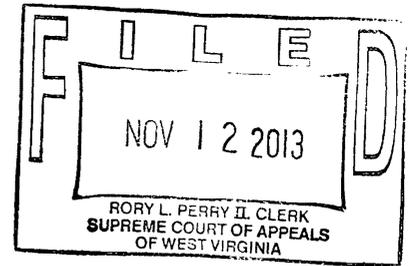


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0885

Commonwealth of Pennsylvania, Pennsylvania
Fish and Boat Commission,

Petitioners/Plaintiffs Below,



Appeal from a final order of
the Circuit Court of Monongalia
County (No. 11-C-556)

v.

Consol Energy, Inc., Consolidation Coal Company,
Defendants Below, Respondents

Petitioners' Brief

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ASSIGNMENTS OF ERROR

- (1) THE CIRCUIT COURT ERRED BY GRANTING RESPONDENTS' MOTION TO DISMISS
- (2) THE CIRCUIT COURT ERRED IN HOLDING THAT THE DELEGATION OF THE PENNSYLVANIA ATTORNEY GENERAL DOES NOT ESTABLISH STANDING

STATEMENT OF THE CASE

This appeal stems from a Final Order of the Circuit Court of Monongalia County granting Respondents' Motion to Dismiss. Petitioners' Complaint asserted claims of nuisance, trespass, negligence per se and strict liability as a result of a large fish kill.

The civil action arose from pollution discharges into Dunkard Creek, a body of water which crosses between Pennsylvania and West Virginia at various points along the border near Greene County, Pennsylvania and Monongalia County, West Virginia. Petitioners filed the underlying civil action in Monongalia Circuit Court, on September 2, 2011. Respondents removed the matter to the United States District Court for the Northern District of West Virginia. Petitioners thereafter filed a Motion for Remand, which was granted on September 4, 2012.

(1) Summary of Facts Regarding the Fish Kill

As set forth in Petitioner's Complaint, Petitioner is the Commonwealth of Pennsylvania, the Pennsylvania Fish and Boat Commission (hereinafter sometimes referred to as "PFBC"). The PFBC is an independent administrative agency of the Commonwealth of Pennsylvania, charged with protecting, preserving and managing fish within the Commonwealth, and overseeing jurisdictional responsibility for fishing and recreational boating. (App. 139) Respondent corporations operate, among other things, long wall mining operations in West Virginia and Pennsylvania. As part of the mining operations, Respondents applied for and were

issued National Pollution Discharge Elimination System (NPDES) permits from the West Virginia Department of Environmental Protection, which regulated the point source discharges from Respondents' mines into certain waterways, including Dunkard Creek. (App. 140, 141) Between May 1, 2009 and November 30, 2009, significant amounts of chloride were discharged by Respondents through their mining operations at the Blacksville No. 2 and Loveridge mines into the West Virginia portion of Dunkard Creek, near Greene County, Pennsylvania. (App. 143) These levels exceeded daily maximum effluent limitations within the NPDES permits and were otherwise toxic and harmful. (App. 146) During this same period, high levels of total dissolved solids were present in the receiving waters which led to and created the release of toxins from golden algae within Dunkard Creek. Toxins released from golden algae are fatal to fish and other aquatic wildlife. As a result of these discharges and resulting toxins, the Commonwealth suffered significant losses of fish, mussels, and mudpuppies. (App. 144)

While dead fish and aquatic life were found in great numbers both in the West Virginia and Pennsylvania waters of Dunkard Creek, the Commonwealth recorded its share of the kill at approximately 42,997 fish, comprised of 40 species; 15,382 freshwater mussels, comprised of 14 species, including 59 Pennsylvania endangered snuffbox mussels and 6,447 mudpuppies. (App. 144) Commission biologists and law enforcement officers observed dead fish, mussels and amphibians as well as living fish, mussels and amphibians showing signs of severe physiologic stress, with large numbers of fish congregating at the mouths of small tributaries and many rolling in the water and gulping air at the surface. Inspection of the stressed fish revealed their gills were inflamed, blood vessels were dilated or ruptured and tissues were abnormally red. (App. 143)

SUMMARY OF ARGUMENT

The circuit court erred by granting Respondent's Motion to Dismiss on the grounds that Petitioners' lacked standing to bring a cause of action for the killing of the Commonwealth's fish and aquatic life. First, the trial court failed to consider the general purpose and powers of the PFBC, an agency of the Commonwealth, as set forth in section 2506(a) of the Fish and Boat Code, 30 Pa.C.S. § 2506(a), and related Pennsylvania case law explaining the powers granted to governmental agencies and municipalities in the Commonwealth of Pennsylvania.

As a matter of law, these agencies are not limited to the *express powers* granted by statute, but also are endowed with additional other powers by necessary implication, including those which are necessary to effectuate the agency's purpose. After reviewing the statute, the Court concluded that the Pennsylvania Legislature chose to restrict the scope of claims the PFBC could bring to those arising under Pennsylvania law and therefore no further exploration was necessary to determine implied powers. As an initial matter, the statute does not restrict the scope of claims to those arising under Pennsylvania law. In fact, the words "Pennsylvania law" or "laws of the Commonwealth" do not appear anywhere in section 2506, subsection (a) or (b).

Moreover, the Circuit Court's conclusion that no further analysis is necessary is in direct contravention to the settled law of Pennsylvania, which holds that agencies have express powers granted statutorily **and** those powers arising by implication. The proper determination of an agency's powers is not an "either-or" analysis whereby express powers preclude the finding of any implied powers for the agency. Rather, the Court will find implied powers (in addition to any express powers) if those powers are necessary to effectuate the agency's purpose.

Determining those implied rights requires an analysis of the agency's purpose. Despite this, after holding that the statute expressly restricted the Petitioner's standing to bring causes of

action exclusively under Pennsylvania law, the Court held it was not necessary to find any implied right. That holding is clearly erroneous.

Standing is conveyed to the Commonwealth in 30 Pa.C.S. § 2506(a), which provides:

- (a) Declaration of Policy. – The Commonwealth 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 streambeds 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 the Commonwealth.

30 Pa.C.S. § 2506(a)(emphasis added)

This declaration of policy and grant of standing makes no distinction between the laws of the Commonwealth or of any other state when conferring standing upon the PFBC, an authorized agency, to act as the trustee of the fish of the Commonwealth and to recover damages for the Commonwealth in a civil action against “any person” who kills “any fish.” Petitioners are therefore not limited to bringing a civil action under Pennsylvania law and have standing to seek redress in any forum, including West Virginia.

Secondly, the trial Court erred by holding that the delegation by the office of Pennsylvania Attorney General did not confer standing to bring a civil action in West Virginia, because the delegation of authority did not create any additional rights beyond what is “stated” within 30 Pa.C.S. § 2506 (b).

Litigation authority is granted to the Office of Attorney General of the Commonwealth of Pennsylvania pursuant to the Commonwealth Attorneys Act. 71 P.S. § 732-101 et seq. Section 204 (c) of the Act provides:

Civil Litigation: Collection of debts. – The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission **in any action brought by or against the Commonwealth or its agencies, and may intervene in any**

other action, including those involving charitable bequests and trusts or the constitutionality of any statute. The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency; the Attorney General shall keep a proper docket or dockets, duly indexed, of all such claims, showing whether they are in litigation and their nature and condition. The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead. The Attorney General shall approve all settlements over such maximum amounts as he shall determine arising out of claims brought against the Commonwealth pursuant to 42 Pa.C.S. § 5110.

71 P.S. § 732-204(c)(emphasis added)

The Act defines “action” as “any action at law or in equity” and includes the Petitioner PFBC in the definition of an “independent agency.” 71 P.S. § 732-102. The Act further provides that the Attorney General (or its agencies by delegation) may intervene in “any other action,” *not just* “any Pennsylvania action.” The act clearly encompasses civil litigation beyond those arising under Pennsylvania law as evidenced by the broad statutory language expressly providing for the litigation of antitrust violations under *federal* law. Most importantly, the litigation power granted to the Attorney General under the Act allows the Attorney General, and its authorized agencies by delegation, to conduct “any particular litigation or category of litigation.” The Act places no restrictions or limitations on the laws under which the PFBC, by delegation, may pursue the litigation.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners request oral argument in this matter pursuant to Rule 20 of the Revised Rules of Appellate Procedure. This case presents a unique issue regarding damages caused to the Commonwealth of Pennsylvania by acts occurring in West Virginia in violation of West

Virginia law. The lower court granted Respondents' Motion to Dismiss on the issue of the Commonwealth's standing to bring a cause of action under West Virginia law.

ARGUMENT

(1) THE CIRCUIT COURT ERRED BY GRANTING RESPONDENTS' MOTION TO DISMISS

A. Standard of Review

This Court will apply a *de novo* standard of review to a circuit court's order granting a motion to dismiss. Syl. pt. 2, State ex re. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). See also Elmore v. Triad Hospitals Inc., 220 W.Va. 154, 157-58, 640 S.E.2d 217, 220-21 (2006)(*per curiam*)(noting applicability of *de novo* standard of review to dismissal pursuant to Rule 12(b)(1) and 12(b)(6)); Johnson v. C.J. Mahan Constr. Co., 210 W.Va. 438, 441, 557 S.E.2d 845, 848 (2001)(*per curiam*)(noting applicability of *de novo* standard of review to motion filed pursuant to Rule 12(b)(1)).

B. The Circuit Court Erred by Failing to Consider Pennsylvania Law with Regard to Standing under a Pennsylvania Statute

The Order granting Respondents' Motion to Dismiss focused exclusively on West Virginia law when discussing standing. (App. 3) However, as the statute at issue is a Pennsylvania statute, the trial court should have given consideration to Pennsylvania law, in particular Pennsylvania law relating to the standing of an agency. Although there are no West Virginia cases addressing the issue of standing for a litigant under a Pennsylvania statute, the West Virginia Supreme Court's analysis of conflicts of laws relating to insurance coverage are instructive: "In Syllabus Point 2 of Lee v. Saliga, we used a 'significant relationship to the transaction and the parties' to determine what state's law should be applied to construing the provision of a motor vehicle policy." McKinney v. Fairchild International, Inc., 199 W.Va. 718,

727, 487 S.E.2d 913, 922 (1997)(citations omitted). The Court in McKinney further noted: “This law arising from the state with a significant relationship should control the reasonable expectation of the parties, rather than that of another state whose only connection to the dispute is the fortuity that the accident occurred there.” Id. at 728, 487 S.E.2d at 923, quoting Lee v. Saliga, 199 W.Va. at 769, 373 S.E.2d at 352. Because a Pennsylvania statute and the intent of the Pennsylvania Legislature in drafting that statute is at issue, Pennsylvania law should be applied for the narrow issue of the Petitioners’ standing to bring the cause of action.

In Pennsylvania, a party seeking judicial resolution of a controversy “must establish as a threshold matter that he has standing to maintain the action.” Fumo v City of Philadelphia, 601 Pa. 322, 336, 972 A.2d 487, 496 (Pa. 2009). In the Commonwealth of Pennsylvania “[a] party must be aggrieved in order to possess standing to pursue litigation. Aggrievability is obtained by having a substantial, direct, and immediate interest in proceedings or litigation.” Johnson v. American Standard, 607 Pa. 492, 510, 8 A.3d 318, 330 (Pa. 2010). In addition to this “general standing” a litigant’s standing can be conferred by statute. With regard to standing specifically for an agency of the Commonwealth, the Pennsylvania Supreme Court has also stated:

The terms ‘substantial interest,’ ‘aggrieved,’ and ‘adversely affected’ are the general, usual guides in that regard, but they are not the only ones. For example, when the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances, the legislature has implicitly ordained that such an agency is a proper party litigant, i.e. that it has ‘standing.’

Commonwealth, Pa. Game Commission v. Commonwealth, Dept of Environmental Resources, 521 Pa. 121, 127, 555 A.2d 812, 815 (1989)

The statutory function, duties and responsibilities of the Pennsylvania Fish and Boat Commission are to regulate, control, manage and perpetuate the fish of the Commonwealth. 30

Pa.C.S. § 2506 (a) and (b). In order to act upon this stated purpose, the PFBC, as an authorized agency of the Commonwealth, is given the broad general power “to recover damages in a civil action against any person who kills any fish or who injures any streams or streambeds by pollution or littering.” 30 Pa.C.S. § 2506 (a). Therefore, the threshold matter for standing, whether the PFBC is aggrieved, is easily satisfied as the PFBC has a statutory interest in managing the fish of the Commonwealth, and in seeking redress when the fish are killed. In fact, the very purpose and function of the PFBC is to protect the fish and aquatic life of the Commonwealth and accordingly to pursue litigation to seek redress on behalf of the citizens of the Commonwealth when those fish are harmed by the actions of others. To place arbitrary limitations on those powers based upon one phrase within the statute, to the exclusion of others, is to frustrate the purpose of the statute and the intent of the Legislature to empower the PFBC as the protector of the Commonwealth’s fish.

A similar challenge to standing was examined in Commonwealth, Pa. Game Commission v. Commonwealth, Dept of Environmental Resources, Supra, where the Supreme Court of Pennsylvania reviewed the holding of the Commonwealth Court regarding the Game Commission’s standing to litigate the matter in controversy. At issue was a solid waste permit granted by the Department of Environmental Resources to Ganzer Sand & Gravel, which allowed Ganzer to operate a solid waste landfill on property adjacent to a wetlands waterfowl refuge. The Game Commission challenged the issuance of the permit before the Pennsylvania Environmental Hearing Board. The Board rejected the Game Commission’s challenges to the permit. On appeal the Commonwealth Court affirmed and held that the Game Commission lacked standing to challenge the permit under the Dam Safety and Encroachment Act. On appeal, as to the issue of standing, the Pennsylvania Supreme Court disagreed and reversed.

The Court examined the powers and duties of the Game Commission as set forth in the Game and Wildlife Code, 34 Pa.C.S. § 101 et seq. In language similar to 30 Pa. C.S. § 2506, the Game and Wildlife Code provides that: “ownership, jurisdiction over and control of game or wildlife is vested in the Commission as an independent agency of the Commonwealth...” 34 Pa. C.S. § 103(a). Id. at 129, 555 A.2d at 816. In examining the purpose of the Commission, the Court further noted, “[A]nother section of the Code provides that the Commission, as an agency of the Commonwealth, is ‘authorized to regulate, protect, propagate, manage and preserve game or wildlife.’” Id. at 129, 555 A.2d at 816.

Based upon the stated purpose of the Game Commission as the protector of the Commonwealth’s wildlife, the Pennsylvania Supreme Court noted that “[i]t is clear from the above that the Game Commission has a substantial interest in the lands and wildlife under its control. This alone would be sufficient to give it standing to legally challenge *any action* which allegedly would have an adverse impact on those interests.” Id. at 129, 555 A.2d at 816 (emphasis added). Indeed, in a concurring opinion, Justice Larsen noted that the purpose of the Game Commission, as a trustee of the natural resources under Article I, Section 27 of the Pennsylvania Constitution, afforded the Commission standing to “take whatever legal action is necessary and appropriate to ‘conserve and maintain’ our ‘clean air, pure water, and ‘the natural, scenic, historic and esthetic values of the environment.’” Id. at 131, 555 A.2d at 817.

Article I, Section 27 of the Pennsylvania Constitution provides the Constitutional basis by which the state is the trustee and protector of all natural resources on behalf of the citizens of the Commonwealth. The Amendment reads:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.

As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa.Const. Art.I, Section 27.

The Pennsylvania Supreme Court has held that Article I, Section 27 of the Pennsylvania Constitution, “creates a public trust of public natural resources for the benefit of all the people (including future generations) and the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them.” Payne v. Kassab, 312 A.2d 86, 272 (Pa.Comm. Ct. 1973).

This Constitutional duty of the Commonwealth to preserve and maintain the Commonwealth’s natural resources, including the fish of the Commonwealth, negates any statutory interpretation which would limit that duty to actions arising only under Pennsylvania law. In fact, the failure to bring “any civil action” for redress because it did not arise under Pennsylvania law would be a breach of the public trust set forth in the Pennsylvania Constitution, Article I, Section 27, for what more basic way is there to protect these public rights than to prohibit their interference or punish their degradation?

As an agency of the Commonwealth charged with fulfilling and supporting the provisions of Article I, Section 27 of the Pennsylvania Constitution, the PFBC has standing to bring any action which furthers the stated purposes of protecting and propagating the fish population, including a cause of action in West Virginia alleging violations of West Virginia common law. Indeed, pursuant to the holding in Commonwealth, Pa. Game Commission, the statutory purpose of the PFBC as the protector of fish is enough to establish standing without further inquiry.

C. The Circuit Court erred in holding that standing to bring an action under West Virginia law for the killing of Pennsylvania fish is not afforded under Section 2506 of the Fish and Boat Code

In establishing that the PFBC lacked standing to bring an action under West Virginia law, the Court focused on one phrase within subsection (b) of Section 2506 of the Fish and Boat Code: “in violation of this Chapter.” (App. 5) Section 2506 (b), in pertinent part, states:

- (b) General Rule. – 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 streambed destroyed or injured in violation of this chapter.

30 Pa.C.S. § 2506(b)

The Circuit Court concluded, erroneously, that the phrase “in violation of this Chapter” was an indication that the Pennsylvania Legislature “chose to *restrict* the scope of the claims or causes of action the Commission may bring.” (App. 5) In fact, the phrase has no such import and to interpret it as such is to frustrate the very purpose the Pennsylvania Legislature sought to promote, the Commission’s standing to “recover damages in a civil action against any person who kills any fish...” Nowhere in the statute is it expressly stated that the only civil actions the PFBC may bring are those under *Pennsylvania* law. To the contrary, “this Chapter” *includes* subsection (a) which sets forth the stated policy of the Code: *to give the Commonwealth standing, through its authorized agencies, to recover damages in a civil action against any person who kills any fish.* 30 Pa.C.S. § 2506(a). It should be noted that, between subsection (a) and (b), only subsection (a) includes the word “standing.” The trial Court erred by holding that section 2506(b) of the Code restricts the PFBC’s standing to litigating only civil actions in Pennsylvania, as this interpretation is in direct contradiction of the stated policy, and purpose of the PFBC, and the standing conferred by subsection (a).

The principal objective of interpreting a statute is to effectuate the intention of the legislature and give effect to *all of the provisions of the statute*. Commonwealth v. Webbs Super Gro Products, Inc., 2010 Pa. Super 139, 2 A.3d 591 (2010)(emphasis added), citing 1 Pa.C.S § 1921(a); Commonwealth v. Drummond, 2001 Pa. Super 122, 775 A.2d 849, 855-56 (Pa. Super. 2001) (en banc)(stating that appellate courts must evaluate each section of a statute because there is a presumption that the legislature intended for the entire statute to be operative).

While the PFBC is certainly charged with enforcing the laws of the Commonwealth with regard to the protection of fish, it is not limited to Pennsylvania law when effectuating that purpose. To hold so in the absence of limiting language within the statute obviates the stated purpose of the Commission, the propagation and protection of the Commonwealth's fish and prevents the PFBC from fully discharging its duties under Article I, Section 27 of the Pennsylvania Constitution. In rejecting a similar narrow interpretation of an agency's powers, the Commonwealth Court of Pennsylvania held, "it is inappropriate to determine the power of an administrative agency in a linguistic vacuum." Commonwealth of Pa., Dept of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509, 517, 454 A.2d 1, 14 (Pa. 1982). See also Upper St. Clair Tp v. Com. Of Pa. Dept of Community Affairs, 478 Pa. 546, 561, 387 A.2d 456, 464 (1978)(holding that "one litmus of the breadth of an administrator's authority is the purpose for which the authority was conferred.")

Pennsylvania Courts caution against restrictive, narrow interpretations of statutes. "At the same time, we recognize that the General Assembly has prescribed that legislative enactments are generally to be construed in such a manner as to effect their objects and promote justice, and, in assessing a statute, Courts are directed to consider the consequences of a particular interpretation, as well as other factors enumerated in the Statutory Construction Act. "

Butler County Mushroom Farm, 499 Pa. at 516-17, 454 A.2d at 5-6 (citing 1 Pa.C.S. § 1921(a))(observing that statutory construction is not an exercise to be undertaken without considerations of practicality, precept and experience, as ignoring such considerations may result in a forced and narrow interpretation that does not comport with legislative intent). The Commonwealth Court of Pennsylvania has noted the danger of overreaching or absurd statutory construction. In Commonwealth v.Percudani, 844 A.2d 35, 47 (Pa. Commw., 2004) the Court held, “[i]n ascertaining legislative intent we may consider the consequences of a particular interpretation and may presume that the legislature did not intend a result that is absurd or unreasonable.”

In Percudani, supra, the Pennsylvania Attorney General filed an action in equity, alleging that various activities of Percudani and others were in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). One of the Defendants, Stranieri, filed Preliminary Objections styled as a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Standing. Specifically, the Defendant argued that, because he had entered into a Consent Order with the State Board of Certified Real Estate Appraisers prior to the filing of the Attorney General’s Complaint, the Commonwealth lacked standing to pursue the matter and there was no subject matter jurisdiction.

Stranieri relied specifically on Sections 4 and 8 (b) of the UTPCPL which provides generally that the Attorney General may bring an action against any person who is “using or is about to use” any method, act or practice prohibited by the Act. He argued that the use of the present tense in the statute limited the Commonwealth’s ability to bring suit to ongoing deceptive acts or practices, which would not include Stranieri because he was precluded from any present or future acts by virtue of the Consent Order. The Commonwealth Court declined to follow the

Defendant's reasoning, holding that adopting that interpretation would limit the Commonwealth's actions to ongoing activities, and the purpose of the law would be frustrated. Specifically, the Court held: "To allow a party to avoid liability for its actions by merely discontinuing its conduct would render the penalty provisions of the Law meaningless in their application." *Id.*, at 46.

The absurd effect of the Court's holding in the underlying matter is to leave the agency charged with the protection and propagation of its fish population with no remedy simply because the actors who caused the injury did so from within the borders of a neighboring state. The PFBC's stated statutory purpose of protecting and managing the Commonwealth's fish, including seeking redress when those fish are killed, comports with the fundamental principles of the standing doctrine, "[t]hat the person must be negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 204, 888 A.2d 655, 660 (Pa. 2005). Certainly, the unlawful killing of 50,000 of the Commonwealth's fish and amphibians constitutes a very real and direct impact on the state and its citizens.

D. The Circuit Court erred by holding that further analysis of the statute to determine if implied powers would provide standing to bring an action under West Virginia law for the killing of Pennsylvania fish was not necessary

While Pennsylvania agencies have only those power conferred upon them by statute, it is well settled that those powers include not only those specifically enumerated but also those which arise by necessary implication. *Commonwealth v. Beam*, 567 Pa. 492, 496, 788 A.2d 357, 360 (2002). In *Commonwealth v. Beam*, the Pennsylvania Department of Transportation ("DOT") filed a complaint in equity to enjoin landowner Troy Beam from using his property to take off, land and house his airplane, alleging that he was operating an airport without a license.

The trial court and the Commonwealth Court held that the DOT lacked authority to seek an injunction.

The Pennsylvania Supreme Court reversed, holding that the DOT had the capacity to institute judicial proceedings where necessary to the execution of its statutory responsibilities. Because the owner's violation was tantamount to a public nuisance, it could be enjoined at common law *regardless of whether an injunction was statutorily authorized*. The authority to secure compliance was inherent in the DOT's statutory duties, which included promulgating and enforcing regulations relating to aviation, airports and air safety. *Id.*, at 496, 788 A.2d at 360. The Court held that "[t]he General Assembly has implicitly conferred upon the Department the capacity to seek redress in a judicial forum to restrain operation of an unlicensed airport. *Accord Racine Fire & Police Comm'n v. Stanfield*, 70 Wis. 2d 395, 234 N.W.2d 307, 309 (Wis. 1975)(explaining that a particular power or duty conferred by statute, may, of necessity, require the additional power to maintain or defend an action arising out of that power or duty); *City of New York*, 458 N.E.2d at 358-59 (recognizing that the authority of an agency to bring suit does not require 'that in every instance there be express legislative authority'; rather the capacity to sue may also be inferred as a 'necessary implication from [the agency's] power and responsibility, provided that there is no clear legislative intent negating review'); 2 AM.JUR.2D ADMINISTRATIVE LAW § 62 (delineating, among commonly implied agency powers, 'the power to sue' and 'the power to enforce a regulation')." *Beam*, *Supra*, at 500, 788 A.2d at 362.

Finally, the Court in *Commonwealth v. Beam*, noted that the Legislature cannot predict all powers which may be necessary to effectuate the purpose of the agency and therefore implied powers are appropriate and necessary. The Court held:

Based upon such considerations, the rule requiring express legislative delegation is tempered by the recognition that an administrative agency is invested with the implied

authority necessary to the effectuation of its express mandates. See Butler County Mushroom Farm, 499 Pa. at 513, 454 A.2d at 4; St. Joe Minerals, 476 Pa. at 310, 382 A.2d at 736; Day v. Public Service Comm'n (Yellow Cab Co.), 312 Pa. 381, 384, 167 A.565, 566 (1933). See generally 2AM.JUR.2D Administrative Law § 57 (1944)(explaining that '[t]he reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency.')

Id., at 360, 788 A.2d at 497.

See also Water and Power Resources Bd v. Green Spring Co., 394 Pa. 1, 9, 145 A.2d 178, 182 (1958)(in discussing the constitutionality of The Water Obstruction Act: "With thousands of streams and rivers within the Commonwealth, each presenting its particular problem, it would have been impossible for the legislature to provide a hard and fast rule to govern each situation.")

The stated purpose of the PFBC is "to protect, perpetuate, propagate and maintain the fish population..." 30 Pa.C.S. § 2506. In order to effectuate this stated purpose, the PFBC is given the broad general power "to recover damages in a civil action against any person who kills any fish..." 30 Pa.C.S. § 2506 (a). These broad powers are not expressly limited to actions brought under Pennsylvania law, as the chapter confers the power to bring "any civil action." By necessary implication "a civil action" (as contrasted with "a Pennsylvania action") would include any civil action necessary to recover damages against any person who has killed the Commonwealth's fish. Therefore, an implied power to bring any civil action is granted to the PFBC in order to carry out its protective functions for the fish of the Commonwealth. The Circuit Court's holding that a statutory analysis was not necessary is patently wrong, particularly in light of the well settled rule in Pennsylvania that: "If two readings of a statute are reasonable, greater deference must be given to the interpretation of the administrative agency responsible for its enforcement." Seneca Landfill v. Dep't. of Env'tl. Protection, 984 A.2d 916, 925 (Pa.

Commw. 2008), quoting Bethenergy Mines Inc. v. Dep't. of Env'tl. Protection, 676 A.2d 711 (Pa. Commw, 1996), *petition for allowance of appeal denied*, 685 A.2d 547 (1996).

(2) THE CIRCUIT COURT ERRED IN HOLDING THAT THE DELEGATION OF THE PENNSYLVANIA ATTORNEY GENERAL DOES NOT ESTABLISH STANDING

A. The Commonwealth Attorney's Act, 71 P.S. § 204(c) is separate and distinct from 30 Pa.C.S. § 2506, and confers upon the Pennsylvania Attorney General, or its independent agencies, the power to bring any action at law or in equity

Litigation authority is granted to the Office of Attorney General of the Commonwealth of Pennsylvania through Section 204(c) of the Commonwealth Attorneys Act. 71 P.S. § 732-101 et seq. Section 204 (c) in full provides:

Civil Litigation: Collection of debts. – The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission **in any action brought by or against the Commonwealth or its agencies, and may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute.** The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency; the Attorney General shall keep a proper docket or dockets, duly indexed, of all such claims, showing whether they are in litigation and their nature and condition. The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead. The Attorney General shall approve all settlements over such maximum amounts as he shall determine arising out of claims brought against the Commonwealth pursuant to 42 Pa.C.S. § 5110.

71 P.S. § 204(c)(emphasis added)

The Act, which is a separate and distinct legislative enactment from 30 Pa.C.S. § 2506, defines “action” as “any action at law or in equity” and includes the PFBC in the definition of an “independent agency.” 71 P.S. § 732-102. The Act further provides that the Attorney General

(or its agencies by delegation) may intervene in “any other action,” not just “any Pennsylvania action.” Most importantly, the delegation from the Attorney General under the Act allows the authorized agencies to conduct “any particular litigation or category of litigation.” The language of the Act is clear and unambiguous and places no restrictions on the laws under which the Attorney General, or any agency, by delegation, may pursue the litigation.

On August 2, 2011, the PFBC requested an authorization from the Pennsylvania Attorney General to initiate a civil action in the “courts of Pennsylvania and West Virginia.” (App. 123) In the request, the PFBC noted that the Commonwealth had suffered damages in excess of \$1,000,000. (App. 124) The PFBC further set forth that Pennsylvania law would be preempted but a civil action could be brought under the laws of the source state, West Virginia. (App. 124) On August 4, 2011, the Attorney General of the Commonwealth of Pennsylvania conferred upon the PFBC all of the power and authority to litigate in its stead pursuant to the Section 204(c) of the Commonwealth Attorneys Act. 71 P.S. § 732-204(c). (App. 120)

Respondents in their Reply Brief in Support of Defendants’ Motion to Dismiss attacked the legitimacy of the delegation under the premise that the Commission filed in its own stead and not as an agent of the Commonwealth. Although the Circuit Court did not address this argument, as this Court is reviewing this matter *de novo*, Petitioners provide herein a response to that argument. The argument highlights first that Respondents do not understand that the Fish and Boat Commission is an agency of the Commonwealth, and has no independent distinction outside the government of the Commonwealth of Pennsylvania. The Pennsylvania Fish and Boat *Commission*, as defined by 30 Pa.C.S. § 101 et seq, is an “independent administrative commission of the Commonwealth.” Respondents attempt to distinguish the Commission outside its status as an agency. There is no distinction. The Commission has no other identity

other than an agency of the Commonwealth, legislatively created and statutorily empowered. It operates under the Executive Branch of the Commonwealth, with members appointed by the Governor. 30 Pa.C.S. § 301(a).

The argument that the PFBC was not delegated authority to bring this suit by the Attorney General under the Commonwealth Attorneys Act is absurd and without merit. The caption of Petitioners Complaint negates Respondents' argument: "Commonwealth of Pennsylvania, Pennsylvania Fish and Boat Commission." Moreover, attempting to characterize the Fish and Boat Commission as anything but an agency of the Commonwealth requires overlooking the stated definition and purpose of the PFBC in the statute governing the PFBC which sets forth: "The Commission, as an *agency of the Commonwealth...*" 30 Pa.C.S. § 2506(b).

The Attorney General delegated his authority to bring this suit to the PFBC pursuant to 204(c) of the Commonwealth Attorneys Act. It is important to note that the Act provides that the Attorney General "may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel *or the counsel for an independent agency* to initiate, conduct or defend *any* particular litigation or category of litigation in his stead." 71 P.S. § 732-204(c)(emphasis added). Moreover, the Act specifically includes the Pennsylvania Fish and Boat Commission in the definition of "Independent Agencies" 71 P.S. § 731-102. Most telling, in the letter granting the delegation, the Attorney General's office referenced "Fish and Boat Commission v. Consol Energy, Inc." when granting authority to "handle the above-referenced case." (App. 120)

The Circuit Court held that the delegation of authority by the Attorney General did not

create any additional rights or authority in the Commission beyond what is stated in 30 Pa.C.S. § 2506(b). The Court's holding fails to consider the broad general powers granted to the Attorney General by the Commonwealth Attorneys Act, and by delegation to the Commission, which are separate from those granted specifically under 30 Pa.C.S. § 2506.

The Office of Attorney General in the Commonwealth of Pennsylvania originates in Article IV, Section 4 of the Pennsylvania Constitution which provides that the attorney general: "shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law." Pa. Const., Article IV, Section 4. The powers and duties of the Attorney General are further codified in the Commonwealth Attorneys Act. 71 PS. § 732-101 et seq. Among these powers and duties is the authority to "collect all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency." 71 P.S. § 732-204(c). Petitioners referred the matter of the loss of the Commonwealth's fish to the Attorney General and the Attorney General in turn delegated the authority to pursue this debt to the PFBC. The power of the Attorney General to delegate his authority to pursue a civil action for the collection of a debt owed to the Commonwealth is not negated or diluted by any provision of 30 Pa.C.S. § 2506.

Moreover, the Office of Attorney General of the Commonwealth of Pennsylvania is vested with the authority to pursue debts "by suit or otherwise." The plain language of the Commonwealth Attorneys Act provides no limitations on this power whether arising under Pennsylvania law or otherwise. In fact, the Pennsylvania Attorney General individually or through its agents has filed suit in neighboring jurisdictions asserting causes of action under Pennsylvania and foreign law. See Commonwealth of Pa. v. Kervick, 60 N.J. 289, 288 A.2d 289 (N.J. 1972)(Pennsylvania attorney general sought sums received by the N.J. state treasurer under

the custodial escheat law); Pennhurst State School v. Estate of Goodhartz, 42 N.J. 266, 200 A.2d 112 (1964)(action by Pennsylvania instrumentality filed in New Jersey to recover funds from estate administered in New Jersey); and, Commonwealth v. Freeman, 74 A.D.2d 912; 426 N.Y.S.2d 71; 1980 N.Y. App. Div. LEXIS 10718 (Pennsylvania Attorney General sued New York attorneys in New York to recover damages for negligence and/or fraud in the practice of law).

This same broad standing to litigate was delegated to the PFBC, an agency of the Commonwealth. The PFBC therefore has standing pursuant to the delegation by the Commonwealth's Attorney General.

CONCLUSION AND PRAYER FOR RELIEF

The Circuit Court's Order granting Respondents' Motion to Dismiss erroneously held that the power conferred to the PFBC under 30 Pa.C.S. § 2506(b) restricts the PFBC to pursuing actions for redress under Pennsylvania law only. The circuit court further erred in not examining the PFBC's purpose to ascertain if implied powers arise by necessary implication to effectuate the agency's purpose, the protection and propagation of the Commonwealth's fish. The Court also erred in holding that the delegation of the Attorney General conferred nothing more than the rights expressly granted under 2506(b). To the contrary, the Attorney General of Pennsylvania retains broad litigating power not limited by jurisdiction. Delegation of that power to the PFBC confers in the PFBC standing to bring civil actions seeking redress for the loss of natural resources in "any civil action."

Petitioners respectfully request that the circuit court's order granting Respondents' Motion to Dismiss be reversed, and the matter reinstated.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA FISH AND BOAT COMMISSION**

BY COUNSEL,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0885

Commonwealth of Pennsylvania, Pennsylvania
Fish and Boat Commission,

Petitioners/Plaintiffs Below,

v.

Appeal from a final order of
the Circuit Court of Monongalia
County (No. 11-C-556)

Consol Energy, Inc., Consolidation Coal Company,
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Sharon Z. Hall, counsel for Petitioners/Plaintiffs Below, Commonwealth of Pennsylvania, Pennsylvania Fish and Boat Commission, do hereby certify that on the 11th of November 2013, the foregoing "Petitioner's Brief" and "Appendix" were served upon counsel of record via 1st Class U.S. Mail, addressed to:

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