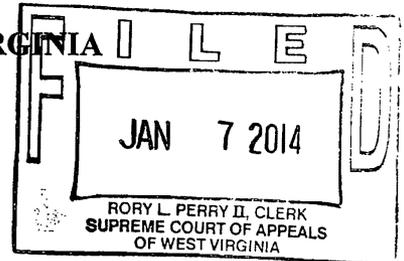


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' Reply Brief**

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## INTRODUCTION TO THE REPLY

It is clear that Respondents seek to avoid responsibility for the killing of tens of thousands of fish and amphibians by a narrow, absurd reading of 30 Pa.C.S. §§ 101 et seq, and completely ignoring settled Pennsylvania law regarding the express and implied powers of an agency. In doing so, Respondents misquote and mischaracterize Petitioner's Complaint, the relevant statute and court decisions. This Reply focuses on these issues while reinforcing the fundamental basis supporting the Petitioner's prayer for relief.

### (1) REPLY TO RESPONDENTS' ARGUMENTS REGARDING THE EXPRESS AND IMPLIED POWERS OF THE PETITIONER AGENCY

#### **A. Respondent suggests a narrow interpretation of the statute which frustrates the stated purpose of the Petitioner Agency**

The Pennsylvania Fish and Boat Commission, as the agency's title suggests, is the Pennsylvania agency tasked with the management, protection and propagation of the Commonwealth's fish and amphibian species. The PFBC's stated purpose is set forth within 30 Pa.C.S. 2506(a), which is a subsection of Title 30, known as the "Fish and Boat Code." 30 Pa.C.S. § 101. Respondents suggest a narrow interpretation of one section of one sentence within subsection (b) of chapter 2506, and suggest this Honorable Court affirm the lower court's narrow and incorrect reading of that subsection to limit and frustrate the stated purpose and duties of the Petitioner agency. Yet, no matter how hard the Respondents try, they cannot find the language within the statute which *expressly* limits the agency's powers to bringing civil actions in Pennsylvania courts. Instead Respondent must reach the tortured conclusion that the words "in violation of this chapter" operate to negate the very function and purpose of the Pennsylvania Fish and Boat Commission ("PFBC") as set forth in 2506(a).

Chapter 2506 is a chapter within Part II “Fish and Fishing” of Pennsylvania Title 30, known as the “Fish and Boat Code.” Chapter One of the statute includes definitions, among them, “Commission,” which is defined as “The Pennsylvania Fish and Boat Commission *of the Commonwealth.*” 30 Pa.C.S. § 102. The Petitioner Agency is an independent agency of the Commonwealth. Despite their protestations, Respondent cannot negate the Declaration of Policy in subsection (a) which confers *standing* upon the Commonwealth without limitation through its authorized agencies (a distinction the PFBC is clearly given both statutorily and by delegation) *to bring a civil action* against any person who kills any fish. Respondents make the incredible claim that subsection (a) does not confer standing upon the Petitioner Agency, an agency of the Commonwealth, whose stated statutory purpose is to regulate, control, manage and perpetuate the Commonwealth’s fish.

In attempting to discount the plain language conferring standing upon the Commonwealth’s authorized agency in 2506(a), Respondent states “*In 30 Pa.C.S. § 2506(a), the Pennsylvania General Assembly stated that it would identify, through other enactments, ‘authorized agencies’ to bring the types of damage actions described therein.*” Respondents’ Brief at 12. A reading of that subsection finds *no such pronouncement*, there is *no* language stating “the General Assembly will identify, through other enactments” these authorized agencies and such language is simply a figment of Respondents creative imagination. To the contrary, subsection (a) of 2506 gives the Commonwealth standing, *through its authorized agencies*, of which the PFBC is clearly identified in corresponding 2506(b).

To follow Respondents logic, we must carve out an exception and provide that only the “Commonwealth” has the power to bring “any civil action” seeking redress for the killing of the Commonwealth’s fish under 2506(a) and the Petitioner Agency PFBC may only bring civil

actions for the killing of the Commonwealth's fish when in violation of the Commonwealth's laws under 2506(b), despite the fact that the Petitioner Agency is the designated agency referred to in subsection(a). This twisted logic withholds from the PFBC the powers and duties so clearly conveyed to it, "to regulate, control, manage and perpetuate fish." 2506(b).

**B. Respondents misconstrue, misstate and misapply case law, statutes, and portions of Petitioners Complaint**

Respondents make numerous misstatements in support of its specious argument which are addressed as follows:

(1) Respondents argue that the Petitioner "implicitly acknowledges that the Circuit Court correctly focused on 30 Pa.C.S. § 2506(b) in deciding the question." Response Brief at 7. Petitioner made no such implication, in fact, the heart of Petitioner's argument was that the Court incorrectly relied exclusively upon 2506(b) to the exclusion of the standing conferred by 2506(a). Petitioner's Brief at 11.

(2) Respondents erroneously assert that "the Commission sought to pursue a civil suit for damages based on alleged violation of the West Virginia Water Pollution Control Act." Respondents' Brief at 8. As Respondents know, Petitioner's Complaint asserts causes of action for the common law claims of negligence, trespass, strict liability and nuisance. Respondents lost this argument when the matter was remanded to state court by the Honorable Frederick Stamp, who agreed that Petitioners were not preempted from bringing common law causes of action against the Respondents in West Virginia state court.

(3) Respondents mischaracterize Petitioner's arguments when it states, "...the Commission argues that the lower court should have disregarded the limiting language of 30 Pa.C.S. § 2506 (b) and upheld its standing to bring this action." Respondents do not cite to

Petitioner's brief when making this assertion because Petitioner's brief contains no such assertion. Petitioner *does not agree* that the statute contains limiting language, in fact one of Petitioner's argument is that the language relied upon so heavily by Respondents does not restrict the agency's power to bring this civil action. Petitioner's Brief at 3,4, 11, 12, 16, and 21.

(4) Respondents assert that the Petitioner cites 30 Pa.C.S. § 2506(b) when stating the basis for standing in the Complaint. In actuality, the only citation in Paragraph 7 of the Complaint is to 30 Pa. § 2506 without the additional citation to either subsection (a) or (b). Moreover, while Paragraph 7 quotes the language of subsection (b), it has always been Petitioner's argument that subsection (b) does not limit standing of the PFBC and standing is specifically referenced and conferred via subsection (a), *the language of which is also set forth within Paragraph 7 of the Complaint*, a detail Respondents fail to acknowledge.

(5) Respondents most outlandish arguments are found in their attempts to discredit the clear standing language of 2506(a) wherein Respondents assert that even if subsection (a) applied, it would not provide a basis for the lawsuit against Respondents. Respondents' Brief at 13. Citing to the language within subsection (a) that civil actions may be brought against a person who has caused the killing of fish by "pollution or littering," Respondents make the patently erroneous claim that Petitioner did not assert that Consol caused the fish kill as a result of pollution.

While Petitioner agrees that the definition of "pollution" in the statute is "any substance, deleterious, destructive or poisonous to fish, to be turned into *or allowed to run, flow, wash or be emptied into any waters within or bordering on this Commonwealth.*" 30 Pa. C.S. § 2504 (emphasis added), Petitioner strongly disagrees with Respondents' claim that no such allegations were made in the Complaint. In fact, Petitioner's Complaint alleges that Consol discharged

“water containing pollutants” into the West Virginia portion of Dunkard Creek, a creek that meanders between Pennsylvania and West Virginia along the border between the states and that these polluting discharges were destructive to the Commonwealth’s fish (insomuch as killing fish is destructive, the Complaint is replete with descriptions of dead and dying fish, fish attempting to breath, fish and aquatic life with inflamed gills and ruptured blood vessels, gulping air and rolling in the water). *See* Complaint ¶¶ 11, 16, 21 [Appendix at 141-143] .

Moreover, Petitioners Complaint alleges that, “ *these discharges caused significant numbers of fish in the Pennsylvania portion of the creek to be killed* as a direct result of Consol’s discharges.” *See* Complaint ¶¶ 11, 16, 20-33, 35-40, 43-44, 50-53, 62-67 and 69 [Appendix at 142-149]. This scenario fits squarely into the definition of a pollutant being allowed to “run, flow, wash or be emptied into any waters within or bordering on this Commonwealth” as the Respondent knows, the waters of Dunkard Creek flow from the area of discharge in West Virginia and into Pennsylvania before flowing back into West Virginia. *See* Complaint ¶ 26 [Appendix at 143-144]. Moreover, Petitioner’s Complaint clearly asserts that the discharges of pollutants harmful to aquatic life caused significant impact to the sections of Dunkard Creek situated in the Commonwealth of Pennsylvania. *Id.* Simply put, the tortious pollution was discharged in West Virginia and damaged not only West Virginia’s natural resources but those of the Commonwealth. Respondents should not be permitted to escape liability because the pollutants they discharged also flowed into the confines of a neighboring state, as if it were a getaway free zone. <sup>1</sup>

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<sup>1</sup> Respondents cite to the Consent Decree entered into with the EPA, which has no bearing on the issue of Petitioner’s standing but which does reinforce that Respondents tacitly admit the discharge of pollutants into Dunkard Creek killed thousands of fish and aquatic life, have accepted responsibility for paid for West Virginia’s natural resources and have built an osmosis plant to limit and control any *further* discharges of harmful chloride into Dunkard Creek. (Respondents brief at 2, footnote 2). Why Respondents have not paid for the carnage in the

(6) Respondents also criticize and seek to distinguish cases cited by Petitioner on the basis that the cases cited do not address standing of the PFBC in particular. This narrow view misses the import of the cited cases, namely that the most important consideration when determining standing of an agency is what functions, duties and responsibilities the Legislature has statutorily invested the agency, as an agency has “[a]n implicit power to be a litigant in matters touching upon its concerns.” Commonwealth, Pa. Game Commission v. Commonwealth, Dept. of Environmental Resources, 521 Pa. 121, 127, 555 A.2d 812, 815 (1989). This is important to note because an agency is not limited to the express powers granted by statute but are endowed with additional other powers by necessary implication, including those which are necessary to effectuate the agency’s purpose. Commonwealth v. Beam, 567 Pa. 492, 500, 788 A.2d 357, 362 (2002).

The type of litigation the agency was pursuing in the Game Commission case is not as important as the Court’s directive in how Courts should determine the standing of an agency to be a litigant, which is to determine first and foremost the function of an agency. The function of the PFBC, as stated by the Pennsylvania Legislature in drafting the Fish and Boat Code, is to regulate, control, manage and perpetuate the Commonwealth’s fish. 30 Pa.C.S. 2506(b). Therefore, the PFBC has standing to be a litigant in matters touching upon those interests, such as when an actor in a neighboring state pollutes a creek and the pollutants kill not only fish in the neighboring state but the Commonwealth’s fish who swim in the same water, separated only by a man made boundary unknown and unrecognized by fish and wildlife.

Respondents’ attempt to distinguish Payne v Kassab 11 Pa. Commw. 14, 312 A.2d 86 (Pa. Commw. Ct. 1973) is equally unconvincing. Respondents focus on the fact that Article I,

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Commonwealth’s portion of Dunkard Creek remains an open question. See Appendix 124, Petitioner agency’s delegation request and Petitioner agency’s recitation of attempted negotiations.

Section 27 of the Pennsylvania Constitution references the public trust doctrine and its application to the management of public natural resources of Pennsylvania. Respondents' Brief at 9. As Respondents well know, PFBC is doing just that: protecting, preserving and attempting to maintain the fish *of the Commonwealth*. Article I, Section 27 is fully engaged when those resources are threatened, whether by an actor engaging in polluting acts within the Commonwealth or one who stands just meters from the border, dumping deleterious chemicals into the creek to flow into the Commonwealth, in violation of the common law of that neighboring state, leaving a trail of death and destruction in its path. Simply put, the public trust doctrine and the management of public natural resources in Article I, Section, 27 is not suspended when those resources are threatened by violations of other states laws, a rare but real occurrence as evidenced by the fish kill of Dunkard Creek in 2009.

**(2) REPLY REGARDING RESPONDENTS' ARGUMENTS AS TO THE LITIGATION AUTHORITY GRANTED TO THE PETITIONER AGENCY BY THE PENNSYLVANIA ATTORNEY GENERAL**

**A. By its plain language and the express language of the delegation letter, the Attorney General delegated to the Petitioner agency its standing to bring the West Virginia action seeking redress for the killing of Pennsylvania fish**

Petitioners reply to Respondents arguments concerning the delegation by the Attorney General by reaffirming first that Petitioner's position is that standing to bring the within civil actions is clearly provided within the Fish and Boat Code and delegation by the Attorney General was not necessary to confer standing to bring this action. Nonetheless, the delegation by the Attorney General, the chief litigation authority in the Commonwealth, was for the PFBC to *stand in his stead* in pursuit of damages relating to the killing of the Commonwealth's fish in Dunkard Creek in September 2009.

Respondents fail to grasp the import of the cases cited by the Petitioner in support of this argument, in so much as Respondents claim that the delegation affords no greater powers than those provided within the confines of the Fish and Boat Act as the cases cited clearly underline the Attorney General's standing to bring *any action* in any jurisdiction, Commonwealth courts or otherwise. The United States Supreme Court has noted the public concerns which may form the basis for a suit by the state, as a representative of the public. See Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923)(original jurisdiction)(suit to enjoin West Virginia from cutting off supply of natural gas to Pennsylvania. Natural gas consumers "constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interests but one which is immediate and recognized by law.") Id at 592. This same public interest in preserving the Commonwealth's natural resources from harm supports standing both for the Attorney General, and the PFBC as its chosen delegate, to bring the underlying civil action.

Herein the Attorney General has delegated to the PFBC all of his litigation powers to bring the within action, powers which the Act defines as "any action brought by or against the Commonwealth or its agencies." 71 P.S. § 204(c). Moreover, the Attorney General may, "upon determining that is it 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." Id.

**CONCLUSION AND PRAYER FOR RELIEF**

Respondents Brief in Response to the Petitioners Brief is fatally flawed and fails to properly distinguish the case law supporting Petitioner’s position that standing is conferred to the Petitioner agency via 30 Pa. 2506 (a) *and* (b), as well as Article I, Section 27 of the Pennsylvania Constitution and through the delegation from the Pennsylvania Attorney General. Petitioner respectfully requests that the trial court order granting Respondents’ Motion to Dismiss be reversed and the matter remanded to the Circuit Court.

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

BY COUNSEL,

A handwritten signature in black ink, appearing to read 'S. Hall', written over a horizontal line.

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Robert P. Fitzsimmons (W.V.Bar #1212)

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**CERTIFICATE OF SERVICE**

I hereby certify on this 6<sup>th</sup> day of January, 2014, that a true and correct copy of the  
foregoing Petitioner's Reply Brief has been served on the following counsel of record via US

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