

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0885

(Circuit Court Civil Action No. 11-C-556)

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

Plaintiff Below/Petitioner,

v.

**CONSOL ENERGY, INC. and
CONSOLIDATION COAL COMPANY,**

Defendants Below/Respondents.

**ON APPEAL FROM THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 11-C-556**

RESPONDENTS' BRIEF

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I. TABLE OF CONTENTS

I. TABLE OF CONTENTS..... ii

II. TABLE OF AUTHORITIES..... iii

III. STATEMENT OF THE CASE..... 1

 A. Consol’s Discharges Were to West Virginia Streams and
 Were Authorized by West Virginia Permits. 1

 B. The Commission’s Asserted Basis for Its Standing to Bring this Action
 and the Circuit Court’s Ruling on Standing..... 2

IV. SUMMARY OF THE ARGUMENT. 3

V. STATEMENT REGARDING ORAL ARGUMENT..... 4

VI. ARGUMENT: THE CIRCUIT COURT PROPERLY GRANTED CONSOL’S
MOTION TO DISMISS. 4

 A. *De Novo* Review of the Circuit Court’s Ruling Demonstrates Its Propriety. 4

 B. The Circuit Court Correctly Applied Pennsylvania Law in Determining
 that the Commission Had No Standing to Bring this Action..... 5

 1. General Framework for Evaluating Standing. 5

 2. Application of 30 Pa.C.S. § 2506(b) to Determine the Commission’s Standing..... 7

 C. Title 30, Chapter 25 of the Pennsylvania Code Vests the Commission with
 Standing to Bring Civil Actions Solely Based on Violations of Pennsylvania Law. 10

 D. There is No Basis for Finding That the Pennsylvania General Assembly
 Intended to Vest the Commission With Additional Standing Beyond That
 Conferred by the Plain Language of 30 Pa.C.S. § 2506(b)..... 13

 E. The Pennsylvania Commonwealth Attorneys Act Does Not Vest the
 Commission with Standing to Bring this Action. 16

VII. CONCLUSION..... 19

II. TABLE OF AUTHORITIES.

Cases

<u>Com, Human Rights Commission v. Transit Cas. Ins. Co.</u> , 478 Pa. 1, 8, 387 A.2d 58, 62 (1977).....	3, 9
<u>Commonwealth of Pa. Dept. of Environmental Resources v. Butler County</u> <u>Mushroom Farm</u> , 499 Pa. 509; 454 A.2d 1 (1982).....	13, 14
<u>Commonwealth of Pa. v. Kervick</u> , 60 N.J. 289; 288 A.2d 289 (N.J. 1972)	18
<u>Commonwealth of Pennsylvania v. Garzone</u> , 613 Pa. 481, 484 (Pa. 2012).....	13
<u>Commonwealth v. Drummond</u> , 775 A.2d 849, 856 (Pa. 2001).....	10
<u>Commonwealth v. Freeman</u> , 74 A.D. 912; 426 N.Y.S. 2d 71 (N.Y. App. Div. 1980).....	18
<u>Elmore v. Triad Hospitals, Inc.</u> , 220 W.Va. 154, 158, 640 S.E.2d 217, 221 (2006) (<i>per curiam</i>).....	5
<u>Feingold v. Bell of Pennsylvania</u> , 477 Pa. 1, 8; 383 A.2d 791,794 (1977)	3, 9
<u>Findley v. State Farm Mut. Auto. Ins. Co.</u> , 213 W.Va. 80, 95; 576 S.E.2d 807, 821 (2002).....	5
<u>International Paper Co. v. Ouellette</u> , 479 U.S. 481, 494 (1987).....	6
<u>Men & Women Against Discrimination v. Family Prot. Servs. Bd.</u> , 229 W.Va. 55, 61; 725 S.E.2d 756, 762 (W.Va., 2011.).....	5
<u>Mey v. Pep Boys - Manny, Moe & Jack</u> , 717 S.E.2d 235, 239 (W.Va. 2011).....	1
<u>Murphy v. Smallridge</u> , 468 S.E.2d 167, 168 (W. Va. 1996)	1
<u>Payne v. Kassab</u> , 11 Pa. Commw. 14, 312 A.2d 86 (Pa. Commw. Ct. 1973)	8, 9
<u>Pennhurst State School v. Estate of Goodhartz</u> , 42 N.J. 266; 200 A.2d 112 (N.J. 1964).....	18
<u>Pennsylvania Game Commission v. Pennsylvania Department of Environmental</u> <u>Resources</u> , 521 Pa. 121; 555 A.2d 812 (1989)	7
<u>Pennsylvania Human Rights Com. V. St. Joe Minerals Corp.</u> , 476 Pa. 302, 309-311; 382 A.2d 731, 738-740 (1978).....	15
<u>Phila. v. Phila. Elec. Co.</u> , 504 Pa. 312, 317; 473 A.2d 997, 999 (1984).....	3
<u>Seneca Landfill v. Dep’t of Env’t. Protection</u> , 984 A.2d 916, 925 (Pa. Commw. 2008).....	11
<u>State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</u> , 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995)	5

<u>State v. Browning</u> , 199 W.Va. 417, 425; 485 S.E.2d 1,9 (1997).....	10
<u>United Artists' Theater Circuit, Inc. v City of Phila.</u> , 535 Pa. 370, 386-390; 635 A.2d 612, 621-622 (1993).....	15
<u>Water and Power Resources Bd. v. Green Spring Company</u> , 394 Pa. 1; 145 A.2d 178 (1958).....	16
<u>Zaleski v. West Virginia Mut. Ins. Co.</u> , 687 S.E.2d 123, 129; 224 W.Va. 544, 560 (W.Va., 2009)	10

Statutes

1 Pa.C.S. § 1903.....	11, 12, 15
1 Pa.C.S. § 1921(b).....	10
1 Pa.C.S. § 1932.....	13
1 Pa.C.S. § 1933.....	11
2 Pa.C.S. § 702.....	8
30 Pa.C.S. § 2101.....	9
30 Pa.C.S. § 2504.....	13
30 Pa.C.S. § 2506(a)	10, 11, 12, 13
30 Pa.C.S. § 321.....	9
30 Pa.C.S. §§ 301.....	9
30 Pa.C.S. 2506(b).....	2
30 Pa.C.S. Chapter 25	2
71 P.S. § 732-101.....	16
71 P.S. § 732-204(c)	17
Pa.C.S. § 2506(b).....	10
Title 30, Chapter 25 of the Pennsylvania Consolidated Statutes.....	4
<u>W. Va. Code §22-11-1</u>	1
<u>W.Va. Code §§ 22-11-6, 22-11-24</u>	2

Other Jurisdiction

34 Pa.C.S. § 101.....	7
71 P.S. § 732-204.....	16, 17

Rules

W.Va. R. Civ. P. 12(b)(1).....	4
W.Va. R. Civ. P. 12(b)(6).....	5

III. STATEMENT OF THE CASE.

Respondents Consol Energy, Inc. and Consolidation Coal Company (together, “Consol”) agree that in ruling on their motion to dismiss the trial court properly accepted as true all of the allegations in the Complaint filed by Petitioner Pennsylvania Fish and Boat Commission (“Commission”). Murphy v. Smallridge, 468 S.E.2d 167, 168 (W. Va. 1996); Mey v. Pep Boys - Manny, Moe & Jack, 717 S.E.2d 235, 239 (W.Va. 2011). The Commission’s Brief on Appeal (“Commission Brief”) reflects this principle by re-stating assertions made in its Complaint, as if they are accepted as true. However, the Commission omits or glosses over certain undisputed facts that are critical to a full understanding of this case.

A. **Consol’s Discharges Were to West Virginia Streams and Were Authorized by West Virginia Permits.**

It is important to observe that the Complaint asserted claims for damages allegedly caused by Consol’s discharge of pollution into streams located in *West Virginia—not Pennsylvania*. Specifically, the Commission claimed that Consol caused unlawful water pollution by discharging “harmful industrial wastewater” into those portions of Dunkard Creek located in West Virginia, which eventually flowed downstream into portions of Dunkard Creek located in Pennsylvania. Complaint, ¶¶ 12 – 13; 16; 26 - 28; 29- 31; 33; 69 [Appendix at 141-145, 149]. The Complaint did *not* allege that Consol discharged harmful substances directly into any Pennsylvania waters, or into streams that border Pennsylvania. Id.

In addition, the Complaint alleged that the harmful discharges by Consol were governed by West Virginia / National Pollutant Discharge Elimination System permits (“WV/NPDES Permits”) issued by the West Virginia Department of Environmental Protection (“WVDEP”), pursuant to the West Virginia Water Pollution Control Act, W. Va. Code §22-11-1, et seq. Complaint, ¶¶ 11 – 13; 23-25 [Appendix at 141-143]. The Commission asserted that those

discharges violated chloride effluent limitations that were set forth in the WV/NPDES Permits held by Consol, and that they caused violations of West Virginia water quality standards in the West Virginia portions of Dunkard Creek. *Id.*, ¶¶ 11, 24-25, 47, 52.¹

Conversely, the Complaint did not assert that Consol caused any violation of Pennsylvania water quality standards or any Pennsylvania law or regulation.

B. The Commission’s Asserted Basis for Its Standing to Bring this Action and the Circuit Court’s Ruling on Standing.

With respect to its standing, the Commission averred that it is an “independent administrative agency” of the Commonwealth of Pennsylvania and was authorized to bring this action under the Pennsylvania statute found at 30 Pa.C.S. § 2506. *Id.*, ¶ 1. In particular, quoting the language of 30 Pa.C.S. 2506(b), the Commission asserted that as the trustee of fish and other aquatic life living in Pennsylvania streams, it could bring “civil suits in trespass on behalf of the Commonwealth to recover for the value of any fish killed or any stream or streambed destroyed or injured in violation of 30 Pa.C.S. Chapter 25,” and that this action constituted such a civil suit. *Id.*, ¶¶ 6-8.²

¹ Discharges in excess of effluent limits and discharges that cause a violation of water quality standards are violations of the West Virginia Water Pollution Control Act. *W.Va. Code* §§ 22-11-6, 22-11-24.

² The same factual allegations set forth in the Complaint formed part of the basis for a civil action filed by the U.S. Environmental Protection Agency (“EPA”) against Consol under the Clean Water Act, in the U.S. District Court for the Northern District of West Virginia. That action was filed following a joint investigation that included participants from the Commission and the Pennsylvania Department of Environmental Protection, among others. *See* Complaint, Civil Action No. 1:11cv-00028 (N.D.W.Va.) (¶¶ 45-55); Declaration of Chad Harsh in Support of United States’ Motion to Enter Consent Decree (¶ 8) [Appendix at 25-51.] That civil action was resolved by a Consent Decree that required Consol to spend over \$200 million on a state-of-the-art treatment system, approximately 36 miles of pipelines to route mine discharges covered by the Consent Decree to the treatment system, a landfill for disposal of reject from a reverse osmosis plant, and other facilities. In addition, the Consent Decree required the payment of a \$5.5 million civil penalty. Notice of the proposed Consent Decree was published in the Federal Register. Neither the Commonwealth of Pennsylvania nor the Commission submitted any comments on the proposed Decree before it was finalized. *Id.*, ¶¶ 12-13, 15- 27.

Contrary to the statements made in the Commission Brief³, the Circuit Court of Monongalia County (“Circuit Court”) did not base its ruling dismissing this action “exclusively” on a determination that the Commission lacked standing “to bring a cause of action under West Virginia law.” Rather, the Circuit Court’s ruling specifically found that the Commission did not have standing to bring this action under 30 Pa.C.S. § 2506, the Pennsylvania statute cited in the Complaint. July 12, 2013, “Order Granting Defendants’ Motion to Dismiss” (“Circuit Court Order”), at 5 [Appendix at 5].

IV. SUMMARY OF THE ARGUMENT.

As a creature of statute, a Pennsylvania administrative agency such as the Commission “can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.” Com. Human Rights Commission v. Transit Cas. Ins. Co., 478 Pa. 1, 8, 387 A.2d 58, 62 (1977). Further, there is no basis for finding that the Legislature intended to “imply” other powers unless such arise from the “strong and necessary implication” of the express words used in the statute. Phila. v. Phila. Elec. Co., 504 Pa. 312, 317; 473 A.2d 997, 999 (1984) (internal citations omitted); Feingold v. Bell of Pennsylvania, 477 Pa. 1, 8; 383 A.2d 791,794 (1977).

The Circuit Court correctly looked to 30 Pa.C.S. § 2506(b) -- the statute cited by the Commission in the Complaint, and the *only* Pennsylvania statute that vests the Commission with the authority to bring civil actions -- in determining whether the Commission had standing to bring this civil action. That statute plainly limits the Commission’s authority to file civil actions to those based on *violations of Pennsylvania law* (specifically, Title 30, Chapter 25 of the

³ Commission Brief, at 6, 11.

Pennsylvania Consolidated Statutes). *Id.* Though the Commission urges otherwise (Commission Brief at 3), no greater standing can be “implied” from this plain statutory language.

Recognizing this, the Commission tries in vain to find some other basis for asking this Court to ignore this fundamental limitation on its standing. It misstates and twists the language of the relevant statutory provisions; seeks (for the first time) to rely on a general provision in the Pennsylvania Constitution; and, finally, suggests that the Pennsylvania Office of Attorney General ceded to it some unspecified, separate authority to bring this action. In the end all of these arguments fail for a number of reasons, but principally because they fly in the face of the unambiguous language of 30 Pa.C.S. § 2506(b), the statute that the Commission itself rightly describes as the law that “govern[s]” it. Commission Brief at 19.

The Circuit Court correctly applied this controlling provision of Pennsylvania law, and its decision should be affirmed.

V. STATEMENT REGARDING ORAL ARGUMENT.

The Commission’s appeal presents no novel questions of West Virginia law, issues of fundamental public importance, or unique factual or procedural issues that merit oral argument. The Circuit Court Order embraces nothing more than a straightforward application of the Pennsylvania statute that vested the Commission with limited authority to bring civil actions. Because of this, Consol does not believe this appeal merits oral argument.

VI. ARGUMENT: THE CIRCUIT COURT PROPERLY GRANTED CONSOL’S MOTION TO DISMISS.

A. *De Novo* Review of the Circuit Court’s Ruling Demonstrates Its Propriety.

Consol agrees that this Court’s review of the Circuit Court’s dismissal of the Complaint pursuant to W.Va. R. Civ. P. 12(b)(1) is *de novo*, even though the Circuit Court considered some

items beyond the pleadings (offered by the Commission) in making its determination. Elmore v. Triad Hospitals, Inc., 220 W.Va. 154, 158, 640 S.E.2d 217, 221 (2006) (*per curiam*). Under this type of review, the findings of the Circuit Court are relevant but not binding on this Court. State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).⁴ As shown by the Circuit Court Order and described further below, the lower court properly applied the plain language of the controlling Pennsylvania statute in reaching its decision. A *de novo* review of that ruling in light of the claims made in the Complaint confirms its validity.

B. The Circuit Court Correctly Applied Pennsylvania Law in Determining that the Commission Had No Standing to Bring this Action.

1. General Framework for Evaluating Standing.

This Court has long held that standing is an absolute prerequisite to establish the jurisdiction of a court to hear a claim, and it cannot be waived. Men & Women Against Discrimination v. Family Prot. Servs. Bd., 229 W.Va. 55, 61; 725 S.E.2d 756, 762 (2011.) It is generally 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, 95; 576 S.E.2d 807, 821 (2002) (internal citations omitted). 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*, 213 W.Va. at 94-95, 576 S.E.2d at 822 (emphasis in original).

The Commission asserts that the Circuit Court “erred by failing to consider Pennsylvania law,” and that it improperly based its dismissal of this lawsuit solely on a finding that the

⁴ Although the Commission correctly cited *McGraw* for the proposition that appeals from orders granting motions to dismiss are generally *de novo* (Commission Brief at 6), other holdings in *McGraw* (addressing the principles applicable to motions to dismiss under W.Va. R. Civ. P. 12(b)(6)) do not apply here.

Commission “lacked standing to bring an action under West Virginia law.” Commission Brief at 6, 11. Further, the Commission urges this Court to entertain oral argument on the premise that “[t]he 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*.” Commission Brief at 6 (emphasis added). Even a cursory review of the Circuit Court Order shows that this assertion is misleading at best, and confuses the *framework* for evaluating standing with the *source of legal authority* for any standing that the Commission may have.

As an initial matter, it is undisputed that the Commission is prohibited from asserting claims against Consol based upon the law of Pennsylvania. Memorandum Opinion and Order Granting Plaintiff’s Motion to Remand, September 4, 2012, U.S. District Court for the Northern District of W.Va., at 11-14, 18 [Appendix at 102-105, 109]; International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (in cases involving interstate water pollution the “[Clean Water Act] precludes a court from applying the law of an affected State against an out-of-state source”). Furthermore, this rule applies even if West Virginia’s choice-of-law principles would ordinarily require a different result. *International Paper*, 479 U.S. at 498, n. 20. Accordingly, it is far from certain that (as the Commission suggests) “Pennsylvania law should be applied for the narrow issue of the [Commission]’s standing to bring the cause of action.” Commission Brief at 7.

In any event, the general principles that apply in evaluating standing in Pennsylvania are not materially different from those developed by this Court. As the Commission points out, in Pennsylvania a plaintiff must demonstrate standing by showing that it has “a substantial, direct and immediate interest in proceedings or litigation.” *Id.* (citations omitted). In West Virginia, a plaintiff must show that it suffered an “injury-in fact,” which is defined as “an invasion of a legally protected interest....” *Findley*, 576 S.E.2d at 821. Generally speaking, then, West

Virginia law on standing is no more demanding than that of Pennsylvania, and it is possibly less so. As a result, even if the Circuit Court had cited Pennsylvania jurisprudence as providing the general framework for evaluating standing, it would have made no difference in the outcome of this case.

2. Application of 30 Pa.C.S. § 2506(b) to Determine the Commission’s Standing.

The Circuit Court properly noted that under *Findley* and other standing jurisprudence of this Court, a plaintiff must have some “legally protected interest” in order to have standing to make a legal claim. Circuit Court Order at 3 (citing *Findley*) [Appendix at 3]. Next, the Circuit Court turned to *Pennsylvania* law to determine whether the Commission (as a Pennsylvania agency) had been vested with such a legally protected interest. Based on a plain reading and application of the unambiguous Pennsylvania statute at issue, the Circuit Court found that it had not. Circuit Court Order at 4-5 [Appendix at 4-5].

The Commission concedes (as it must) that if it has standing to pursue this action, that authority must be found to have been “conferred by statute” rather than arising from “general standing” as articulated by various decisions of the Pennsylvania Supreme Court. Commission Brief at 7 (citations omitted). It thus implicitly acknowledges that the Circuit Court correctly focused on 30 Pa.C.S. § 2506(b) in deciding the question. However, the Commission then proceeds to argue, based on Pennsylvania decisions addressing *other* agencies and *other* statutes, that the Circuit Court Order was in error. Those arguments are demonstrably without merit.

The primary decision upon which the Commission relies is Pennsylvania Game Commission v. Pennsylvania Department of Environmental Resources, 521 Pa. 121; 555 A.2d 812 (1989). That decision addressed the Pennsylvania Game and Wildlife Code, 34 Pa.C.S. § 101, et seq., rather than the statute addressing the authority of the Commission. Since it involved

an administrative appeal of a permit, there was no occasion for the Pennsylvania Supreme Court to consider whether (and if so, to what extent) the plaintiff Game Commission had been granted authority to file civil actions. To the contrary, the Administrative Agency Law that the court interpreted in Game Commission granted a right to judicial review of an agency decision to any person having a “direct interest” in the agency action and “aggrieved” by it. 2 Pa.C.S. § 702. In addition, in Game Commission the plaintiff agency had been *expressly* granted concurrent authority to enforce the very statute that the Pennsylvania Environmental Hearing Board had refused to allow it to raise. It was in this context that the court in Game Commission found that a “legislatively conferred interest” created the implicit authority for the plaintiff agency to participate in permit proceedings.

The case presented here is nothing of the sort. Here, the Commission sought to pursue a civil suit for damages based on alleged violations of the West Virginia Water Pollution Control Act, a statute that it has no role in enforcing. It was not seeking judicial review of an agency permitting decision. Further, instead of having express authority to do so, the Commission has been granted *no* authority to bring a civil action other than for damages caused by violations of Pennsylvania law. *See* 30 Pa.C.S. § 2506(b) (authorizing the Commission to bring “civil suits in trespass” for “the value of any fish killed or any stream or streambed destroyed or injured *in violation of this chapter* [referring to Chapter 25, Title 30 of the Pennsylvania Consolidated Statutes].”) (emphasis added). As a result, Game Commission offers no support for the Commission’s position.

The same holds true with respect to Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86 (Pa. Commw. Ct. 1973), the second decision cited by the Commission in support of this aspect of its appeal. In Payne, Pennsylvania’s intermediate appellate court denied a challenge to a project

(sponsored by a municipality and the Pennsylvania Department of Transportation) that would have encroached upon a public park and required the removal of several large trees. That challenge was based upon Article I, Section 27 of the Pennsylvania Constitution, which provides (in part) that “[t]he Commonwealth shall conserve [its natural resources] and maintain them for the benefit of all the people....” In dismissing the case, the court held that “Section 27 was intended to allow the normal development of property *in the Commonwealth*, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania.” Payne, 11 Pa. Commw. at 20, 312 A.2d at 94 (emphasis added). The court did not address the Commission, 30 Pa.C.S. § 2506, or the jurisdiction of any Pennsylvania agency to bring a civil action for damages – either in Pennsylvania or in another state based on actions there.

To the contrary, the court in Payne held that under Article 1, Section 27 if a proposed “development of property *in the Commonwealth*” would inappropriately threaten natural resources, an action may be brought to enjoin that development. Id. (emphasis added). Since all of the actions of Consol that form the basis for the Complaint occurred in West Virginia,⁵ Article I, Section 27 of the Pennsylvania Constitution, and Payne, simply do not apply.

In summary, the Commission does not derive its authority to bring civil actions from Article I, Section 27 of the Pennsylvania Constitution. Any authority that it has to do so is conveyed exclusively by the statutes that created the Commission and authorized it to act – that is, 30 Pa.C.S. §§ 301 and 2506.⁶ *See Feingold*, 477 Pa. at 8; 383 A.2d at 794; *Com, Human Rights Commission*, 478 Pa. at 8; 387 A.2d at 62. Accordingly, the Commission’s newly-minted

⁵ Complaint, ¶¶ 9, 11 – 13 [Appendix at 140-141].

⁶ The Pennsylvania General Assembly stated that its purpose in creating the Commission was to allow it to enforce the “laws of the Commonwealth [of Pennsylvania]” relating to the protection, propagation, and distribution of fish. 30 Pa.C.S. §§ 301, 321 and 2101 (emphasis added).

argument that it has broad and sweeping powers to file civil actions under the Article 1, Section 27 of the Pennsylvania Constitution is without merit.⁷

C. Title 30, Chapter 25 of the Pennsylvania Code Vests the Commission with Standing to Bring Civil Actions Solely Based on Violations of Pennsylvania Law.

The sole basis upon which the Commission is authorized to bring civil actions is 30 Pa.C.S. § 2506(b).⁸ That provision reads, in pertinent part, as follows:

The Commission...may...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.

Id. Since this section is located within Chapter 25 of Title 30 of the Pennsylvania Consolidated Statutes, the reference to “this chapter” means Chapter 25. That, in turn, means that the Commission is *not* authorized to bring a civil action unless the damages were caused by alleged “violations of” Chapter 25. Id.; 1 Pa.C.S. § 1921(b) (Pennsylvania Statutory Construction Act) (unambiguous words control the meaning of statutes); Commonwealth v. Drummond, 775 A.2d 849, 856 (Pa. 2001).⁹

⁷ As this argument based on Article 1, Section 27 of the Pennsylvania Constitution was never raised before the Circuit Court, Consol questions whether it may be properly considered in this appeal. Zaleski v. West Virginia Mut. Ins. Co., 687 S.E.2d 123, 129; 224 W.Va. 544, 560 (W.Va., 2009) (the Court has “long held that theories raised for the first time on appeal are not considered”) (internal citations omitted); State v. Browning, 199 W.Va. 417, 425; 485 S.E.2d 1,9 (1997). Nevertheless, because it is easily refuted on substantive grounds, Consol has addressed it.

⁸ Unlike the Complaint, in its brief the Commission asserts standing under 30 Pa.C.S. § 2506(a) (“Declaration of policy”), a provision it claims gives it “broad general power” to recover damages in a civil action for harm to natural resources. Commission Brief at 4, 16. However, the Commission is not mentioned in 30 Pa.C.S. § 2506(a). In fact, no specific authority to file civil actions is given to any agency by this legislative statement of policy. Id. As explained *infra*, the Commission is given limited authorization to do so by 30 Pa.C.S. § 2506(b), not 30 Pa.C.S. § 2506(a).

⁹ The Commission makes the rather remarkable assertion that “[N]owhere in the statute is it expressly stated that the only civil actions the [Commission] may bring are those under Pennsylvania law.” Commission Brief at 11. As Chapter 25 is a Pennsylvania law, and 30 Pa.C.S. § 2506(b) expressly states that the Commission may only bring actions based upon violations of Chapter 25, the Commission’s statement is illogical at best.

In hopes of expanding its authority beyond this statutory grant, the Commission first argues that the phrase “this chapter,” as set forth in 30 Pa.C.S. § 2506(b), does not mean “Pennsylvania law.” Commission Brief at 11. That, however, is an absurd interpretation, and would violate the well-established rule that words in a statute are to be given their common and ordinary usage. 1 Pa.C.S. § 1903. It also ignores the principle that “when interpreting a statute, presumably every word...is intended for some purpose, and accordingly must be given effect. Drummond, 775 A.2d at 856. If the Pennsylvania General Assembly did not intend to limit the Commission’s authority to bring damage actions to those involving actions “in violation of [Chapter 25],” it would not have included that limiting condition in this statutory enactment. Since it did include it, the courts are not free to ignore it. Id.; 1 Pa.C.S. § 1903.

Next, the Commission argues that the phrase “this chapter” encompasses 30 Pa.C.S. § 2506(a), and that § 2506(a) (“Declaration of policy”) expresses the Legislature’s intent to give the Commonwealth of Pennsylvania “standing, through its authorized agencies, to bring civil suits to recover damages” without any requirement that such actions be based on alleged violations of Chapter 25. Because of that, the Commission argues that the lower court should have disregarded the limiting language of 30 Pa.C.S. § 2506(b) (“...destroyed or injured *in violation of this chapter*”) and upheld its standing to bring this action.¹⁰

There are several fatal deficiencies in this argument. First, when interpreting statutes, the particular controls the general. 1 Pa.C.S. § 1933. Here, 30 Pa.C.S. § 2506(b), which specifically identifies the Commission and describes the type of civil actions the Commission is authorized to

¹⁰ In the alternative, the Commission argues that where “two readings of a statute are reasonable, greater deference must be given to the interpretation of the administrative agency responsible for its enforcement.” Commission Brief at 16 (citing Seneca Landfill v. Dep’t of Env’t. Protection, 984 A.2d 916, 925 (Pa. Commw. 2008)). As discussed *infra*, there are not two “reasonable” interpretations of 30 Pa.C.S. § 2506(b); there is only one plain meaning of the words used, and there is no need to engage in statutory interpretation.

file, must prevail over 30 Pa.C.S. § 2506(a) (“Declaration of policy”), which does *not* mention the Commission, and does not vest *any* particular agency with authority to file *any* action.

Second, unambiguous words must be applied according to their common meaning, and every part of a statutory provision is presumed to have meaning and must be applied. 1 Pa.C.S. § 1903; Drummond, 775 A.2d at 856. 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. Accordingly, one must look to the statutes that authorize particular agencies to file civil actions to determine how the Legislature implemented the general statement of policy set forth in 30 Pa.C.S. § 2506(a).

As stated, insofar as the Commission is concerned, that grant of specific authority to bring such actions was limited to those based on violations of Chapter 25, Title 30 of the Pennsylvania Consolidated Statutes. 30 Pa.C.S. § 2506(b). Since this lawsuit was not based on any alleged violations of that Pennsylvania law, the Commission had no standing to bring it.

Third, even the Commission itself replicated the language of 30 Pa.C.S. § 2506(b) in stating the basis for its standing to bring this action. *See* Complaint, ¶ 7. [Appendix at 140]. In addition, in its submission to this Court the Commission acknowledges that “the statute governing the Commission” is 30 Pa.C.S. § 2506(b) – not 30 Pa.C.S. § 2506(a). Commission Brief at 19.

Fourth, even if 30 Pa.C.S. § 2506(a) applied, it would still not provide a basis for the Commission’s lawsuit against Consol. By its plain language, a civil action could only be brought under 30 Pa.C.S. § 2506(a) against a person who has caused the killing of fish by “pollution or littering.” As there has been no allegation that Consol littered, in order to support

the claims made against it the Commission would have to assert that Consol caused the Dunkard Creek fish kill as a result of “pollution.”

Since they are *in pari materia*, the Court may properly apply the definition of “pollution” found in section 2504 of Title 30 (“Pollution of waters”), only two sections before the provision at issue. Commonwealth of Pennsylvania v. Garzone, 613 Pa. 481, 484 (Pa. 2012); 1 Pa.C.S. § 1932. That provision defines pollution as allowing “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). Here, there has been no allegation that Consol caused any substance to be discharged into any waters within or bordering on Pennsylvania. To the contrary, the Complaint alleges that Consol caused unlawful water pollution by discharging “harmful industrial wastewater” into a stream located in West Virginia. *See* Complaint, ¶¶ 11 – 13 [Appendix at 141]. Accordingly, because the Complaint does not allege that Consol caused “pollution” within the meaning of 30 Pa.C.S. § 2504, it would be subject to dismissal even if the Commission had asserted standing on the basis of 30 Pa.C.S. § 2506(a).

D. There is No Basis for Finding That the Pennsylvania General Assembly Intended to Vest the Commission With Additional Standing Beyond That Conferred by the Plain Language of 30 Pa.C.S. § 2506(b).

As described above, the plain language of the controlling statutory provision, 30 Pa.C.S. § 2506(b), demonstrates that the Circuit Court Order was proper. None of the decisions cited by the Commission in the hope of avoiding the application of that unambiguous statute provides any grounds for doing so.

For example, the opinion in Commonwealth of Pa. Dept. of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509; 454 A.2d 1 (1982) dealt not with the authority to

bring civil actions, but with the issuance of administrative compliance orders by an agency whose predecessor had long been recognized as having the authority to do so. Butler County Mushroom Farm, 499 Pa. at 518; 454 A.2d at 6. Further, Butler County Mushroom Farm involved an agency that closely regulated the entity that was the subject of the administrative order, and did not address any statutory interpretation issues, as the statute in that case included no provision specifically granting the right to issue such orders. Butler County Mushroom Farm 499 Pa. at 514-517; 454 A.2d at 4-5. In that case, the court found that the use of an administrative compliance order was such “a customary and vital tool” that it fell within the implied power of administrative agencies that regulate mine safety. Butler County Mushroom Farm 499 Pa. at 512; 454 A.2d at 3. Here, the Commission has no role in regulating Consol’s operations, and there is a specific statutory provision that prescribes the Commission’s authority in filing civil actions. Butler County Mushroom Farm therefore provides no support for the Commission’s standing here.

Likewise, Commonwealth v. Beam, 567 Pa. 492; 788 A.2d 357 (2002) addressed an agency (the Pennsylvania Department of Transportation) that had broad and sweeping powers to regulate the terms and conditions of airport operations, and to issue, suspend, and revoke airport licenses, but no specific authority to commence a civil injunction action against the unlicensed operation of an airport. Beam, 567 Pa. at 493-494, 497. By contrast, the Commission here plainly *does* have the authority to file civil actions under 30 Pa.C.S. § 2506(b) to recover for damages to aquatic life and streams. The only question is whether that authority is limited by the express statutory language that specifies that such damage must have arisen from a violation of Title 30, Chapter 25 of the Pennsylvania Consolidated Statutes.

In Beam, the Pennsylvania Supreme Court noted that it has “long adhered to the precept that the power and authority exercised by administrative agencies must be conferred by legislative language that is clear and unmistakable...’A doubtful power does not exist.’” Beam, 567 Pa. at 495. Here, the legislative language *is* “clear and unmistakable”: the Commission may only bring civil actions for damages caused by actions “in violation of [Chapter 25].” 30 Pa.C.S. § 2506(b); 1 Pa.C.S. § 1903.

Although the Beam court recognized the DOT’s right to file an action to enjoin the operation of unlicensed airports based on the principle that an agency is “invested with the implied authority necessary to the effectuation of its express mandates” (Beam, 567 Pa. at 496 (internal citations omitted)), no such consideration of “implied authority” is necessary or warranted where (as here) the agency in question has been granted express statutory authority to take some action. In this case, the Commission has been granted the express authority to fulfill its mandate by filing civil damage actions based on violations of Chapter 25 of Title 30 of the Pennsylvania Consolidated Statutes. Given that, there is no basis for implying that the Legislature intended to grant the Commission any broader authority. Circuit Court Order, at 5. *See also* United Artists’ Theater Circuit, Inc. v City of Phila., 535 Pa. 370, 386-390; 635 A.2d 612, 621-622 (1993) (legislative authorization to Philadelphia Historical Commission to designate building exteriors as historic did not imply power to designate interior of a building as historic); Pennsylvania Human Rights Com. v. St. Joe Minerals Corp., 476 Pa. 302, 309-311; 382 A.2d 731, 738-740 (1978) (in light of statutory enumeration of specific investigatory powers, authority to require answers to written interrogatories could not be implied as a part of the statutory scheme, since the General Assembly’s omission of broader discovery provisions may have been intentional).

Finally, Water and Power Resources Bd. v. Green Spring Company, 394 Pa. 1; 145 A.2d 178 (1958) (cited in the Commission Brief at 16) has no application to the case *sub judice*. Water and Power Resources Bd. involved a challenge to the “Water Obstruction Act” as an unlawful delegation of legislative power in violation of Article II, Section 1 of the Pennsylvania Constitution. In upholding that statute, the court found that it was entirely reasonable for the General Assembly to vest regulatory authority over dams in an administrative agency, along with a general standard or criterion for the agency to interpret and apply on a case-by-case basis. Water and Power Resources Bd., 476 Pa. at 9-10; 145 A.2d at 182-183.

In lawfully delegating authority to the Commission to bring civil damage actions for harm to natural resources, the General Assembly in 30 Pa.C.S. § 2506(b) exercised its legislative prerogative by granting the Commission the authority to bring such actions, but only where there has been a violation of the laws contained in the referenced Pennsylvania statutory chapter. Limiting the Commission’s authority in such a manner does not remove its discretion to decide which cases (of the ones that fall within that grant of authority) should be filed. There is no reason to suggest that this was an unlawful delegation of legislative authority to the Commission, and Consol has never so argued. The point is that this delegation of authority was *expressly limited* to the filing of damage actions based on violations of Pennsylvania law, and that express limitation must be followed.¹¹

E. The Pennsylvania Commonwealth Attorneys Act Does Not Vest the Commission with Standing to Bring this Action.

The Commission argues that the Commonwealth Attorneys Act, 71 P.S. § 732-101, et seq., grants to the “Pennsylvania Attorney General, or its independent agencies” the power to

¹¹ The Commission also claims that the Circuit Court Order leaves it without a remedy to address its losses. The record, however, does not support this assertion and it is not a ground for overturning the lower court’s proper disposition of this case.

bring “any action at law or in equity.” Commission Brief at 17. Stated differently, the Commission asserts that the Commonwealth Attorneys Act, at 71 P.S. § 732-204, grants “[l]itigation authority” to the Pennsylvania Attorney General. *Id.* The Commission, however, never explains how this authority to represent the Commonwealth and its agencies in legal proceedings creates standing in the Commission to bring this action.

The Commission is an “independent administrative agency” of the Commonwealth of Pennsylvania and claims that it was authorized to bring this action under 30 Pa.C.S. § 2506. Complaint, ¶ 1 [Appendix at 139]. Thus, the Commission did not assert in its Complaint that the Commonwealth Attorneys Act granted it standing to file the Complaint (*Id.*), and it has not identified a single case in which any agency relied on that statute in such a manner.

Moreover, the Circuit Court properly dismissed this action because the Commission lacked standing to bring it -- not because the Commission’s counsel was improperly appointed. Circuit Court Order at 5, 7 [Appendix at 5, 7]. Even though the Pennsylvania Attorney General may have “litigation authority” (Commission Brief at 17) to handle certain litigation on behalf of Pennsylvania agencies, and may delegate that authority to designated agencies to handle “any particular litigation or category of litigation *in his stead*” (71 P.S. § 732-204(c), emphasis added), that simply has no relevance to the question of whether any of those agencies (including the Commission) has standing to pursue a particular action.

Nor does the Commission derive some independent basis for filing this action under that part of the statute that grants the Attorney General the authority to “collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth *which shall be referred to and placed with the Attorney General....*” 71 P.S. § 732-204 (emphasis added). This was not a collection action, seeking to recover a known debt. It was an action purportedly filed under the common law of

West Virginia, for the payment of “damages,” to be determined. Complaint, ad damnum clause [Appendix at 149-150.] Likewise, there was no “debt” referred to the Attorney General for collection; the Commission’s memorandum to the Pennsylvania Attorney General’s Office requested approval for the retention of outside counsel to file a lawsuit for “damages to Pennsylvania’s natural resources and fishing opportunities.” [Appendix at 124.] Obviously, making such a request did not confer standing in the Commission to bring this action, and neither did the Pennsylvania Attorney General’s approval of the request.¹²

In short, the Circuit Court correctly ruled that “the delegation of authority [by the Attorney General] does not create any additional rights or authority in the Commission beyond what is stated in 30 Pa.C.S. § 2506(b).” [Appendix at 6.] The Commission has offered no credible argument to the contrary, and on this ground also the Circuit Court Order should be affirmed.

¹² None of the three (3) cases cited on pp. 20-21 of the Commission Brief affect this conclusion in the least. Commonwealth of Pa. v. Kervick, 60 N.J. 289; 288 A.2d 289 (N.J. 1972) involved a claim asserted by the Commonwealth of Pennsylvania under its escheat statute, not some independent authority of the Office of the Pennsylvania Attorney General. Pennhurst State School v. Estate of Goodhartz, 42 N.J. 266; 200 A.2d 112 (N.J. 1964) addressed the extraterritorial enforcement of familial support obligations, not the ability of a state agency to file civil actions under a statute that contained specific limits on the grounds upon which such actions could be filed. Commonwealth v. Freeman, 74 A.D. 912; 426 N.Y.S. 2d 71 (N.Y. App. Div. 1980) involved a discovery dispute as to the scope of the attorney-client privilege. Contrary to the Commission’s assertion (Commission Brief at 21), the plaintiff was *not* “the Pennsylvania Attorney General,” but the Commonwealth of Pennsylvania.

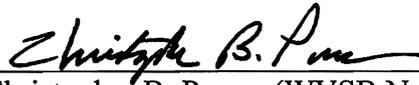
VII. CONCLUSION.

For the reasons described above, Consol asks that the Court affirm the Circuit Court's July 12, 2013 Order dismissing this case for lack of subject matter jurisdiction due to the failure of the Commission to establish its standing to bring this action.

Respectfully Submitted,

CONSOL ENERGY, INC. and
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0885

(Circuit Court Civil Action No. 11-C-556)

COMMONWEALTH OF PENNSYLVANIA
FISH AND BOAT COMMISSION,

Plaintiff Below/Petitioner,

v.

CONSOL ENERGY, INC. and
CONSOLIDATION COAL COMPANY,

Defendants Below/Respondents.

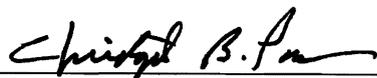
CERTIFICATE OF SERVICE

I, Christopher B. Power, counsel for Respondents, do hereby certify that the foregoing
Respondents' Brief has served upon counsel of record this 19th day of December, 2013, via U.S.

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