



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH

v.

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

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**EHB Docket No. 2022-015-B**

**Issued: November 9, 2022**

**OPINION AND ORDER  
ON PERMITTEE'S MOTION FOR SUMMARY JUDGMENT**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board grants the Permittee's Motion for Summary Judgment where the Appellant lacks standing to challenge the NPDES Permit. The Appellant lacks standing because the record, when viewed in the light most favorable to the non-moving party, did not demonstrate that the Appellant had a substantial, immediate and direct interest in the subject matter of the appeal.

**OPINION**

**Background**

This matter involves an appeal filed with the Environmental Hearing Board ("the Board") by Pennsylvania Senator Katie J. Muth ("Senator Muth"), challenging the issuance of Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. PA0276405 ("Permit") to Eureka Resources, LLC ("Eureka") by the Department of Environmental Protection ("the 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. In an Opinion and Order issued June 3, 2022, the Board granted in part and denied in part Eureka's Motion to Dismiss. The Board held that Senator Muth did not have representational standing or standing as a trustee pursuant to the Environmental Rights Amendment. However, the Board deferred ruling on Senator Muth's individual standing until further discovery was conducted. On June 7, 2022, Eureka filed a Petition for Reconsideration that the Board denied on June 8, 2022. The Board also denied a Renewed Motion to Dismiss filed by Eureka on June 15, 2022. The Board issued an Order on June 21, 2022, staying this matter with exceptions for conducting discovery and filing dispositive motions on the issue of Senator Muth's individual standing.

Currently before the Board is a Motion for Summary Judgment ("the SJ Motion") filed by Eureka on September 19, 2022. The SJ Motion argues that Senator Muth does not have individual standing to bring this appeal. Senator Muth filed her Response in Opposition to the SJ Motion on October 19, 2022, and Eureka subsequently filed its Reply to the Response on October 22, 2022. The Department has not filed a response to the SJ Motion. The Board is now prepared to rule on the SJ Motion.

### **Standard of Review**

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law.

See 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-808. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the nonmoving party. *Stedje v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

### **Standing**

When an appellant is on notice that its standing is at issue, and then that standing is challenged in a motion for summary judgment filed after the close of discovery, the appellant must be able to point to evidence demonstrating the basis for its standing. *Wurth v. DEP*, 2000 EHB 155, 173. 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.

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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.

## **Discussion**

In our prior Opinion in this case, the Board rejected Senator Muth’s claim that she had both representational standing and trustee standing to pursue her appeal of Eureka’s Permit. That Opinion left open the possibility that Senator Muth might have standing as an individual to challenge the Permit in front of the Board and suggested that discovery and additional motions would assist the Board in deciding that issue. Eureka conducted discovery through interrogatories, requests for admissions and a request for production of documents directed at Senator Muth. Apparently, no deposition of Senator Muth was taken by Eureka. Following completion of the

limited discovery, Eureka filed its SJ Motion and related filings. Senator Muth filed a Response to the SJ Motion along with related filings and Eureka filed a short Reply Brief. Following our review of the filings in this case, we hold that Senator Muth does not have individual standing and we grant Eureka's SJ Motion and dismiss the appeal.

Turning to the specifics of this case, Senator Muth has filed a third-party permit appeal. In third-party permit appeals, the Board has held that a party challenging a Department permit decision demonstrates a substantial, direct and immediate interest in the decision when the appellant credibly avers that the appellant uses<sup>1</sup> the affected area and there is a realistic potential that the appellant's use of the area could be affected by the challenged activity. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643. Senator Muth asserts in her Brief that she has done just that. (Sen. Muth's Brief in Opposition to the Motion, p. 3). Her Brief is full of broad statements setting forth her contention that she uses various areas and resources that will be impacted by the activities authorized by Eureka's Permit. Her claims generally fall into three categories: 1. Impacts to her recreational use of water resources in and around the Dimock area; 2. Impacts to her use of water resources well downstream of Dimock, specifically the Susquehanna River in and around Harrisburg, and; 3. Impact to the food consumed by Senator Muth and others. We will first address the claims surrounding her activities in the Dimock area in proximity to the permitted activity.

She asserts that "Dimock is a place where [she] has significant ties and where she and her family enjoy recreating" and that "[s]he visits the area of the proposed Facility. She recreates there. She enjoys the environment, sightseeing, visiting good friends and acquaintances. She has

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<sup>1</sup> In this context, we read the terms "uses" or "use" broadly to include recreational pursuits and other types of activities that involve interaction with the resource that is of concern to the appellant.

recreated along Burdick Creek.” (Sen. Muth’s Brief in Opposition to the Motion, p. 6, 8). However, none of these statements in her Brief concerning her use of the potentially affected area in and around Dimock are supported by a citation to the record. A close examination of Senator Muth’s affidavit and verified responses to interrogatories and request for admissions and the documents produced in response to the request for production of documents do not contain support for the broad assertions regarding her use of the Dimock area that are made in her Brief.<sup>2</sup>

Senator Muth included a signed affidavit with her initial Notice of Appeal (“NOA”) filed on March 7, 2022. Her affidavit states that “my personal experience with waters of the Commonwealth spans many counties” but does not provide any further detail about those experiences. (NOA, Exhibit B).<sup>3</sup> In our opinion, nothing stated in the affidavit offers support for her claim of individual standing. In addition to the affidavit, Senator Muth verified two other documents that are included in the record. The first verified document is Appellant’s Answers and Objections to Eureka Resources, LLC’s First Set of Interrogatories Requests for Production of Documents and Requests for Admissions Directed to Appellant that is attached to Eureka’s Statement of Undisputed Material Facts as Exhibit H (“Exhibit H”). The verified responses to the Interrogatories and the Request for Admissions in Exhibit H do not provide any information regarding the Senator’s use of the water resources in the Dimock area and, therefore, do not offer

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<sup>2</sup> The Board is not limited to considering only affidavits and verified responses when evaluating the issue of a party’s standing. However, we find that the requirement that these items be sworn to under the penalty of law by the party means they carry more weight in our determinations regarding credible facts than statements made in the other non-verified filings. It would have been most helpful to the Board in reaching its determination in this case if it had been provided sworn deposition testimony from Senator Muth but, as noted, a deposition was not taken so the Board will make its decision on the record it has and not the record it wishes it had.

<sup>3</sup> The initial NOA was corrected once (Docket Entry #2) and amended once (Docket Entry #8). Senator Muth’s affidavit was included as an exhibit to the corrected NOA but was not included as an exhibit to the amended NOA so it is not clear whether it was withdrawn or not. Ultimately since we conclude that it does not support the Senator’s claim for individual standing, we do not need to decide the legal status of the affidavit.

any support for her individual standing. The first request set forth in the Request for Production in Exhibit H asks Senator Muth to produce “any and all Documents which Appellant believes supports her claim of individual standing to bring the appeal in the present matter.” (Exhibit H, p. 6). After objecting to the request, the Senator responded stating “Without waiver of the forgoing objections, and in addition to documents filed of record in this matter, see attached, including documents evidencing unreimbursed expenses during Appellant’s trips to Dimock.” (Exhibit H, p. 6).<sup>4</sup> The documents produced by the Senator were as follows: 1. Two Lease Agreements and a Lease Extension Agreement for property in Harrisburg, PA.<sup>5</sup> The term periods for the leases and lease extension were 1/1/19 to 11/30/19 and 8/25/2021 to 11/30/22; and 2. Three redacted credit card statements showing charges from three separate dates in 2021 (January 23, May 4, and July 31) apparently related to payments for hotel, food, gasoline and miscellaneous from several different locations (Trucksville, PA; Pittson, PA; Springville, PA and Montrose, PA).<sup>6</sup> Senator Muth does not provide any explanation of the credit card charges or attempt to link them to her use of the water resources in or around the Dimock area.

Senator Muth also provided verified answers to a second set of interrogatories from Eureka. The two interrogatories and answers are set forth as Exhibit M to Eureka’s Statement of Undisputed Material Facts (“Exhibit M”). The first interrogatory asks Senator Muth to “Identify and state with particularity all facts that you contend support your individual standing in this

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<sup>4</sup> Senator Muth objected to the four other requests for documents and appears not to have produced any further documents in response to those requests. (Exhibit H, p.6-8).

<sup>5</sup> The addresses in the Lease Agreements and Lease Extension Agreement were redacted to only show that the property or properties in question had a Harrisburg, PA address.

<sup>6</sup> Two of the charges do not list a specific location although the charge for the Hampton Inn dated May 4, 2021 lists a phone number that Eureka asserts identifies the location of the Hampton Inn as Tunkhannock, PA. (Eureka’s Statement of Undisputed Facts, #20, p.4). Senator Muth denied that fact in her Response to Eureka’s Statement of Undisputed Facts. (Response, #20, p.4).

appeal.” (Exhibit M, p. 3). This verified answer is the place in the record where the Senator most directly addresses the factual basis for her assertion that she has individual standing, so we set forth her response in its entirety: *“Without waiving any of the general objections set forth above, or limiting in any way Appellant’s prior responses to discovery and filings in the captioned matter, or the Board’s findings in its Opinion and Order of June 3, 2022, Appellant has spent time, and currently spends time, personally and professionally in the township of Dimock where the proposed facility would be located. In addition, based on evidence from other Eureka facilities in the State, the discharge from the proposed facility would contain heavy metals, radioactive material and other materials, and will discharge this material into the waters of the Commonwealth (e.g. Burdick Creek) that is tributary to the Susquehanna River. These are areas in which Appellant resides, works, and recreates. Appellant has an apartment in Harrisburg, one of the many places where she works. The Susquehanna River runs through Harrisburg and is the source of drinking water for the City of Harrisburg. Senator Muth and her family enjoy recreating along the Susquehanna River, both in Harrisburg and Susquehanna County. In addition, Burdick Creek is a drinking water source for livestock in the Dimock area, with dairy and beef cow farmers utilizing Burdick Creek for water supply. Eureka’s discharge will be consumed by such animals, as well as fish, in the food chain consumed by Appellant and others.”* (Exhibit M, p. 3).

In the verified answer quoted above, there are two principal statements that are directed to her use of the water resources in the Dimock area. First, she states that she has spent, and currently spends time, personally and professionally in the township of Dimock where the proposed facility would be located. Secondly, she states that she and her family enjoy recreating along the Susquehanna River, both in Harrisburg and Susquehanna County. Unfortunately, we are provided no details at all concerning the frequency, length, specific location and nature of the use she asserts



in her answer. Given that her claim that she has individual standing was being aggressively challenged by Eureka, it was incumbent on her to bring forward all her evidence and provide sufficient detail about her activities to convince the Board that she satisfied the standing requirements. We would have expected some discussion by way of answers to interrogatories or an affidavit detailing when, where, and how she spent time and recreated in Dimock and along the Susquehanna River in Susquehanna County. Further undermining her claim of individual standing, she failed to provide any physical evidence supporting her claim of use of the waters in the Dimock area beyond the three credit card statements and made no effort to explain how the credit card statements she provided in response to the request for production tie into her use claim. At best, and in the light most favorable to the Senator, the statements arguably demonstrate that she was in the broad vicinity of Dimock on three separate occasions in 2021. The lack of detail and supporting evidence<sup>7</sup> as to her recreational use during those three occasions and any other times she may have been in Dimock strongly contrasts with the evidence of use presented in many of the cases where the Board has found individual standing based on recreational use of a given area. *See Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 754 (the Board denied a motion for summary judgment and found the appellant had standing where appellant-member testified that he hiked in the affected area, detailed the time he spent there, took photographs, birdwatched, and had an aesthetic appreciation for the area); *Food & Water Watch v. DEP*, 2019 EHB 459, (the Board found a third-party appellant had representational standing where appellant's members had individual standing based on a record that detailed their recreational activities such

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<sup>7</sup> We fully understand that many recreational activities such as walking along a stream, canoeing, birdwatching, etc. may not produce documentary evidence of those uses and we evaluated the facts in this case with that in mind. The lack of physical evidence is not dispositive but in conjunction with the overall lack of detail supporting the claimed activities along with no explanation tying the physical evidence (credit card receipts) that was provided to the uses and/or activities claimed, supports our determination that the Senator has not credibly averred her use of the affected area.

as kayaking, birdwatching, wading and walking along the creek); *Blose v. DEP*, 1998 EHB 635, 638 (the Board held that appellant had standing where his deposition, answers to interrogatories and affidavit all demonstrated that he used the site for swimming, boating, fishing and canoeing on a regular basis for the past 40 years). Ultimately our review of the verified information provided by Senator Muth regarding her use of the affected area in and around Dimock fails to convince us that she has the requisite contact with the area to demonstrate that she has a substantial, direct and immediate interest in the outcome of the appeal.

Senator Muth also relies on her use of the Susquehanna River in the Harrisburg area as a basis for claiming that she has individual standing. Eureka's permitted discharge is into a tributary of Burdick Creek, which flows into Meshoppen Creek, which eventually discharges into a branch of the Susquehanna River. In her verified answer to the first interrogatory (Exhibit M), set forth in its entirety above, Senator Muth states that she and her family enjoy recreating along the Susquehanna River in Harrisburg. She also makes a reference to the Susquehanna serving as a source of drinking water for Harrisburg. We have credible evidence that the Senator has leased and is currently leasing an apartment in the Harrisburg area and we have no doubt that her legislative duties require her to spend significant time in Harrisburg. Once again, however, we have no details concerning the what, when or how she and her family recreate along the Susquehanna River in the Harrisburg area nor any direct evidence of that fact. She also offers no support for her claim that the Susquehanna River is the source of drinking water for the City of Harrisburg. Eureka disputes that claim and states that the Susquehanna is not a primary source of drinking water and instead serves as a backup source. It claims that water from the Susquehanna only enters the drinking water system on limited occasions when the backup system is tested to ensure it remains operational. We need not resolve that dispute because even if we view that

information in the light most favorable to Senator Muth as we are required to do, we hold that the claim that the Susquehanna is a source of drinking water for the City of Harrisburg and that she may suffer some type of harm as a result of Eureka's discharge is not adequate to support her claim of individual standing. In order to have individual standing, there must be a causal connection between Eureka's discharge and the alleged harm claimed by Senator Muth and that causal connection must be sufficiently close so as not to be remote or speculative. Given the readily apparent distances involved between the discharge point in Susquehanna County and any intake for the Harrisburg water system as well as the relative flows involved, the potential harm to Senator Muth that may result from drinking treated water from the Susquehanna during the times she is in Harrisburg is too remote and speculative to constitute the type of direct and immediate harm required to find individual standing.

Finally, we turn our attention to the last argument set forth in Senator Muth's verified responses. In her answer to the first interrogatory (Exhibit H), set forth in its entirety above, she states that Burdick Creek is a drinking water source for livestock in the Dimock area and raises the concern that the discharge from Eureka will be consumed by the livestock as well as fish. She then asserts that these livestock and fish are in the food chain consumed by her and others. She offers no evidence in support of these alleged facts concerning the use of Burdick Creek by livestock or the likelihood of her consuming contaminated food raised in the Dimock area. The sequence of events required to lead to her consumption of such food strikes us as both remote and speculative and entirely within her control. This claim is insufficient to satisfy the requirement that her interests in the outcome of the appeal be both direct and immediate in order to have individual standing.

## Conclusion

We have little doubt that Senator Muth is sincerely concerned about the potential impact of the Permit that she is challenging in this appeal. However, concern alone does not equate to standing and an appellant like Senator Muth must make credible averments of her use of an affected area and show that the challenged activity has the realistic potential to affect her and her use of the resource in order to maintain an appeal in front of the Board. Eureka challenged her standing to bring this appeal. That challenge to her individual standing required her to come forward with record evidence that convinced the Board that she had a substantial, immediate and direct interest in the subject matter and outcome of the appeal. The phrase “substantial, immediate and direct interest” is a legal term of art that has a specific meaning in the standing context. Standing is not intended to be a significant barrier to bringing challenges to Department actions but in order to give the standing requirement meaning, when standing is challenged, a party is required to come forward with record evidence sufficient to demonstrate that they are aggrieved by the Department’s action in a substantial, direct and immediate way. Senator Muth fails to point to evidence in the record that supports her claim of a substantial, immediate and direct interest in her third-party permit appeal. Therefore, we find that she lacks individual standing to maintain her appeal. Eureka’s SJ Motion is granted and because we have resolved the lone standing issue that remained after our prior decision in Eureka’s favor, Senator Muth’s appeal is dismissed. It is hereby ordered as follows:



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH

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**EHB Docket No. 2022-015-B**

**ORDER**

AND NOW, this 9<sup>th</sup> day of November, 2022, it is hereby ordered that the Permittee's Motion for Summary Judgement is **granted**. The appeal in the above-referenced matter is terminated and the docket will be marked as **closed**.

**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: November 9, 2022**

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