13-0885

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
FISH AND BOAT COMMISSION,

Plaintiff,

v.

CASE NO.: 11-C-556
Judge Russell M. Clawges, Jr.

CONSOL ENERGY, INC.,
CONSOLIDATION COAL COMPANY,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter came before the Court on the 20th day of May 2013, on Defendants Consol Energy, Inc. and Consolidation Coal Company's Motion to Dismiss, filed May 8, 2013, on the grounds that this Court lacks subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The Plaintiff filed a Response on May 17, 2013. The parties subsequently filed Supplemental briefs.

Plaintiff appeared by counsel, Sharon Z. Hall. Defendants appeared by counsel, Christopher B. Power. The Court heard arguments of counsel and took the motion under advisement. The Court has studied the motion, responses, and the memoranda of law submitted by the parties; considered the arguments of counsel; and reviewed pertinent legal authorities. As a result of these deliberations, the Court is ready to rule.

FACTS and PROCEDURAL HISTORY

Plaintiff Fish and Boat Commission ("Commission") is an independent administrative agency of the Commonwealth of Pennsylvania. Plaintiff is alleging claims for damages sustained in Pennsylvania for loss of fish, mussels, and other aquatic life caused by the Defendants' discharge of harmful industrial wastewater into streams located in West Virginia. The Commission claims that Defendants' discharges in September 2009 into the West Virginia Fork of Dunkard Creek caused pollution and harmful effects in those parts of Dunkard Creek that are located downstream in Pennsylvania.

Specifically, Plaintiff contends that one or more of the Defendants discharged large quantities of chlorides into the West Virginia waters of Dunkard Creek and triggered a golden algae bloom which killed more than 50,000 fish and amphibians in the Pennsylvania portions of the waterway. The Complaint does not allege that any of the Defendants discharged harmful substances directly into any Pennsylvania waters.

Plaintiff initiated this action by filing its Complaint in this Court on September 2, 2011. On October 11, 2011, Defendants removed the case to the U.S. District Court for the Northern District of West Virginia, invoking federal question jurisdiction and the complete preemption doctrine. The District Court remanded the matter back to this Court by Order entered September 4, 2012. Plaintiff asserts common law tort claims against the Defendants, including nuisance, trespass, negligence *per se*, negligence, and strict liability.

The Defendants filed this Motion to Dismiss arguing that the Plaintiff lacks standing to bring the claims it asserts for two reasons. First, Defendants argue that Plaintiff's legal authority to allege claims for loss of aquatic life is limited to Pennsylvania causes of action for losses caused by

violations of Pennsylvania law. Second, Defendants further contend that the West Virginia Water Pollution Control Act ("WPCA"), Code Section 22-11-25 is the exclusive basis for seeking recovery for loss of fish or aquatic life in West Virginia courts and that the Plaintiff has no authority to bring an action under the WPCA.

DISCUSSION

Generally, standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 94 (2002). Also, generally speaking, standing is an element of jurisdiction over the subject matter. State ex rel. Paul B. v. Hill, 201 W.Va. 248, 256 (1997).

Furthermore, standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. Typically the standing inquiry requires careful judicial examination to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.* Findley at 94-95. [Emphasis in original].

"Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syl. Pt. 5, Findley.

Lack of Statutory Authority

"The commission shall administer and enforce [the Fish and Boat Code] and other laws of this Commonwealth relating to the protection, propagation and distribution of fish." 30 Pa. C.S. § 321. "The commission shall administer and enforce this part and other laws of this Commonwealth relating to the protection, propagation and distribution of fish." 30 Pa. C.S. § 2101.

"The Commonwealth [of Pennsylvania] has sufficient interest in fish living in a free state to give it standing, through its authorized agencies, to recover damages in a civil action against any person who kills any fish or who injures any streams or stream beds by pollution or littering. The proprietary ownership, jurisdiction and control of fish, living free in nature, are vested in this Commonwealth by virtue of the continued expenditure of its funds and its efforts to protect, perpetuate, propagate and maintain the fish population as a renewable natural resource of this Commonwealth." 30 Pa. C.S. § 2506(a).

"The commission, as an agency of the Commonwealth authorized to regulate, control, manage and perpetuate fish may, in addition to criminal penalties provided in this title, bring civil suits in trespass on behalf of the Commonwealth for the value of any fish killed or any stream or stream bed destroyed or injured in violation of this chapter." 30 Pa. C.S. § 2506(b).

"[A]n administrative agency can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language." Com., Human Relations Commission v. Transit Cas. Ins. Co., 478 Pa. 430, 438 (1978).

The Commission is a creature of statute and, thus, "has only those powers which are expressly conferred upon it by the legislature and those powers which arise by necessary implication." Feingold v. Bell of Pennsylvania, 477 Pa. 1, 8 (1977).

The Pennsylvania Fish and Boat Commission of the Commonwealth is only authorized to bring civil suits for damages as a result of violations of Pennsylvania law, based on the language of 30 Pa. C.S. § 2506(b). The Commission insists that it is not limited to the express powers granted by statute, but also has powers by necessary implication and those which are necessary to effectuate its purpose. Plaintiff points out that Pennsylvania Courts have found that "legislative enactments are generally to be construed in such a manner as to effect their objects and promote justice." Com. v. Beam, 567 Pa. 492, 495 (2002).

Defendants disagree that the Commission has express or implied authority to bring an action asserting claims for any violations other than under 30 Pa. C.S. Chapter 25. The Court agrees. The wording of the subject statute is detailed such that the Court need not have to construe the legislative intent. The provision leaves no gaps to fill in an implied power. In this code section, the Pennsylvania legislature set forth precisely what the Commission is authorized to undertake. The Court must conclude that the legislature did not intend to grant the Commission any authority beyond that which is clearly stated. The narrow and explicit language does not allow this Court to find any implied right of the Commission to bring a cause of action under West Virginia common law.

The code section specifically limits the Commission to seeking to recover damages from those who kill fish or injure streams or stream beds in violation of Chapter 25 of the Fish and Boat Code. By including the clause, "in violation of this chapter," the Pennsylvania legislature chose to restrict the scope of the claims or causes of action the Commission may bring. The limiting language is clear, unambiguous, and unmistakable – the Commission is not authorized to bring civil suits for violations of West Virginia laws.

Alternatively, Plaintiff argues that the Pennsylvania Office of Attorney General delegated authority to the Commission to initiate this action, and this delegation had the effect of conferring standing. The Court disagrees. The delegation of authority does not create any additional rights or authority in the Commission beyond what is stated in 30 Pa. C.S. § 2506(b). It simply allows the Commission to hire outside counsel to pursue the claims for which it is authorized. It does not establish standing in the Commission to bring this action.

West Virginia Code Section 22-11-25, the West Virginia Water Pollution Control Act

"If any loss of game fish or aquatic life results from a person or persons' failure or refusal to discharge any duty imposed upon such person by this article, section seven, article six of this chapter or article eleven-a of this chapter, either the West Virginia Division of Natural Resources or the Division of Environmental Protection, or both jointly may initiate a civil action on behalf of the State of West Virginia to recover from such person or persons causing such loss a sum equal to the cost of replacing such game fish or aquatic life." W.Va. Code § 22-11-25.

The objective of the enactment of our WPCA is to provide the State with an enforcement mechanism for keeping the waters of this State free of pollutants. Taylor v. Culloden Public Service District, 214 W.Va. 639, 648 (2003).

Defendants also contend that the Plaintiff cannot assert these West Virginia common law claims because the WPCA superseded common law and only the West Virginia Division of Natural Resources or the West Virginia Department of Environmental Protection have the right to bring actions under the WPCA. Defendants overlook the fact that the WPCA governs fish or aquatic life within the waters of *West Virginia.* Even if West Virginia Code § 22-11-25 creates the only

available cause of action for loss of fish under the jurisdiction of West Virginia, it does not protect fish or aquatic life of another State. Plaintiff is pursuing this action for the loss of aquatic life inhabiting waters of Pennsylvania only. Therefore, this argument is not applicable and has no bearing on Plaintiff's authority to seek recovery under West Virginia common law.

ORDER

ACCORDINGLY, based on the foregoing, it is ORDERED that the Defendants Consol Energy, Inc. and Consolidation Coal Company's Motion to Dismiss is GRANTED.

It is further ORDERED that this is a final order and the Clerk is directed to remove this case from the active docket of this court.

The Court further directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this order to the parties and/or counsel of record.

Enter July 12, 2013

Russell M. Clawges, Jr., Judge
17th Judicial Circuit, Division II.

STATE OF WEST VIRGINIA SS:

I, Jean Friend Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend, Circuit Clerk