



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	EHB Docket No. 2022-015-B
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC., Permittee	:	Issued: June 3, 2022
	:	

**OPINION AND ORDER ON
PERMITTEE’S MOTION TO DISMISS**

By Thomas W. Renwand, Chief Judge

Synopsis

The Permittee’s Motion to Dismiss is granted in part and denied in part. A state senator does not have standing to bring an appeal of an NPDES permit on behalf of residents who live and work in the vicinity of a proposed oil and gas liquid waste treatment facility. Nor does the Environmental Rights Amendment of the Pennsylvania Constitution grant special standing to an individual legislator to appeal actions of the Department of Environmental Protection in her role as an elected official. As to the question of individual standing, the Board defers ruling on this issue until further discovery is conducted.

OPINION

Introduction

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Pennsylvania Senator Katie J. Muth, challenging the issuance of Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. PA0276405 to Eureka Resources, LLC (Eureka) by the Department of Environmental Protection (Department). Eureka

has proposed the construction and operation of an oil and gas liquid waste treatment facility located in Dimock Township, Susquehanna County. The permit authorizes Eureka to discharge wastewater to Tributary 29418 to Burdick Creek, a tributary of the Susquehanna River, in Susquehanna County.

Senator Muth is a Pennsylvania State Senator who represents District 44, which includes parts of Berks, Montgomery and Chester Counties. (Amended Notice of Appeal, para. 1, 2.) On April 12, 2022, Eureka filed a Motion to Dismiss on the basis that Senator Muth does not have standing to bring this appeal. Senator Muth filed a Response opposing the motion on May 12, 2022, and Eureka filed a Reply on May 13, 2022. The Department filed no response to the motion.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party; a motion to dismiss may be granted only where the moving party is entitled to judgment as a matter of law. *Downingtown Area Regional Authority v. DEP*, EHB Docket No. 2021-127-L, *slip op.* at 3 (Opinion and Order on Motion to Dismiss issued April 5, 2022) (citing *Burrows v. DEP*, 2009 EHB 20, 22); *Hopkins v. DEP*, EHB Docket No. 2021-067-B, *slip op.* at 2 (Opinion and Order on Motion for Partial Dismissal of Appeal issued April 1, 2022) (citing, *inter alia*, *Consol PA Coal Co. v. DEP*, 2015 EHB 48, 54)). A motion to dismiss may only be granted when a matter is free from doubt. *Downingtown*, *slip op.* at 3 (quoting *Bartholomew v. DEP*, 2019 EHB 515, 517). Therefore, with these principles in mind, we evaluate Eureka's Motion to Dismiss and Senator Muth's Response.

Standing

In order to have standing to challenge an action of the Department, an appellant must be aggrieved by that action. *Wurth v. DEP*, 2000 EHB 155, 170 (citing *Florence Township v. DEP*,

1996 EHB 282). To be aggrieved, a party must have a substantial, immediate and direct interest in the subject matter and outcome of the appeal. *Del-AWARE, Unlimited, Inc. v. DER*, 1987 EHB 351, 361. The Pennsylvania Supreme Court has addressed what it means to be “aggrieved.” In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), the Court set forth the elements that an appellant must demonstrate in order to have standing:

[The party] must have a direct interest in the subject matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must also be substantial.

The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not “aggrieved” thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be “aggrieved” to assert the common interest of all citizens in procuring obedience to the law.

Id. at 280-81 (footnotes omitted) (quoting *Man O’ War Racing Assn., Inc. v. State Horse Racing Commn*, 250 A.2d 172, 176-77 (Pa. 1969)).

An interest is “substantial” when it surpasses the common interest of all citizens in procuring obedience to the law. *Food and Water Watch*, 2019 EHB 459, 463 (citing *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016), *aff’d*, No. 565 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. April 12, 2021)). In other words, “there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *William Penn*, 346 A.2d at 282. For an interest to be “direct” there must be a causal connection between the matter complained of and the harm alleged. *Id.*; *Food and Water Watch*, 2019 EHB at 463. Finally, an interest is “immediate” where the causal connection is sufficiently

close so as not to be remote or speculative. *Id.* The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to seek relief from the particular action of the Department that is being appealed. *Wurth v. DEP*, 2000 EHB at 170; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944.

Senator Muth claims standing on behalf of residents who live and work in the area of the proposed discharge, as a trustee under Article I, § 27 of the Pennsylvania Constitution, and in her own individual capacity.

Representational Standing

Senator Muth states that she has brought this appeal on behalf of individuals who live and work in Dimock Township and Susquehanna County and who use and enjoy the land and waterways in the vicinity of the proposed facility. (Amended Notice of Appeal, para. 28.) Included with her Notice of Appeal and Response to Motion to Dismiss are numerous affidavits signed by individuals who reside in the general area of the proposed facility who have set forth their objections to the granting of the NPDES permit. (Exhibit C to Notice of Appeal; Exhibit B to Amended Notice of Appeal; Exhibit A to Response to Motion to Dismiss.) Additionally, paragraphs 28 through 33 of the Amended Notice of Appeal detail the specific concerns of two residents of Dimock and Susquehanna County, Victoria Switzer and Matt Neenan. Neither Ms. Switzer nor Mr. Neenan have appealed the Department’s issuance of the NPDES permit. Nor have any of the residents who provided affidavits to Senator Muth filed their own appeals.¹

¹ Senator Muth’s Amended Notice of Appeal states that Ms. Switzer and Mr. Neenan have not filed their own appeals due to “fear of harassment, retaliation, or from lack of resources.” (Amended Notice of Appeal, para. 33.) We acknowledge that litigation can be costly and, at times, a difficult endeavor. Where a potential appellant does not have the financial means to litigate an appeal, the Pennsylvania Bar Association Environmental and Energy Law Section offers assistance in securing pro bono representation to qualifying individuals. Information regarding this program is contained in the Instructions for the Notice of Appeal form on the Board’s website. As for allegations of harassment, any such matters that arise during the course of an appeal may be brought to the Board’s attention where they will be addressed accordingly.

Senator Muth’s district, Senate District 44, serves parts of Berks, Chester and Montgomery Counties. (Amended Notice of Appeal, para. 2.) It does not include Dimock Township or Susquehanna County; nor is the proposed oil and gas liquid waste treatment facility within Senator Muth’s district. Her Notice of Appeal states, “As an elected member of the Pennsylvania State Senate, I have a duty to uphold the Pennsylvania Constitution, to ensure state government departments and agencies follow required laws and policies, and to serve and protect the residents of the Commonwealth of Pennsylvania.” (Amended Notice of Appeal, Introduction.)

The Board has addressed the question of whether a legislator’s role as an elected official provides them with standing to challenge Department actions within their district or within the Commonwealth. In *Levdansky v. DEP*, 1998 EHB 571, State Representative David Levdansky appealed the Department’s issuance of a major permit modification for a landfill. He claimed standing both as a legislator whose legislative district included the landfill and as an individual who lived near the site. While the Board held that Representative Levdansky had standing to challenge the permit modification as an individual who lived in the neighborhood of the landfill, he did not have standing to challenge the action as a legislator. In reaching this conclusion, the Board relied on the Commonwealth Court’s holding in *Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)² and stated as follows:

The Commonwealth Court has applied the *William Penn* test to a legislator seeking to participate in a matter by virtue of his status as a legislator...The Court held that legislators, as legislators, are only granted standing when specific powers unique to their functions under the Constitution are diminished or interfered with. The Court

² In *Wilt*, a member of the General Assembly, as a taxpayer and in his role as legislator, sought to enjoin the Secretary of Public Welfare and State Treasurer from taking action to operate a mental health facility in his district. The Commonwealth Court dismissed the suit for lack of standing, finding that the plaintiff had no standing to bring the suit by virtue of his status as a legislator.

determined that “[s]ome other nexus must then be found to challenge the allegedly unlawful action.”

1998 EHB at 573-74 (citing *Wilt*, 363 A.2d at 881).

The Board went on to state:

The Board has held that a legislator has no personal stake in the outcome of the appeal where he is seeking to intervene in his capacity as a state representative and his interest is not direct, immediate and substantial. *Concord Resources Group of Pennsylvania, Inc. v. DER*, 1992 EHB 1563. While Representative Levdansky is permitted to participate as an *amicus curiae* in the capacity of a state legislator, his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen’s general interest.

Id. (citing *Wilt*, 363 A.2d at 881).

Similarly, in *Dauphin Meadows v. DEP*, 1999 EHB 928, State Senator Jeffrey Piccola sought to intervene in an appeal of a landfill expansion in his district. As in *Levdansky*, the senator was found to have standing in his personal capacity, as an individual whose office was located along the haul route of the landfill. However, his role as legislator did not afford him standing. As the Board explained, “The motion expresses the Senator’s understandable interest in championing the rights of his constituents. In accordance with *Levdansky*, however, Senator Piccola may not intervene on that basis.” *Id.* at 930-31.

Likewise, in *Concord Resources Group of Pennsylvania, Inc. v. DER*, 1992 EHB 1563, State Representative David Wright sought to intervene in an appeal of the denial of an application to site a hazardous waste treatment and disposal facility in his district. Again, relying on the Commonwealth Court’s holding in *Wilt*, the Board determined that Representative Wright’s status as a legislator did not meet the *William Penn* test for substantial, direct and immediate interest. The Board held, “While it is commendable that he is seeking to protect his constituents’ interests

before the Board, his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen’s general interest in assuring adherence to the [statutes involved in the appeal].” *Id.* at 1568 (footnote omitted).

The Commonwealth Court has also recently weighed in on the subject of legislative standing. In *Sunoco Pipeline, L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019), the Court reviewed the question of whether State Senator Andrew Dinniman had standing to file a formal complaint with the Public Utility Commission (PUC) seeking to enjoin Sunoco’s construction and operation of pipelines within his senatorial district. As with actions before the Environmental Hearing Board, in order for a complainant to have standing to pursue a complaint before the PUC he must be aggrieved, i.e., he must have a direct, immediate and substantial interest in the subject matter of the controversy. *Id.* at 1287 (quoting *Municipal Authority Borough of West View v. Public Utility Commission*, 41 A.3d 929, 933 (Pa. Cmwlth. 2012) (emphasis not included) (and further citing *William Penn, supra*)). In reviewing the senator’s claim of legislative standing, the Court relied on its prior holding in *Wilt, supra*, in concluding, “Legislators have duties not shared with citizens, but their interest in legislation terminates with completion of their vote.” *Id.* at 1290. The Court noted that Senator Dinniman based his legislative standing on a number of factors, including his representation of the community affected by the pipeline project and his participation on various Senate committees. Senator Dinniman stated that he filed the complaint “to force the PUC to ‘review, elucidate and improve upon the safety of a public utility, as operated within his district, which affects the health, safety and economic stability of his constituents.’” *Id.* at 1291-92. The Court concluded that the senator’s duties, as senator, did not confer legislative standing on him to bring an action with the PUC to challenge construction and operation of the pipelines.

Similarly, Senator Muth has stated that her interest in bringing this appeal is to protect the residents of the community where the discharge will occur and to ensure that the Department has complied with the law. While Senator Muth’s work on behalf of the citizens of Pennsylvania is commendable, nonetheless her role as senator does not convey any special standing to bring this appeal on their behalf. The purpose behind the standing doctrine in the context of an appeal before the Board is to ensure that the appellant is the appropriate party to seek relief from a Department action. *Matthews International Corp. v. DEP*, 2011 EHB 402, 404; *Valley Creek Coalition*, 1999 EHB at 944. Requiring an appellant to have standing ensures that the litigant has a personal stake in the outcome of the controversy. *Raymond Proffitt v. DEP*, 1998 EHB 677, 681 (citing *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689, 691 (Pa. Cmwlth. 1994) (quoting *Baker v. Carr*, 369 U.S. 186 (1962))). In other words, the appellant must have a personal connection to the action on appeal beyond that of a legislator acting on behalf of the citizens of this Commonwealth.

We conclude that Senator Muth does not have representational standing as a state senator to bring this appeal on behalf of residents who live and work in the area of the proposed facility.

Standing Pursuant to Environmental Rights Amendment

Senator Muth asserts that she has not brought this appeal as a legislator, but as a trustee under Pennsylvania’s Environmental Rights Amendment. (Sen. Muth Response, para. 13, 14.) Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment, provides as follows:

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.

The Pennsylvania Supreme Court has held that the third clause of Article I, § 27 “establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.” *Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth*, 161 A.3d 911, 931-32 (Pa. 2017) (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 955-56 (Pa. 2013)).

Senator Muth states that she has brought this appeal, not as a legislator, but as a trustee on behalf of Pennsylvania residents “all of whom are beneficiaries under the Environmental Rights Amendment and all of whom allege impact.” (Brief in Support of Sen. Muth Response, p. 7-8.) Although Senator Muth states that she has not filed this appeal as a legislator, her claim of trustee status under Article I, § 27 is based on and derivative of her position as a state senator. The Introduction to her Amended Notice of Appeal states as follows:

I, Senator Katie J. Muth, submit this appeal to the Board for urgent review and consideration. As an elected member of the Pennsylvania State Senate, I have a duty to uphold the Pennsylvania Constitution, to ensure state government departments and agencies follow required laws and policies, and to serve and protect the residents of the Commonwealth of Pennsylvania.

(Amended Notice of Appeal, Introduction.) In addition, paragraphs 9-10 of her Amended Notice of Appeal, included under the heading of “Standing,” state the basis of her appeal:

9. Senator Muth filed the instant appeal to defend the Constitution of Pennsylvania in accordance with her oath of office, which states “I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity.”

10. Senator Muth’s oath of office *obligates* Senator Muth’s support and defense of the United States Constitution and the Constitution of Pennsylvania to extend beyond a single geographical area or a single topic.

(Amended Notice of Appeal, para. 9-10) (emphasis in original.)

The Amended Notice of Appeal details her role as a senator and her responsibilities in that regard: Senator Muth represents Pennsylvania residents in District 44. (Amended Notice of Appeal, para. 2.) She is an elected member of the Senate Leadership, serving as the Policy Committee Chair for the Democratic Caucus. (Amended Notice of Appeal, para. 3.) She serves on the Senate Environmental Resources and Energy Committee, which is responsible for overseeing matters related to the Commonwealth's natural resources. (Amended Notice of Appeal, para. 4.)

As we have stated, the role of legislator does not automatically convey standing, whether as an individual or on behalf of constituents or other Pennsylvania citizens. The legal question we now must decide is whether the Environmental Rights Amendment confers standing on an individual state legislator as a trustee to challenge a Department action. Based on our review of the law, it does not. Article I, § 27 conveys no special standing on members of the General Assembly to bring an appeal as a trustee of the Commonwealth's natural resources. This question has been addressed by the District Court for the Eastern District of Pennsylvania in *Yaw v. Delaware River Basin Commission*, 2021 U.S. Dist. LEXIS 109601, 2021 WL 2400765, 51 ELR 20107 (E.D. Pa. June 11, 2021). In that matter, State Senators Gene Yaw and Lisa Baker, as well as other plaintiffs, sought a declaration that the Delaware River Basin Commission exceeded its authority by imposing a moratorium on fracking in the Delaware River Basin. One theory of standing raised by the senators was that they were trustees of the Commonwealth's public natural resources under Article 1, § 27 and, as trustees, they had a fiduciary duty to manage and oversee the trust.

In examining this theory of standing, the District Court referred to the Pennsylvania Supreme Court's opinion in *PEDF*, and, in particular, the following language:

Trustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.

PEDF, 161 A.3d at 931-32. Relying on this language, the District Court held that the senators could not be designated as trustees under the Environmental Rights Amendment "because they are *individual legislators, not Commonwealth agencies or entities.*" *Yaw*, 2021 U.S. Dist. LEXIS 109601 at *23 (emphasis added.)

The Board is not bound by the decision of the Federal District Court, but we agree with its logic. Article I, § 27 contains no authority for individual legislators to act as trustees of the Commonwealth's natural resources and provides no standing for them to challenge an action of the Department of Environmental Protection in their capacity as individual legislators. A member of the General Assembly has no special standing to bring an appeal under the Environmental Rights Amendment beyond that of any Pennsylvania citizen. Were that the case, it would greatly expand the traditional doctrine of standing. Indeed, it could lead to legislators acting as private attorneys general challenging actions across the state.

Further, such a ruling could lead to chaotic results. For example, it raises the following question: "If a State Senator has individual standing, then would the tens of thousands of other state employees also have standing? If not, what would be the cutoff as to individuals that would have Trustee standing and those individuals who do not?" (Brief in Support of Motion to Dismiss, p. 8.) The senator's theory would essentially eliminate the need for standing for any of those tens

of thousands of state employees who wish to challenge an action of the Department under Article I, § 27.

We do not believe this is what the drafters of Article I, § 27 intended. Rather, the trustee duties under Article I, § 27 are vested in the “agencies and entities of the Commonwealth government, both statewide and local.” *PEDF*, 161 A.3d at 931-32. Unlike the Executive Branch, where the authority to act is vested in one individual, the Governor, the Legislative Branch consists of individual senators and representatives who must come together as one body to take official action on its behalf. Thus, an individual legislator may not act as trustee under Article I, § 27 on behalf of the entire Legislature without authorization to do so.

Here, Senator Muth has not claimed authority to act on behalf of the Senate or the entire General Assembly in bringing this action under Article I, § 27; rather, she states that she has brought this action in her capacity as an individual senator. As we have discussed, Article I, § 27 does not empower individual legislators to act as trustees. On that basis, the Environmental Rights Amendment does not provide her with standing to bring this appeal.³

Notably, in the *Yaw* case the District Court held that even if the senators had been found to have trustee obligations under the Environmental Rights Amendment, they would still lack standing because they had not made out a “cognizable injury.” *Yaw*, 2021 U.S. Dist. LEXIS 109601 at *24 (citing *Erickson v. AmeriCold Logistics, LLC*, 311 F. Supp. 3d 1073, 1077 (D. Minn. 2018) (“The fact that plaintiffs are trustees does not excuse them from well-established standing requirements.”)) Likewise, even if Senator Muth were found to have authority to act as a

³ We express no opinion on whether Senator Muth would have standing to file this appeal if she were acting on behalf of the entire Senate or the General Assembly.

trustee under Article I, § 27, she would still be required to demonstrate the well-established elements of standing in order to proceed.

We conclude that Senator Muth does not have standing to bring this appeal as a trustee under the Environmental Rights Amendment of the Pennsylvania Constitution.

Individual Standing

Senator Muth contends that she has standing in her own right to appeal the issuance of the NPDES permit by the Department. She states that she has spent time personally and professionally in the township of Dimock where the proposed facility will be located. (Brief in Support of Sen. Muth Response, p. 6.) She further alleges that the issuance of the permit will harm her because it will allow the discharge of “radioactive and other wastes into the waters of the Commonwealth, that will flow into the Chesapeake Bay Watershed, the Delaware River Basin, and the Susquehanna River Basin and surrounding areas in which Senator Muth resides, works, and recreates.” (Brief in Support of Sen. Muth Response, p. 7)

A majority of the Board at this stage of the litigation is not able to reach a consensus on the question of Senator Muth’s individual standing. Discovery and additional motions directed to the issue of Senator Muth’s standing to pursue this appeal would assist the Board in resolving this issue.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EUREKA RESOURCES,
LLC., Permittee

:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2022-015-B

ORDER

AND NOW, this 3rd day of June, 2022, it is ordered as follows:

- 1) The Motion to Dismiss is **granted** as to the question of representational standing.
- 2) The Motion to Dismiss is **granted** as to the question of trustee standing pursuant to Article I, § 27 of the Pennsylvania Constitution.
- 3) Because a majority of the Board was not able to reach a consensus on the question of individual standing, this portion of the Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand

THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman

MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Judge

s/ Steven C. Beckman

STEVEN C. BECKMAN
Judge

DATED: June 3, 2022

c: DEP, General Law Division:
Attention: Maria Tolentino
(via *electronic mail*)

For the Commonwealth of PA, DEP:
Ann Conserette, Esquire
Michael T. Ferrence, Esquire
(via *electronic filing system*)

For Appellant:
Lisa Johnson, Esquire
(via *electronic filing system*)

For Permittee:
Paul J. Bruder, Jr., Esquire
Aaron D. Martin, Esquire
(via *electronic filing system*)