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PROVIDING ANOTHER LEG TO STAND ON? A QUESTION
OF THE “ZONE OF INTERESTS” IN CHALLENGING AGENCY
DECISION-MAKING UNDER THE AIR POLLUTION
CONTROL ACT

I. INTRODUCTION

The Pennsylvania state legislature passed the current version of the Pennsylvania Air Pollution Control Act (the Act) in 1992, which then-Governor Bob Casey, Sr. signed into law.¹ The Act enumerates the duties of the Department of Environmental Protection (DEP), previously the Department of Environmental Resources, in regulating the various sources of air pollution in Pennsylvania.² The Act also describes the circumstances under which a private party can challenge a decision made by the DEP and the requisite level of public involvement in the DEP’s decision-making process.³ On June 16, 2011, the Pennsylvania Environmental Hearing Board (EHB) specifically addressed both standing and public notice under the Act in *Matthews International Corp. v. Commonwealth of Pennsylvania, Department of Environmental Protection (Matthews Int’l)*.⁴ This case is unique in light of the EHB’s analysis of the public notice requirement and the resulting interaction between the standing and public notice portions of the Act.⁵

Public accountability is important to both addressing perceived wrongs in a forum of justice and creating transparency in decision-making.⁶ Despite the recognized value of public accountability, the government can incur only a limited degree of public scrutiny

1. See S.B. 1650, 176th Gen. Assemb., Reg. Sess. (Pa. 1992) (passing Pennsylvania Air Pollution Control Act into law).

2. See 35 PA. STAT. ANN. § 4004 (West, Westlaw through 2012) (describing DEP’s duties to include implementation of Act’s provisions throughout Commonwealth, and oversight and regulation of new projects affecting air pollution levels in Commonwealth).

3. See 35 PA. STAT. ANN. §§ 4002, 4006.1, 4010.2 (West, Westlaw through 2012) (outlining portions of Act at issue in case at bar).

4. See *Matthews Int’l Corp. v. Commw. of Pa., Dep’t of Env’t. Prot.*, No. 2008-235-R, 2011 Pa. Environ. LEXIS 40, at *1 (Pa. Environ. Hearing Bd. Jun. 16, 2011) (rejecting Matthews’ challenge for lack of standing, and concluding public notice was not required).

5. For a further discussion of the interaction between the standing and public notice portions of the Pennsylvania Air Pollution Control Act, see *infra* notes 150-158 and accompanying text.

6. See Sanford A. Church, *A Defense of the “Zone of Interests” Standing Test*, 1983 DUKE L.J. 447, 447-48 (characterizing standing tests as crucial mechanism for public access to courts).

before the scrutiny impedes the government's work to the point of ineffectiveness.⁷ Restrictions on the ability to judicially challenge a governmental action prevent parties who merely dislike an agency's decision from bogging down courts and hearing boards.⁸ In addition, not requiring a public notice or comment period for every agency action allows the agency to resolve minor issues quickly and efficiently.⁹

This Note examines the issues of standing and public notice in *Matthews Int'l* and predicts how the case will affect future applications of the traditional standing and public notice rules.¹⁰ Part II of the Note details the facts of *Matthews Int'l*, including the arguments presented by the parties to the EHB.¹¹ Part III provides a background to the development of the main legal issues in this case; specifically, standing to challenge an agency decision and the public notice required when an agency issues a decision or new rule.¹² Part IV of the Note then discusses the EHB's analysis of those legal issues in reaching its conclusion in *Matthews Int'l*.¹³ Next, Part V addresses whether the EHB's analysis was congruent with the previously established jurisprudence and whether the dissenting opinion was justified based on that same precedent.¹⁴ Finally, Part VI forecasts the potential impact of *Matthews Int'l* in Pennsylvania.¹⁵

7. See *id.* at 447 (stating zone of interests test prevents abuse of judicial system while still providing access to courts for citizens with good faith claims).

8. See Sheldon K. Rennie, *Bennett v. Plenert: Using the Zone-Of-Interests Test to Limit Standing Under the Endangered Species Act*, 7 VILL. ENVTL. L.J. 375, 378 (1996) (outlining specific requirements for standing as: specific violation of plaintiff's legally-protected interest, causal connection between injury and challenged action, and likeliness favorable decision will redress injury).

9. See Royal C. Gardner, *Public Participation and Wetlands Regulation*, 10 UCLA J. ENVTL. L. & POL'Y 1, 6-7 (1991) (explaining why Congress created exceptions to public notice requirement in Administrative Procedure Act).

10. For a detailed analysis on the standing and public notice issues in *Matthews Int'l v. DEP*, see *infra* notes 33-124 and accompanying text. For an impact analysis on the decision in this case, see *infra* notes 159-178 and accompanying text.

11. For an explanation of the factual background of *Matthews Int'l*, see *infra* notes 16-32 and accompanying text.

12. For a background of the main issues addressed in *Matthews Int'l*, see *infra* notes 33-97 and accompanying text.

13. For further discussion of the EHB's analysis of the main issues in *Matthews Int'l*, see *infra* notes 98-124 and accompanying text.

14. For an examination of the consistency of the EHB's analysis, see *infra* notes 125-127 and accompanying text.

15. For an exploration of the potential impact of *Matthews Int'l*, see *infra* notes 159-178 and accompanying text.

II. FACTS

Matthews International Corporation (Matthews) “is a publicly traded company that produces cremation and burial equipment,” and has a division in Pittsburgh that manufactures bronze memorial products.¹⁶ In March 2008, privately owned Granite Resources Corporation (Granite), one of Matthews’s competitors in the Pittsburgh area, filed a Request for Determination of Requirement for a Plan Approval/Operating Permit with the DEP to build a new facility in nearby Aliquippa, Pennsylvania.¹⁷ The facility would be used to form and surface coat bronze plaques, which serve as memorial markers in cemeteries.¹⁸ In its request to the DEP, Granite sought to have the facility designated as a minor source of air contamination to “exempt [the facility] from plan approval and operating permit requirements.”¹⁹

Under Pennsylvania’s air quality regulations, a facility can be exempt from the normal procedures and permit requirements under the Air Pollution Control Act and accompanying regulations if its air emissions are below a certain level.²⁰ After reviewing Granite’s request, the DEP determined the proposed facility posed “minor significance” to the air quality in the area and exempted the facility from the normal regulations and requirements.²¹ Matthews sought to reverse this determination and appealed the DEP’s decision, claiming it was “arbitrary, capricious, an abuse of discretion, and contrary to the law.”²² In response, the DEP and Granite argued that Matthews did not have standing to bring the challenge

16. *Matthews Int’l Corp. v. Commw. of Pa., Dep’t of Env’tl. Prot.*, No. 2008-235-R, 2011 Pa. Envirn. LEXIS 40, at *2 (Pa. Env’tl. Hearing Bd. Jun. 16, 2011) (illustrating Matthews International Corporation’s business and profile within production industry).

17. *Id.* at *2 (describing Granite Resource Corporation and events leading up to litigation).

18. *Id.* (recounting purpose of Granite’s new facility is to as producing bronze plaque for use as memorial markers).

19. *Id.* at *2-3 (detailing Granite’s request that DEP exempt new facility from normal requirements of Air Pollution Control Act).

20. *Id.* at *3 (assessing how pertinent regulations addressed Granite’s request through exemptions for facilities not producing high levels of pollution); *see also* 25 PA. CODE § 127.14 (West, Westlaw through 2012) (specifying exemptions to plan approval, including sources determined to be of minor significance by DEP).

21. *Matthews Int’l*, 2011 Pa. Envirn. LEXIS 40, at *3 (indicating DEP’s grant of Granite’s request to exempt its new facility from plan approval requirements).

22. *Id.* (recounting Matthews’ response to DEP’s decision through Matthews’s subsequent appeal to EHB).

and DEP's action did not require public notice before becoming final.²³

In its final brief submitted to the EHB, Matthews's attorneys argued the company had standing to challenge the decision because its interests in the business of its competition were within the "zone of interests" of the Act.²⁴ The brief further stated the Act "expressly includes protection of competitive interests."²⁵ In addition, Matthews's attorneys argued, "Matthews is a member of the public and is entitled to, but did not receive, notice and opportunity for comment" on the EHB's decision and "[t]his interest is distinct and separate from its interest as a competitor and alone is enough to confer standing."²⁶

The DEP refuted the claim that Matthews had standing based on competitive interests alone.²⁷ In fact, the DEP's brief averred that competitive interests were not within the zone of interests the state legislature attempted to protect in the Act.²⁸ "The only economic policy related item mentioned is a collective one of fostering the 'development, attraction and expansion of industry, commerce and agriculture.' Individual economic interests are not mentioned."²⁹

In the end, the EHB agreed with the DEP and dismissed Matthews's suit for lack of standing.³⁰ Specifically, the majority agreed

23. *Id.* (outlining DEP and Granite's argument that Matthews did not have standing and public notice requirements did not apply).

24. *See Appellant's Response to Dep't of Env'tl. Protection's Mot. to Dismiss for Lack of Standing* at 2, *Matthews Int'l*, 2011 Pa. Environ. LEXIS 40 (No. 2008-235-R), available at http://ehb.courtapps.com/public/document_shower_pub.php?csNameID=3716 (arguing why Matthews had standing to challenge DEP action).

25. *See id.* (presenting appellant's argument regarding competitive interests to EHB).

26. *Compare Appellant's Response* at 2-3 (arguing Matthews had standing on both competitive interest and public notice grounds), *with Dep't of Env'tl. Protection's Mot. to Dismiss for Lack of Standing of Appellant Matthews Int'l Corp.* at 5-12, *Matthews Int'l*, 2011 Pa. Environ. LEXIS 40 (No. 2008-235-R), available at http://ehb.courtapps.com/public/document_shower_pub.php?csNameID=3716 (noting appellant argued standing based on public comment requirement, while DEP's Motion did not discuss public comment requirement).

27. *See Defendant's Motion to Dismiss* at 7-13, *Matthews Int'l*, 2011 Pa. Environ. LEXIS 40 (No. 2008-235-R) (refuting Matthews had standing to challenge DEP action).

28. *See id.* at 12 (explaining why Matthews' claim did not meet zone of interests test).

29. *See id.* at 9 (describing which statutory language supports DEP's argument and why).

30. *See Matthews Int'l*, 2011 Pa. Environ. LEXIS 40, at *15-16 (Pa. Env'tl. Hearing Bd. Jun. 16, 2011) (dismissing appeal for lack of standing and no public comment requirement applied for specific DEP action at issue).

with the DEP's argument that competitive interests were not among the protected interests outlined in the Act, and thus did not meet the zone of interests test.³¹ Additionally, the majority concluded the DEP was not required by either statute or regulation to provide public notice or opportunity to comment on its decision approving Granite's request for an exemption from the normal permitting requirements.³²

III. BACKGROUND

A. In the Zone (of Interests)

Pennsylvania law requires an appealing party have a certain level of interest in an agency's decision, especially decisions made by the DEP or other state agencies.³³ According to the jurisdiction provisions of the Environmental Hearing Board Act, persons challenging an action by the DEP must be "adversely affected" by the action in order to have standing.³⁴ This language is consistent with standing tests applied in both federal and state courts.³⁵

On the federal level, the test for standing was first aimed at the average citizen, as broadly outlined by the Supreme Court of the United States in *Commonwealth of Massachusetts v. Mellon (Mellon)*.³⁶ In *Mellon*, the appealing parties challenged a federal law that they argued took away the states' powers and the citizens' rights to due process.³⁷ In particular, the appellants argued that because the fed-

31. *See id.* at *10-12 (explaining competitive interests not included in zone of interests).

32. *See id.* at *15 (finding public notice not required by statute or regulation).

33. *See id.* at *4 (citing *Valley Creek Coal. v. Commw. of Pa., Dep't of Env'tl. Prot.*, No. 98-228-MG, 1999 WL 1295113 (Pa. Env'tl. Hearing Bd. Dec. 15, 1999) (stating purpose of standing doctrine is "to determine whether the appellant is the appropriate party to seek relief from a Department action").

34. *See* 35 PA. STAT. ANN. § 7514(c) (West, Westlaw through 2012) (describing when DEP can take action on orders, permits, licenses, or decisions). The DEP may:

take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person.

Id.

35. For further information on the standing tests applied by federal and Pennsylvania state courts, see *supra* notes 36-62 and accompanying text.

36. *See* *Massachusetts v. Mellon*, 262 U.S. 447, 447 (1923) (addressing standing for average citizen).

37. *See id.* at 479-80 (indicating appellants' argument that the laws in question take away citizens' basic rights).

eral government used taxpayer dollars to implement the federal law, taxpayers should have standing to challenge the validity of the law in question.³⁸ Because the statute in question affected such a vast number of taxpayers, the Court ruled the right to challenge did not apply to all taxpayers.³⁹ In order to have standing, a citizen must show he or she incurred a more direct injury from the statute in question.⁴⁰

The Supreme Court first firmly established the zone of interests test to determine which plaintiffs can challenge agency decisions in relation to a particular statute in the 1970 case *Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp (Camp)*.⁴¹ The appellants challenged a ruling by the Comptroller of the Currency stating, “[A]s an incident to their banking services, national banks[] . . . may make data processing services available to other banks and to bank customers.”⁴² The Court allowed the challenge by founding the statute’s general policies identified a specific group of people who could challenge actions taken in pursuit of enforcing the statute.⁴³ Specifically, the Court declared the issue of standing concerned “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁴⁴

More than twenty-five years later, the Supreme Court reaffirmed the zone of interests test in *Bennett v. Spear (Spear)*.⁴⁵ In *Spear*, citizens challenged an Environmental Protection Agency (EPA) ruling under the Endangered Species Act regarding the use of reservoir water to protect local species of fish.⁴⁶ The Court permitted the citizens’ suit because their claims were within the zone

38. *See id.* at 486 (illustrating why appellants feel citizens have been aggrieved and have standing to challenge statute).

39. *See id.* at 487-88 (explaining overload on courts if all taxpayers could challenge unfavorable laws).

40. *See id.* at 488 (outlining standing of average citizen).

41. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970) (depicting zone of interests test and what interests generally include).

42. *See id.* at 151 (illustrating ruling in dispute by allowing appellants’ data processing services can be provided to local banks and their customers by national banks).

43. *See id.* at 157-58 (explaining applicability of statutes in question to appellants).

44. *See id.* at 153 (interpreting of standing determinations).

45. *See generally Bennett v. Spear*, 520 U.S. 154 (1997) (upholding zone of interests test).

46. *See id.* at 158-59 (indicating Interior Department’s decision to minimize Klamath Project water levels as reason why appellants filed suit).

of interests specified in the Endangered Species Act.⁴⁷ The Court held specific provisions of any given statute would determine which interests the statute protected and thus, which persons may challenge an agency action under the statute.⁴⁸ Further, the Court stated the zone of interests test was generally satisfied in citizen suits brought under environmental statutes that authorize such suits by “any person.”⁴⁹

In Pennsylvania, the state courts have used the Supreme Court’s zone of interest test to determine which plaintiffs have standing to bring suit.⁵⁰ In 1975, the Supreme Court of Pennsylvania determined a plaintiff must have a “substantial interest” in order to have standing in *William Penn Parking Garage, Inc. v. City of Pittsburgh* (*William Penn Parking Garage*).⁵¹ Under the substantial interest requirement, the plaintiff must demonstrate some “discernible adverse effect” to an interest directly resulting from an agency action that is different from a general interest shared by all citizens.⁵² In *William Penn Parking Garage*, the appellants challenged a city ordinance “imposing a tax on all patrons of ‘non-residential parking places.’”⁵³ Ultimately, the court did not uphold the appellants’ challenge because the elected body that issued the ordinance did not exceed its authority.⁵⁴ The court also stated the aggrieved party’s interest must be directly related to the underlying policies protected by the specific law in question.⁵⁵

In 1984, the Supreme Court of Pennsylvania invoked the zone of interests test in *Upper Bucks County Vocational-Technical School Education Ass’n v. Upper Bucks County Vocational Technical School Joint*

47. *See id.* at 175-77 (determining appellants’ claim of commercial interest in Interior Department’s choice of action as meeting zone of interests test).

48. *See id.* at 162 (defining when grievances fall within zone of interests test). “[A] plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” *Id.*

49. *See id.* at 165-66 (stating statutory provisions allowing “any person” to bring suit should be interpreted liberally).

50. For further analysis of the Pennsylvania courts’ use of the zone of interests tests, see *infra* notes 51-61 and accompanying text.

51. *See William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975) (describing substantial interest).

52. *See id.* at 282, 286 (describing “direct” and “immediate” interests).

53. *See id.* at 275 (articulating why suit was initially filed).

54. *See id.* at 294-95 (explaining courts’ power to adjudicate taxation matters passed into law by elected bodies).

55. *See id.* at 284, 286 (citing cases for supplementary definition of immediate interest).

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Committee (Upper Bucks County Vocational-Technical School).⁵⁶ A teachers union challenged the local vocational school joint committee's decision to reduce the length of the school year due to a recent union strike.⁵⁷ The court used the zone of interests test to conclude the teachers, acting as taxpayers, did not have standing to challenge the ruling.⁵⁸ Similarly, the Pennsylvania Commonwealth Court applied the test in the 1993 case *Nernberg v. City of Pittsburgh (Nernberg)*.⁵⁹ In *Nernberg*, the appellants appealed the Pittsburgh City Council's approval for the construction of student housing near their residential apartments.⁶⁰ Ultimately, the court dismissed the case because the statute in question did not give the appellants standing.⁶¹

The EHB has also used a variation of the zone of interests test to determine whether an appellant can challenge a DEP action under the various statutes.⁶² The EHB first established in *Wurth v. Commonwealth of Pennsylvania, Department of Environmental Protection (Wurth)*⁶³ and *Township of Florence v. Commonwealth of Pennsylvania, Department of Environmental Protection (Township Of Florence)*⁶⁴ that in order to have standing to challenge an action taken by the DEP, an appellant must have been "aggrieved" by that action.⁶⁵ *Wurth* in-

56. See *Upper Bucks Cnty. Vocational-Technical Sch. Educ. Ass'n v. Upper Bucks Cnty. Vocational-Technical Sch. Joint Comm.*, 474 A.2d 1120, 1120 (Pa. 1984) (invoking zone of interests test).

57. *Id.* at 1120-22 (explaining factual background of case, including teachers' strike and subsequent decision by joint committee to shorten school year). The strike was resolved by the time of the ruling. *Id.*

58. *Id.* at 1123 (stating statute's benefit to teachers was incidental and not meant to be protective).

59. See *Nernberg v. Pittsburgh*, 620 A.2d 692, 694-95, 697 (Pa. Commw. Ct. 1993) (reaffirming governing status of zone of interests test).

60. *Id.* at 693 (explaining Pittsburgh City Council's decision to approve housing construction as rationale behind appellants suit).

61. See *id.* at 696 (agreeing with lower court's analysis that statute did not protect competitive interests).

62. For further analysis of the EHB's past decisions regarding standing, see *infra* notes 65-73 and accompanying text.

63. *Wurth v. Commw. of Pa., Dep't of Env'tl. Prot.*, No. 98-179-MG, 2000 WL 294469, at *9 (Pa. Env'tl. Hearing Bd. Feb. 29, 2000) (requiring appellant have substantial interest in litigation, which was greater than general citizens' interest in law enforcement).

64. *Twp. of Florence v. Commw. of Pa., Dep't of Env'tl. Prot.*, No. 96-045-MG, 1997 WL 588978, at *6 (Pa. Env'tl. Hearing Bd. Aug. 26, 1997) (characterizing need for substantial, direct, and immediate interest in DEP's action as essential requirement to show aggrieved claimant).

65. See *Wurth*, 2000 WL 294469 at *9 (citing *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975)) (stating aggrieved party must show direct harm with causal relation from challenged action); see also *Twp. of Florence*, 1997 WL 588978 at *6 (citing *William Penn Parking Garage*, 346 A.2d at 280)

volved the reissuance of a landfill permit to a private operator, with the EHB concluding the appellant did not have a sufficiently direct injury to establish standing.⁶⁶ In *Township of Florence*, the EHB dismissed the appeal of an air quality plan approval for the expansion of a municipal solid waste landfill because the appellant did not adequately demonstrate an interest in the outcome of the DEP's decision.⁶⁷

In the last decade, the EHB supplemented the zone of interests test with a more specific standing requirement, as illustrated in *Pennsylvania Trout Unlimited v. Commonwealth of Pennsylvania, Department of Environmental Protection (Pennsylvania Trout)*.⁶⁸ *Pennsylvania Trout* involved the DEP's issuance of a water obstruction and encroachment permit for the construction of a shopping mall.⁶⁹ The EHB ultimately found the DEP's decision had enough of a direct and adverse effect on the appellants to grant them standing.⁷⁰ While the test outlined by *Pennsylvania Trout* is similar to the zone of interests test, the opinion does not specifically mention any statutory provisions.⁷¹ Further, the EHB has directly applied the Supreme Court's analysis from *Camp* in other decisions regarding standing.⁷² Because both the Supreme Court of the United States

(emphasizing need to show substantial, direct, immediate interest in agency decision).

66. *Wurth*, 2000 WL 294469 at *1 (providing procedural posture).

67. *See Twp. of Florence*, 1997 WL 588978 at *1 (explaining appeal was denied for not demonstrating direct, immediate, and substantial interest in DEP action).

68. *See Pa. Trout v. Commw. of Pa., Dep't of Envtl. Prot., No. 2002-251-R*, 2003 WL 22321705, at *1-2 (Pa. Envtl. Hearing Bd. Sept. 24, 2003) (describing essential elements for standing).

69. *See id.* at *1 (portraying DEP's issuance of water obstruction and encroachment permit to construction and development group as reason for appeal).

70. *See id.* at *4-6 (holding appellants had standing because appellant group's members regularly used and enjoyed area in question and had future plans to use and enjoy the area).

71. *See id.* at *2 (citing *Giordano v. Commw. of Pa., Dep't of Envtl. Prot., No. 99-204-L*, 2000 WL 1506957, (Pa. Envtl. Hearing Bd. Oct. 4, 2000)) (outlining EHB test for standing as disputed action having, or will have, adverse effects, and appellants are among those to feel effects).

In order to establish standing, the appellants must prove that (1) the action being appealed has had - or there is an objectively reasonable threat that it will have - adverse effects, and (2) the appellants are among those who have been - or are likely to be - adversely affected in a substantial, direct, and immediate way [citations omitted] The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause).

Id.

72. *See McCutcheon v. Commw. of Pa., Dep't of Envtl. Res., No. 94-096-W*, 1995 WL 24326, at *2 (Pa. Envtl. Hearing Bd. Jan. 5, 1995) (holding appellant did

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and Pennsylvania common law apply nearly identical standards to determine standing for appellants, the EHB uses both standards interchangeably.⁷³

B. Informing the Public

In *Matthews Int'l*, the question of standing was related to the Air Pollution Control Act's public notice requirement, which provides standing to those who comment on a DEP action during the required public comment period.⁷⁴ The Act also requires the DEP to give public notice when it intends to approve a plan of construction or modification and issue a permit.⁷⁵ Further, the regulations promulgated by the DEP under the Act also require public notice when changing the exemption list—a list of qualifying sources of minor significance and physical changes of minor significance to sources.⁷⁶

The Supreme Court previously addressed the public notice requirement as it relates to agency actions under the Administrative Procedure Act.⁷⁷ The Natural Resources Defense Council challenged the Atomic Energy Commission's decision to grant a power company a license to operate a nuclear facility in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council (Vermont Yankee)*.⁷⁸ The Court ruled in favor of the power company because it followed all of the proper procedures in granting the license.⁷⁹ In

not have standing because statute did not protect appellant's private enterprise interests over others).

73. For further discussion of the Supreme Court and Pennsylvania courts' analyses of standing, see *supra* notes 36-61 and accompanying text.

74. See 35 PA. STAT. ANN. § 4010.2 (West, Westlaw through 2012) (specifying who has standing to appeal DEP action). "Any person who participated in the public comment process for a plan approval or permit shall have the right, within thirty (30) days from actual or constructive notice of the action, to appeal the action to the hearing board" *Id.*

75. See 35 PA. STAT. ANN. § 4006.1(b)(1) (West, Westlaw through 2012) (clarifying when DEP must provide public notice relating to permits). "The department shall provide public notice and the right to comment on all permits prior to issuance or denial and may hold public hearings concerning any permit." *Id.*

76. See 25 PA. CODE § 127.14(d) (West, Westlaw through 2012) (detailing when DEP must give public notice in relation to sources of minor significance and physical changes of minor significance to sources).

77. See *Lincoln v. Vigil*, 508 U.S. 182, 195-96 (1993) (outlining Administrative Procedure Act's public notice requirements); see also *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978) (noting importance of assuring due process for aggrieved individuals).

78. See *Vermont Yankee*, 435 U.S. at 519 (specifying agency's grant of nuclear license as why petitioner challenged).

79. See *id.* at 557-58 (explaining why majority disagreed with Court of Appeal for District of Columbia's ruling in favor of petitioner).

cases where an agency is making a “quasi-judicial” determination that affects a limited number of people, certain additional procedures may be required to afford due process to other interested parties.⁸⁰

The Court further addressed the public notice requirement in *Lincoln v. Vigil (Lincoln)*.⁸¹ In *Lincoln*, the petitioners challenged the Indian Health Service’s decision to cancel a regional health care program in order to reallocate resources for a nationwide program.⁸² At that time, the Court established the circumstances under which the “notice-and-comment” requirement must be enforced, as well as the exceptions to the requirement.⁸³ Ultimately, the Court ruled the Indian Health Service’s decision did not violate the obligations stated in the agency’s enabling act.⁸⁴

The Pennsylvania Commonwealth Court specifically addressed the public notice provisions of the Act in *Soil Remediation Systems, Inc. v. Department of Environmental Protection*.⁸⁵ The appellant challenged the DEP’s denial of their request to extend an air pollution control plan approval.⁸⁶ After the EHB dismissed the initial appeal, the court reversed and stated the appellant did not have adequate notice of the DEP’s denial.⁸⁷ The court held the DEP must follow all procedures outlined in the Act to properly meet the public notice requirement.⁸⁸ The court determined there was a reasonable chance of depriving the appellant of the opportunity to become fully availed of the appeal process if the DEP either failed to follow the requirement entirely or if it claimed to have met the require-

80. *See id.* at 542 (indicating when additional measures are needed in rulemaking decisions to assure due process for affected individuals).

81. *See Lincoln*, 508 U.S. at 184, 189 (narrating respondent children’s argument that agency decision violated public notice-and-comment requirements of Administrative Procedure Act).

82. *See id.* (explaining respondent’s challenge to discontinuation of direct clinical services through Indian children’s program).

83. *See id.* at 196 (stating notice requirement applies when agency makes “legislative” or “substantive” rules, but not rules regarding internal agency matter not affecting general public).

84. *See id.* at 199 (distinguishing from cases used by Tenth Circuit to rule in favor of petitioners).

85. *See Soil Remediation Sys., Inc. v. Dep’t of Env’tl. Prot.*, 703 A.2d 1081, 1083 (Pa. Commw. Ct. 1997) (specifying public notice provisions of Air Pollution Control Act as basis of main issue).

86. *See id.* at 1082 (illustrating DEP’s dealings with appellant regarding request for extension of plan approval as basis for appeal).

87. *See id.* at 1084 (reversing EHB’s decision because DEP’s advance notice letter did not properly constitute notice under the Act).

88. *See id.* (recognizing appeal process may commence only after DEP determination is final and affected parties receive notice).

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ment through alternative means that were unknown or confusing to the appellant.⁸⁹

In an opinion written by then-Chief Judge and current DEP Secretary Michael Krancer, the EHB most recently laid out the test to determine if there was adequate public notice and participation in *Ainjar Trust v. Commonwealth of Pennsylvania, Department of Environmental Protection (Ainjar Trust)*.⁹⁰ *Ainjar Trust* involved a challenge to the DEP's approval of an Act 537 sewage-planning module, which was ultimately upheld by the EHB.⁹¹ Ultimately, the determining factor was whether the appellant had "access" to the appealed action in order "to comment on [it]."⁹²

Despite this encouragement to provide the public with notice, the Pennsylvania Commonwealth Court has held that in determining whether public notice is required in a given situation, the statute in question must specifically state such a requirement applies.⁹³ Neither the EHB nor a court can require public notice when such a provision is not clearly included in the applicable statute, a rule emphasized by the Commonwealth Court in *Presock v. Department of Military and Veterans Affairs (Presock)*.⁹⁴ The Department of Military and Veterans Affairs' terminated a paralyzed veteran's pension, from which the veteran appealed arguing the statute did not require a "loss of use" of his extremities to be a "total" inability to use his extremities.⁹⁵ The court reversed the termination decision and determined the veteran was not required to show "absolute[ly] no use of the arms and legs," as the Department of Military and Veter-

89. See *id.* (stating "advance copy" of final decision letter could reasonably be interpreted to not be final action from which appeal could begin).

90. See *Ainjar Trust v. Commw. of Pa., Dep't of Envtl. Prot.*, No. 99-248-K, 2001 WL 1335018, at *28-30 (Pa. Envtl. Hearing Bd. Oct. 10, 2001) (articulating opinion written by Michael Krancer that held appellant had adequate notice of project and was able to participate in decision-making process).

91. See *id.* at *28 (summarizing challenge to whether adequate notice and opportunity to participate was provided and subsequent EHB ruling in favor of DEP).

92. See *id.* at *28 (quoting *Green Thornbury Comm. v. Commw. of Pa., Dep't of Envtl. Res.*, No. 93-271-W, 1995 WL 348012, at *16 (Pa. Envtl. Hearing Bd. May 25, 1995)) (finding adequate access to module as determining factor).

93. See *Presock v. Dept. of Military and Veterans Affairs*, 855 A.2d 928, 931 (Pa. Commw. Ct. 2004) (stating despite encouragement to liberally construe statutes, words cannot essentially be added to statute in lieu of interpreting statute as written).

94. See *id.* at 931 (specifying extent of judicial interpretation of statute). "Any omitted words may not be supplied in interpreting provisions of a statute." *Id.*

95. See *id.* at 930 (indicating Department of Veterans' Affairs termination of Presock's pension was catalyst for appeal).

ans Affairs had insisted.⁹⁶ Such an interpretation, the court concluded, improperly added the word “total” to the statutory definition of “loss of use.”⁹⁷

IV. NARRATIVE ANALYSIS

After hearing arguments presented from both sides, the EHB concluded Matthews had no legal basis to bring the challenge and dismissed the suit.⁹⁸ The EHB ruled Matthews did not have proper standing under the Air Pollution Control Act to bring the challenge.⁹⁹ It also found Matthews’s claim that the DEP failed to abide by the proper public notice requirement lacked merit.¹⁰⁰

The EHB’s opinion principally discussed the issue of whether Matthews had standing to bring the challenge.¹⁰¹ The majority relied on its precedent to ascertain the standing rules to determine whether the appeal would go forward.¹⁰² The majority also drew on various facets of the standing doctrines developed by the Supreme Court of the United States and Pennsylvania courts.¹⁰³ The EHB first addressed whether Matthews was an aggrieved party as a result of the DEP’s decision.¹⁰⁴ In doing so, the majority specifically relied on earlier EHB decisions, such as *Wurth, Township of Florence*, and *Pennsylvania Trout*, to determine if Matthews had a threatened “substantial” interest, and if that interest was “direct” and “immediate” to the action in question.¹⁰⁵ In order to clarify the specific interests required for standing, the majority turned to the Supreme

96. *See id.* at 931-32 (holding Department’s interpretation of statute was not consistent with statute’s wording).

97. *See id.* at 932 (reversing because Department’s termination of benefits was based on improper interpretation of statute).

98. *See Matthews Int’l Corp. v. Commw. of Pa., Dep’t of Env’t. Prot.*, No. 2008-235-R, 2011 Pa. Environ. LEXIS 40, at *15 (Pa. Env’t. Hearing Bd. Jun. 16, 2011) (dismissing appeal after determining Matthews did not have standing and public notice requirement did not apply).

99. *See id.* at *6 (determining Matthews did not have standing to challenge DEP decision).

100. *See id.* at *15 (dismissing Matthews claim that DEP did not follow public notice procedures).

101. *See id.* at *4-12 (explaining EHB’s decision on standing issue, specifically that Matthews’s competitive interests did not yield standing to challenge DEP decision).

102. *See id.* at *5-6 (analyzing previous EHB cases).

103. *See Matthews Int’l*, 2011 Pa. Environ. LEXIS 40, at *7-8 (discussing majority’s analysis of previous state and federal court cases).

104. *See id.* at *6 (explaining appellant must be “aggrieved” to have standing to challenge action).

105. *See id.* (citing *Pa. Trout v. Commw. of Pa., Dep’t of Env’t. Prot.*, No. 2002-251-R, 2003 WL 22321705, at *2 (Pa. Env’t. Hearing Bd. Sept. 24, 2003); *Giordano v. Commw. of Pa., Dep’t of Env’t. Prot.*, No. 99-204-L, 2000 WL 1506957, at *1 (Pa.

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Court of Pennsylvania's decisions in *William Penn Parking Garage* and *Upper Bucks County Vocational-Technical School*, as well as the Pennsylvania Commonwealth Court's subsequent *Nernberg* decision, for guidance.¹⁰⁶ The EHB also referred to a footnote in the U.S. Supreme Court's decision in *Camp* to illustrate how the state's common law rules on standing derive from the nation's highest legal interpretative body.¹⁰⁷

In combining these similar determinations, the majority also used the language of the Act itself to reach its conclusion.¹⁰⁸ Matthews claimed that § 4002(a) (iv) of the Act confirmed the legislature intended the Act to prevent agency actions from interfering with individual competitive interests.¹⁰⁹ This subsection states it is the "policy of the Commonwealth" to protect its air resources "to the degree necessary for the . . . development, attraction and expansion of industry, commerce and agriculture . . ." ¹¹⁰ The majority rejected Matthews's argument, stating the subsection "encourage[ed] competition and the expansion of industry," which was contrary to Matthews's argument.¹¹¹ Matthews also relied on previous EHB decisions to demonstrate an individual competitive interest was sufficient to meet the standing requirement.¹¹² The majority, however, pointed out that the appellants' interests in those specific cases were more direct and immediate than the interest Matthews was claiming.¹¹³ As a result, the majority deemed Matthews's interest as one the Act did not intend to protect; therefore, Matthews did not have standing to bring the challenge.¹¹⁴

Env'tl. Hearing Bd. Oct. 4, 2000)) (explaining effect DEP action must have on appellant for appellant to have standing).

106. *See id.* at *7-8 (relying on state court cases to explain what interests meet standing requirement).

107. *See id.* at *7 (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (describing test as zone of interests protected by statute).

108. *See Matthews Int'l*, 2011 Pa. Envirn. LEXIS 40, at *9-10 (explaining majority's use of statutory language to support decision).

109. *See id.* (specifying provision claimed by Matthews to give it standing based on its own competitive interests).

110. *See* 35 PA. STAT. ANN. § 4002(a) (West, Westlaw through 2012) (detailing wording of relevant statutory provision).

111. *See Matthews Int'l*, 2011 Pa. Envirn. LEXIS 40, at *10 (interpreting statutory language).

112. *See id.* (pointing out appellant's argument in support of standing).

113. *See id.* at *10-11 (distinguishing previous cases supporting argument from circumstances of present case).

114. *Id.* at *11-12 (concluding Matthews's competitive interests were not within Act's zone of interests on the issue of standing).

Concerning the public notice requirement, the majority once again turned to the wording of the statute and regulation to determine whether the DEP's action in this instance required public notice.¹¹⁵ Matthews contended both the statute and regulation in question required the DEP to provide public notice and the right to comment when approving construction and modification plans and permit requirements.¹¹⁶ While public notice was required when the DEP intended to approve the plans and requirements, the majority did not find such a prerequisite when the DEP ruled on a determination for an exception to the requirements.¹¹⁷ According to Matthews, the public notice and comment requirement should be in place for the determination of exemptions from normal statutory obligations.¹¹⁸ Yet the majority countered that to do so would add a provision that did not exist in the statute, which the Commonwealth Court previously declared unlawful for courts to do.¹¹⁹

While the dissent agreed with the majority that an individual competitive interest did not give an appellant standing to bring a challenge, it insisted the majority misinterpreted the portion of the statute regarding the public notice requirement.¹²⁰ The dissent asserted the public notice requirement was broader than the majority's interpretation, and concluded the statute did require public notice for this type of action.¹²¹ It reasoned that because the statute gave the right of appeal to those who participated in the notice and comment process, and process was denied in this case, the statute gave the right to appeal to those who *would have* participated in

115. See *id.* at *12-15 (using Act's language and language of subsequent regulations regarding when public notice is required and when a person may challenge DEP action to resolve public notice issue).

116. See *Matthews Int'l*, 2011 Pa. Environ. LEXIS 40, at *12 (providing Matthews's argument that it did not receive notice or ample time to comment).

117. *Id.* (noting no statutory provision requires notice when granting exemptions under rules).

118. *Id.* at *13 (explaining resulting inconsistency if Matthews's interpretation of public notice requirement were accepted).

119. *Id.* at *13-14 (utilizing *Presock* to explain limitation on judicial interpretation of statutes). "Even where courts are encouraged to liberally construe statutes . . . words may not be added under the guise of interpreting the meaning of the statute." *Id.*

120. See *id.* at *16-18 (Mather, J., concurring in part and dissenting in part) (differing in opinion on when a person may challenge DEP action and how standing can be established).

121. See *Matthews Int'l*, 2011 Pa. Environ. LEXIS 40, at *17 (Mather, J., concurring in part and dissenting in part) (discussing statutory provision stating public comment process requiring opportunity for public comment for plan approvals and operating permits prior to issuance).

the public notice and comment period if it had been available.¹²² The majority, however, determined the dissent's interpretation would not only bog down the DEP in carrying out the statute's provisions, but also potentially flood the EHB's docket with cases from appellants claiming they would have commented had they been given the opportunity.¹²³ The majority felt this interpretation was contrary to what the state Legislature intended.¹²⁴

V. CRITICAL ANALYSIS

The EHB majority properly interpreted prior case law to arrive at its conclusion on each of the major issues in *Matthews Int'l*.¹²⁵ The Board's conclusions were consistent with both the precedent set by the Supreme Court of the United States, the Pennsylvania courts, and the EHB's previous decisions.¹²⁶ The EHB's interpretation of the statutory language, which provides standing to challenge agency actions to average citizens who make comments, however, challenges more than thirty-five years of Pennsylvania case law and nearly ninety years of Supreme Court jurisprudence.¹²⁷

In addressing the standing issue, the majority relied on the precedent set by the Supreme Court in *Camp*.¹²⁸ The EHB recognized that to have standing, one must have the type of interest the legislation intended to protect.¹²⁹ In *Camp*, as well as in Pennsylvania cases, the interest at stake had to be "among the policies underlying the legal rule relied upon by the person claiming to be 'aggrieved.'"¹³⁰ The Supreme Court of Pennsylvania addressed the particular grievance raised in *Matthews Int'l*, competitive interests,

122. *Id.* at *17-18 (arguing loss of right to publicly comment gave *Matthews* automatic right to appeal).

123. *See id.* at *15 (majority opinion) (countering dissent's interpretation of standing in relation to public notice).

124. *See id.* (arguing dissent's interpretation was inconsistent with intent of Pennsylvania Legislature).

125. For more information on the majority's interpretation of prior cases, see *supra* notes 102-119 and accompanying text.

126. For more information on the precedents used by the EHB in *Matthews Int'l*, see *supra* notes 105-107 and accompanying text.

127. For further discussion of Supreme Court and Pennsylvania state court decisions regarding standing, see *supra* notes 36-61 and accompanying text.

128. For more information on the zone of interests test in *Camp*, see *supra* notes 41-44 and accompanying text.

129. *See Matthews Int'l*, 2011 Pa. Envir. LEXIS 40, at *7-9 (explaining primary definition of "immediate" interest).

130. For further explanation of Pennsylvania cases upholding the zone of interests test, see *supra* notes 50-61 and accompanying text.

and held that such an interest would grant standing only if the legislation explicitly protected that interest.¹³¹

Further, the majority consistently used several of its prior decisions to supplement the zone of interests test, and confirm that standing is also contingent on the appellant actually being an aggrieved party.¹³² The precise test for what constitutes an aggrieved party was previously outlined on more than one occasion and again used in *Matthews Int'l*.¹³³ This supplemental test is consistent with the established Pennsylvania case law in *William Penn Parking Garage*, and also with the case law set by the Supreme Court in *Melton*.¹³⁴ Through the use of the zone of interests test and the supplemental aggrieved party test, both of which were established in precedent more than forty years prior, the majority concluded the appellant's competitive interests were not among the protected interests outlined by the Act.¹³⁵

The majority primarily relied on the language of the Act itself to determine whether the DEP violated the requirements for public notice and whether the appellant subsequently gained standing because of the violation.¹³⁶ The majority then addressed Matthews's argument that this situation should be included in the public notice requirements, citing several Pennsylvania Commonwealth Court cases that stated otherwise.¹³⁷ In particular, *Presock* emphasized that even where courts are encouraged to construe statutes and regulations liberally, words cannot be added where they do not exist.¹³⁸ In the past, the EHB liberally construed the public notice

131. See *Upper Bucks Cnty. Vocational-Technical Sch. Educ. Ass'n v. Upper Bucks Cnty. Vocational-Technical Sch. Joint Comm.*, 474 A.2d 1120, 1122-23 (Pa. 1984) (asserting benefits and costs incidentally related to legislation or regulation are not considered within zone of interests).

132. For additional EHB cases stating appellants must be an aggrieved party, see *supra* notes 62-71 and accompanying text.

133. For more information on the specific test to determine who constitutes an aggrieved party, see *supra* notes 68-71 and accompanying text.

134. For further discussion of precedential cases establishing the standing requirement of being directly affected by agency action, see *supra* notes 36-71 and accompanying text.

135. For more information on the EHB's analysis of the appellant's standing claim in *Matthews Int'l*, see *supra* notes 109-119 and accompanying text.

136. See *Matthews Int'l Corp. v. Commw. of Pa., Dep't of Env'tl. Prot.*, No. 2008-235-R, 2011 Pa. Env'tl. LEXIS 40, at *12-13 (Pa. Env'tl. Hearing Bd. Jun. 16, 2011) (emphasizing statutory language regarding when public notice is required and how people can gain standing through public comment process as most pertinent to issue).

137. See *id.* at *13-14 (rejecting appellant's interpretation of statute by citing precedent from Pennsylvania Commonwealth Court).

138. For a discussion of the Commonwealth Court's construction of the pertinent statutory language in *Presock*, see *supra* notes 93-97 and accompanying text.

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requirement in relation to standing by requiring appellants to have adequate notice of the opportunity to make a public comment.¹³⁹ The subsequent *Presock* case, however, limited the test to cases where the public notice requirement is specified in the statute.¹⁴⁰ The majority correctly recognized and applied this limitation in *Matthews Int'l*, pointing out the statutory language only required public notice on the issuance of permits.¹⁴¹ The Act does not require the DEP to issue public notice when they rule on an exemption from the Act's permitting requirements.¹⁴²

The dissent, while correct in concurring that *Matthews* did not have standing based on competitive interests, incorrectly asserted that *Matthews* had standing through the public notice requirement.¹⁴³ The dissent argued that under the Act, "a person has the right to participate in the public comment process for plan approvals and operating permits."¹⁴⁴ It then proffered that because *Matthews* would have participated in the public comment process had there been one, its objection to its loss of the right to publicly comment was valid, and thus, it gained standing to challenge the action.¹⁴⁵ This analysis is flawed, however, because the Act neither requires a public comment process in order to grant exceptions to permits, nor provides standing for probable participation in the process.¹⁴⁶ The dissent even stated, "A person establishes standing *through the act of participating* in the public comment process."¹⁴⁷

139. For more information on the EHB's past analysis of the public notice issue, see *supra* notes 90-93 and accompanying text.

140. See *Presock v. Dep't. of Military and Veterans Affairs*, 855 A.2d 928, 931 (Pa. Commw. Ct. 2004) (stating omitted words cannot be used to interpret statutory provisions).

141. For more information on the EHB's analysis of the public notice requirement in *Matthews Int'l*, see *supra* notes 115-124 and accompanying text.

142. See *Matthews Int'l Corp. v. Commw. of Pa., Dep't of Env't. Prot.*, No. 2008-235-R, 2011 Pa. Env't. LEXIS 40, at *12 (Pa. Env't. Hearing Bd. Jun. 16, 2011) (holding statute and corresponding regulation did not require public notice alleged by appellant).

143. See *generally id.* at *16-25 (Mather, J., concurring in part and dissenting in part) (arguing in dissent that public notice was required, which gave appellant standing to challenge DEP's action).

144. *Id.* at *17 (citing 35 PA. STAT. ANN. § 4006.1(b) (West, Westlaw through 2012)) (describing statutory provision imparting standing on *Matthews*).

145. See *id.* at *17-18 (concluding *Matthews* had standing for appeal).

146. See *id.* at *12-13 (majority opinion) (citing 25 PA. CODE § 127.14(d) (West, Westlaw through 2012); 35 PA. STAT. ANN. § 4006.1(b) (West, Westlaw through 2012)) (explaining statute and regulation do not require public notice for exemptions to permit requirements or provide standing to parties who would have participated in public comment process that did not happen).

147. See *Matthews Int'l*, 2011 Pa. Env't. LEXIS 40, at *17 (Mather, J., concurring in part and dissenting in part) (emphasis added) (recognizing participation in comment period provides standing).

The dissent essentially admitted that according to the statute, a person must actually participate in the public comment process to have standing to challenge the action.¹⁴⁸ By arguing otherwise, the dissent tried to do exactly what the majority and case precedent (including *Presock*) prohibited—adding language to the statute that does not already exist.¹⁴⁹

The *Matthews Int'l* decision, in its entirety, is arguably consistent with the zone of interests test.¹⁵⁰ The EHB cited the Act in determining “any person who participated in the public comment process for a plan approval or permit” has standing to appeal the action to the EHB.¹⁵¹ Further, such an interpretation does not add words to the statute, as forbidden by previous Pennsylvania Commonwealth Court cases.¹⁵² The statutory language gives standing to a person who makes a public comment; thus, those who make public comments have an interest in the agency action that is protected by the statute.¹⁵³

This interpretation of the public notice provisions of the Act, however, undermines the broader principle initially established in *Mellon* of precluding standing to just any ordinary citizen.¹⁵⁴ Further, Pennsylvania courts have upheld this concept throughout the development of the zone of interests standing doctrine.¹⁵⁵ This interpretation also overrules the EHB’s own recent precedent setting out the test to establish standing.¹⁵⁶ The test even states the harm alleged by the appellant must be “greater than the population at large” and that there must be “a direct and immediate connection

148. *See id.* at *17 (acknowledging actual participation in public comment process imparts standing).

149. *See Presock v. Dept. of Military and Veterans Affairs*, 855 A.2d 928, 931 (Pa. Commw. Ct. 2004) (observing words may not be essentially added to statute’s language during course of interpretation).

150. *See Matthews Int'l*, 2011 Pa. Environ. LEXIS 40, at *6-12 (providing details on various zone of interests tests used in analyzing whether *Matthews* had standing to challenge DEP action).

151. *Id.* at *14 (citing 35 PA. STAT. ANN. § 4010.2 (West, Westlaw through 2012)) (describing how participating in public notice period grants appellant standing to appeal agency action).

152. For further analysis of precedent stating that language cannot be added to a statute, see *supra* notes 119 and accompanying text.

153. *See* 35 PA. STAT. ANN. § 4010.2 (West, Westlaw through 2012) (providing those who participate in public comment process for plan approval or permit with right to appeal action to EHB within thirty days of notice of action).

154. For more information on *Mellon’s* analysis on granting standing to ordinary citizens, see *supra* notes 36-40 and accompanying text.

155. For more information on Pennsylvania case law reinforcing the *Mellon* analysis, see *supra* notes 50-73 and accompanying text.

156. For more information on previous EHB cases establishing a test for standing, see *supra* notes 63-71 and accompanying text.

between the action under appeal and the appellant's harm."¹⁵⁷ *Matthews Int'l* is in direct conflict with that test, particularly when addressing the public notice requirement.¹⁵⁸

VI. IMPACT

While the EHB addressed the standing and public notice issues separately in a reasonable manner, the law generated from the combined interpretations may have improperly expanded the grounds for standing in challenging agency actions.¹⁵⁹ The EHB's ruling on the standing issue alone was consistently relied upon both federal and state precedent.¹⁶⁰ Subsequently, its interpretation of the public notice requirement, which relied mainly on the language of the Act itself, arguably created a ground for standing that would not normally exist under the zone of interests test or the EHB's previous jurisprudence on the issue.¹⁶¹

In its interpretation of the public notice issue, the majority rejected the dissent's argument that anyone who would have participated in the public comment process, as well as those who actually did participate, has standing to challenge an agency action.¹⁶² The EHB even went further to specifically state that this particular interpretation was *not* intended by the legislature when passing the Act.¹⁶³ The EHB, however, does not refute the assumption that any person who participates in the public comment process has standing.¹⁶⁴ Without refuting this assumption, the EHB creates the possibility that a citizen, not aggrieved by an agency action or within the zone of interests, has standing to bring a lawsuit against the

157. See *Pa. Trout v. Commw. of Pa., Dep't of Env't. Prot.*, No. 2002-251-R, 2003 WL 22321705, at *2 (Pa. Env't. Hearing Bd. Sept. 24, 2003) (describing level of harm experienced and clarity of causation between harm and agency action needed for individual to establish standing).

158. For a detailed explanation of the EHB majority's analysis of the public comment provision, see *supra* notes 115-124 and accompanying text.

159. For further discussion on how the EHB may have expanded grounds for standing, see *infra* notes 101-124 and accompanying text.

160. See *supra* notes 101-114 and accompanying text (analyzing standing requirement in *Matthews Int'l*).

161. See *supra* notes 115-119 and accompanying text (examining public notice requirement in light of case at bar).

162. See *supra* notes 115-124 and accompanying text (interpreting public notice issue).

163. *Matthews Int'l Corp. v. Commw. of Pa., Dep't of Env't. Prot.*, No. 2008-235-R, 2011 Pa. Env't. LEXIS 40, at *15 (Pa. Env't. Hearing Bd. Jun. 16, 2011) (interpreting legislative intent).

164. See *id.* at *14-15 (analyzing standing requirement in relation to submitting public comment).

DEP for a decision the citizen did not like if the person commented on it.¹⁶⁵

At the very least, *Matthews Int'l* has the potential to create much confusion as to whether someone has standing to challenge a DEP action under the Pennsylvania Air Pollution Control Act.¹⁶⁶ On one hand, the DEP will use the case to contend an appellant must be aggrieved, as well as substantially and directly affected, by the decision in order to have standing to challenge.¹⁶⁷ On the other hand, an appellant will use the case to argue the Act only requires participation in the public comment process to have standing.¹⁶⁸ Both conclusions are explicit in the opinion, yet they are inherently contradictory.¹⁶⁹

If the EHB decides participation in the public comment process does fall within the Act's zone of interests, it subjects itself to a heavier caseload.¹⁷⁰ By merely submitting a comment, a citizen would have standing to challenge an agency action taken under the Act, provided there was a public comment process.¹⁷¹ This means more people in general are likely to file challenges before the Board, leading to unnecessary litigation that ultimately disrupts the Board from carrying out its duties.¹⁷²

An expansion of the standing requirements could, however, promote improved civic involvement from ordinary citizens.¹⁷³ If ordinary citizens can challenge an agency action subject to the public comment process, it is likely more citizens will participate in the process, even if the purpose involves gaining standing to challenge

165. For further analysis of how average citizens outside the traditional zone of interests can have standing, see *supra* notes 150-153 and accompanying text.

166. For further discussion of the confusion created by *Matthews Int'l* regarding standing, see *infra* notes 167-169 and accompanying text.

167. See *Matthews Int'l*, 2011 Pa. Envir. LEXIS 40, at *2-6 (discussing each party's arguments on whether Matthews attained standing to challenge DEP action based on competitive interests).

168. See *id.* at *14-15 (analyzing Air Pollution Control Act's public comment provision in relation to standing).

169. See *id.* at *6-7, 14 (contradicting own interpretation of zone of interests test providing higher requirements for standing).

170. See Church, *supra* note 6, at 449-50 (explaining zone of interests tests and other standing tests originated to prevent courts from experiencing time-consuming caseloads).

171. For further discussion on how average citizens can have standing by submitting comments, see *supra* note 153 and accompanying text.

172. See Church, *supra* note 6, at 447 (explaining zone of interests test prevents abuse of judicial system while providing those with good faith claims access to court).

173. See Rennie, *supra* note 8, at 375-76 (stating Congress generally encouraged citizen suits in environmental statutes, yet subsequent standing tests imposed by courts restrict these suits).

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the action if dissatisfied with the result.¹⁷⁴ Consequently, the more people that have standing to challenge such a DEP action, the more the DEP would be inclined to consider public comments before promulgating a new rule or issuing a permit.¹⁷⁵

Because this decision was issued at the EHB level, it only affects future cases that come before the EHB.¹⁷⁶ Further, the case is mandatory legal guidance for only EHB cases involving standing under the Air Pollution Control Act and the public notice requirement.¹⁷⁷ Despite the limited immediate legal effect of *Matthews Int'l*, the potential legal loophole to the zone of interests test created by the case could possibly broaden the standing requirement for other similarly worded statutes.¹⁷⁸

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174. *See id.* at 399 (stating creating additional elements for standing deter “worthy plaintiffs” from seeking “valid legal interests”).

175. *See Gardner*, *supra* note 9, at 1 (quoting S. Doc. No. 248, 79th Cong., 2d Sess. (1946), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, at 19-20 (1948)) (explaining importance of public participation in rulemaking). “[Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.” *Id.*

176. *See* 35 PA. STAT. ANN. § 7514(a) (West, Westlaw through 2012) (explaining effective scope of EHB decision making as limited to actions and decisions made by DEP).

177. *See id.* at § 7514(a)-(b) (explaining specific types of cases Board adjudicates).

178. For further discussion on how *Matthews Int'l* could broaden standing for similarly worded statutes, see *supra* notes 150-153 and accompanying text.

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