. See id. (asserting because appeal was filed outside time allowed, appeal was too late).
149. See Onyx, 2006 WL 2025304, at *11 (finding no appealable action).
150. See id. (admitting letter did not contain needed clauses).
151. See id. (finding Department had knowledge to add needed statements).
152. Id. at *11 (distinguishing case from Eljen).
The Board put special emphasis on the Department's knowledge of how to address the issue.\textsuperscript{153} Other letters were sent to petitioners on the same issue; the other letters included the required information to make them final appealable actions.\textsuperscript{154} The Board in \textit{Onyx} suggested that the Department's knowledge was now an additional factor that must be considered when addressing the issue of final appealable actions.\textsuperscript{155}

C. \textit{Corco Chemical v. Department of Environmental Protection}

Although the principles of \textit{Eljen} and \textit{Onyx} seem straightforward, a very strong dissent arose when applying these factors to another set of facts. \textit{Corco Chemical v. Dept of Envtl. Prot.} also addressed the issue of final agency action.\textsuperscript{156} The majority of the court found no appealable action to exist, while the dissent strongly believed that an appealable action was present.\textsuperscript{157}

Corco Chemical Corporation (Corco) is a chemical production and repacking plant.\textsuperscript{158} Corco received a letter from the Environmental Cleanup Division of the Department, declaring that there were “outstanding issues that still existed with regard to the regulated aboveground storage tanks in use at the facility and with the Spill Prevention and Response Plan (SPRP).”\textsuperscript{159} The majority determined that the language of the letter did not suggest a final decision on the part of the Department, but provided an interpretation before making a final decision.\textsuperscript{160} The Board further stated the requests for information by the Department were within the Board's area of concern.\textsuperscript{161}

A strong dissent was written in response to the majority's opinion about the existence of final action.\textsuperscript{162} The dissent first reasoned that the letter contained two prescriptive elements: (1) the

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\textsuperscript{153} See \textit{Onyx}, 2006 WL 2025304, at *11 (determining prior knowledge of how to address parties important).

\textsuperscript{154} See id. (emphasizing required knowledge of required information to make letter appealable by Department).

\textsuperscript{155} See id. (finding prior knowledge to be new factor in analysis of final action).


\textsuperscript{157} See id. at *6 (Pa.Envtl.Hr'g.Bd. Sept. 8, 2005) (holding appealable action did not exist, and dissenting appealable action did exist).

\textsuperscript{158} See id. at *1 (describing nature of Corco's work).

\textsuperscript{159} Id. (elaborating on letter sent by Department with request to clean up).

\textsuperscript{160} See id. at *3 (explaining reasoning for finding no final action existed).

\textsuperscript{161} See id. (reasoning why letter is not appealable action).

\textsuperscript{162} See \textit{Corco Chemical}, 2005 WL 3872398, at *5 (J. Krancer, dissenting) (dissenting from majority in finding final appealable action did not exist).
}
requirement of additional documents; and (2) the submission of an updated SPRP.\footnote{Id. (announcing reasoning for opinion of existence of final action by Department).} “This letter sets forth a concrete prescriptive imperative.”\footnote{Id. (stating prescriptive nature of letter).} The dissent then pointed out that the prescriptive nature went beyond the authority allowed to the Department by law.\footnote{See id. (asserting that requests by Department go past what is allowed by Section 902). This extension beyond what is allowed by the law was also recognized by the majority: “[W]hile the Department’s requirements [of the letter] for a description of the facility may entail more detail than the language used in section 902 of the Act for a description of the facility, may of those requirements . . . may be proper.” Id.} The dissent asserted that the letter was “the functional denial of the Appellant’s submittals which the dissent contends amounts to a valid SPRP and is therefore an appealable action of the Department.”\footnote{Id. at *6 (reasoning functional denial of letter exists and therefore final appealable action is appropriate).}

All three cases addressed final agency action on the part of the Department.\footnote{For a further discussion of cases, see supra 107-62 and accompanying text.} The difficulty surrounding the issue of final action is prevalent in Corco, where the Board could not agree on the existence of a final action by the Department.\footnote{See Corco Chemical, 2005 WL 3872398, at *5 (J. Krancer, dissenting) (dissenting from majority about existence of final appealable action).}

IV. A Closer Look

Over the course of cases considered by the Board, a wide spectrum of decisions about the letters involved has developed.\footnote{See Kutztown v. Dep’t of Envtl. Prot., No. 2001-244-L, 2001 WL 1613480, at *4-6 (Pa.Envtl.Hr’g.Bd. Dec. 13, 2001) (describing numerous cases and differing decisions).} The majority of the cases, though not all, can be generally placed into two categories: (1) letters requiring some kind of corrective action; and (2) letters that serve merely as warnings.\footnote{For a further discussion of two categories, see infra notes 170-90 and accompanying text.} This Section will attempt to describe the factors that distinguish these two categories of letters given by the Department to parties, and explain the conclusions the Board reached.\footnote{For a further discussion of two categories, see infra notes 171-90 and accompanying text.} Further consideration will be given to determine if the conclusions arrived at were consistent; finally, possible criticisms and solutions will be addressed.\footnote{For a further discussion of criticisms and solutions, see infra notes 192-94 and accompanying text.}
A. Corrective Action Letters

An abundance of cases have come to the Board on appeal after the Department had attempted to require that the aggrieved party take some kind of action.\textsuperscript{173} This action, unfortunately, is not always easy to determine from the letter.\textsuperscript{174} There are many cases in which the letters specifically state that action was required and many cases that imply that action is required. Reading the desired action from an ambiguous letter is not always an easy task.

Using all or parts of the \textit{Kutztown} analysis, the Board has consistently found that letters requiring the party to take corrective action are appealable.\textsuperscript{175} In \textit{Kutztown}, the Board found the requirement of a Corrective Action Plan (CAP) to be a significant determination that the letter in question was an appealable action.\textsuperscript{176} The same conclusion was reached in \textit{Hatfield}.\textsuperscript{177} The Board found that there was liability for the party in limiting the new connections which also affected the obligation and duties of Hatfield by requiring Hatfield to submit a written plan to the Department.\textsuperscript{178}

The Board found appealable action even after the Department stated that no appealable action existed because of the imposition of liability and requirement of corrective action.\textsuperscript{179} In \textit{Borough of Edinboro v. Department of Environmental Protection (Edinboro)},\textsuperscript{180} the Department sent two letters to the Edinboro Municipal Authority.\textsuperscript{181} The first letter informed the Municipality of the hydraulic

\begin{enumerate}
\item[173.] For a further differing holdings, see \textit{infra} notes 192-94 and accompanying text.
\item[174.] See id. at *5 (finding letter ambiguous in many areas). The \textit{Kutztown} opinion found a letter to be appealable when it contained "language that is somewhat tentative, and some language that reads like a request, and some language that provides a legal interpretation." \textit{Id}.
\item[175.] See id. (holding requirement to comply with Corrective Action Plan as one reason for existence of final action).
\item[176.] See id. (holding that requirement to comply with Corrective Action Plan was a significant reason for finding final action).
\item[178.] See id. (describing liability and change in status as reasons for finding appealable action).
\item[181.] See id. (detailing letters sent to municipality).
\end{enumerate}
overloading and asked for a written plan to address the issue.\textsuperscript{182} The second letter attempted to communicate to Edinboro that the first letter was only “intended to inform of obligations under Pennsylvania law.”\textsuperscript{183}

The Board determined that by expecting Edinboro to refuse new connections, and submitting a waste load management report identifying the problems and corrective steps, the original letter imposed obligations and duties that changed the “status quo” of the party.\textsuperscript{184} The original letter constituted a final action by the Department, and the second letter did not modify or withdraw the duties imposed upon Edinboro by the original letter, but was “merely an attempt to characterize the earlier letter as a nonappealable action” and was irrelevant.\textsuperscript{185}

In these three cases and others, the theme of requiring the party to take corrective action of some sort is very prevalent.\textsuperscript{186} More weight was placed on that factor than most other factors present in the \textit{Kutztown} analysis, as two cases barely referenced another reason for finding appealable action.\textsuperscript{187}

\section*{B. Warnings}

Warning letters constitute the main subject of the other line of cases drawn from the Board’s analysis of final agency action. The Board has consistently stated that “a warning alone is not an appealable action.”\textsuperscript{188} The case that most clearly demonstrates the idea of a warning was \textit{Bituminous Processing Co. v. Department of Environmental Protection (Bituminous Processing)}.\textsuperscript{189}

The Department sent Bituminous Processing, a mining company, a letter declaring that their surface mine permit was suspended due to violations found and previously stated in other

\begin{enumerate}
\item \textsuperscript{182} See \textit{id.} (requesting a written plan from Edinboro).
\item \textsuperscript{183} \textit{Id.} (describing second letter’s description of penalties under Pennsylvania Law).
\item \textsuperscript{184} See \textit{Edinboro}, 2000 WL 88739, at *2 (discussing change in party’s status).
\item \textsuperscript{185} \textit{Id.} (discussing irrelevance of second letter sent by Department).
\item \textsuperscript{186} For a further discussion of three cases in relation to CAPs, see \textit{supra} notes 170-81 and accompanying text.
\item \textsuperscript{187} For a further discussion of cases in relation to \textit{Kutztown} factors, see \textit{supra} notes 170-81 and accompanying text.
\end{enumerate}
compliance orders.190 The Department also gave the company notice of intent to forfeit their bonds on the permit if the failures were not corrected within thirty days.191

In making the conclusion, the Board relied on *E.P. Bender Coal Co. v. Dep. Of Envtl. Prot. (E.P. Bender Coal Co.)*192 In *E.P. Bender Coal Co.*, the Board stated: “a Department letter, which discusses, among other things, the possibility of future enforcement is not an appealable action.”193 The Board in *Bituminous Processing* found that the letter was only a notice of intent by the Department.194 The Board concluded that “[a] notice of intent does not order one to take corrective action, it simply warns of possible future [Department] action.”195 The Board reasoned that because the Department gave time to correct the offenses before action would be taken, no order was given to take any corrective action.196

C. Criticism and Analysis

Though the Board has attempted to establish factors to interpret the cases at hand, the decisions have not always been consistent.197 Because of the inconsistencies and disagreements over the same facts, as in *Corco*, a party receiving a letter from the Board may still have difficulty in determining whether the letter constitutes a final action, even if the party thinks the letter contains either a CAP or merely a warning.198

One solution is to require the Department to determine if the outgoing letter is appealable or not before the letter is sent. This would alleviate the issues surrounding whether there is an action,

190. See id. at *1 (asserting suspension of mining due to violations of previous letter).
191. See id. (notifying company of intent to take action if issues were not resolved within thirty days).
193. Id. (explaining possibility of future action not enough for final appealable action)
194. See id. at *2 (holding letter to be non appealable).
196. See id. (determining no CAP required).
and it would prevent the Department from making inconsistent assertions regarding the intent behind that letter. Current case law states, however, that a determination by the Department that a letter is or is not appealable is not determinative. Therefore, no matter what the Department claims about its own letters, it is for the Board to decide what is actually happening. Requiring the Department to decide and mark a letter appealable may provide the best information to the parties themselves so that a decision to appeal can be made immediately upon receipt of the letter. The Department may be less willing to use this method because it will pinpoint a decision and not allow for change in opinion for a solution that would better suit its needs. Because current case law does not allow for this option, the legislature would have to make changes to allow the Department this power.

D. Call the Lawyers: Where to Go From Here

Because these cases are so fact sensitive and must be addressed on a case by case basis through application of the Kutztown factors, “it is impossible to paint a bright line” rule. Even general guidelines seem vague at best. Case by case reviews cause difficulties for parties who receive letters from the Department. Upon receipt of a letter, a party may not be in a very good position to determine whether it has an appealable action. Some letters may impose great use of a company’s time and resources and may lead to millions of dollars of expenses and potential loss of income. Therefore, there are no easy guidelines for a company to follow upon receipt of the letter.

Because of all of the potential consequences, it is important for parties who receive letters from the Department to make sure they


200. See id. at *10 (finding Mirandization of parties not required nor determinative of existence of action).


202. See id. (determining need for case by case decisions).

203. For a further discussion of difficulty in determining final appealable action, see supra notes 102-65 and accompanying text.

204. For a further discussion of consequences of not appealing, see supra notes 94-100 and accompanying text.

205. For a further discussion of difficulties in determining final appealable action, see supra notes 102-65 and accompanying text.
take the proper steps to protect themselves. Unfortunately, the Department cannot simply make a statement in the letter regarding the letter’s status as a final action; therefore, it is up to individual party to try to determine if they have an appealable action. The best cause of action for parties is, upon receipt of a letter from the Department, to immediately send it to a lawyer. Lawyers are better equipped to determine whether the letter should be appealed and to handle the appeal in the required amount of time. A possibly aggrieved party should not hold on to the letter for even a few days as the thirty day limitation for appeals is strict and the party may end up harming itself. Without much hope for a bright line rule, the most important steps a party can take upon receipt of a Department letter are: (1) to retain a lawyer to review the letter with the Kutztown factors; and (2) to keep an eye towards the recently decided cases of Eljen, Onyx Greentree, and Corco.

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206. For a further discussion of consequences of not appealing decision, see supra notes 94-100 and accompanying text.


209. For a further discussion of these cases, see supra notes 101-64 and accompanying text.