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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 6 MAP 2017

EQT PRODUCTION COMPANY,

Appellee,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellant.

BRIEF FOR APPELLEE EQT PRODUCTION COMPANY

Appeal from the Final Order of the Commonwealth Court of Pennsylvania at No. 485 MD 2014, Entered January 11, 2017

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INTRODUCTION

There are two fatal flaws in the Department's interpretation of the operative provisions of the Clean Streams Law. First, the Department ignores the preposition "into" in the text of the statute. Second, the Department's asserted interpretation has no limiting principle, resulting in potentially endless penalties, to which the Department's only and legally unsatisfying response is "trust us." When these two flaws are coupled with the amendatory history of the Clean Streams Law and the principles of statutory construction mandated by the General Assembly and the controlling precedent regarding those statutory construction principles, there is an overwhelming case that the Commonwealth Court correctly interpreted the statute, and this Court should affirm the declaratory judgment.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Did the Commonwealth Court correctly hold that Section 301 of the Clean Streams Law "is a provision that prohibits acts or omissions resulting in the initial active discharge or entry of industrial waste into waters of the Commonwealth and is not a provision that authorizes the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway of the Commonwealth following its initial entry into the waterways of the Commonwealth?"

   The Commonwealth Court answered in the affirmative.

2. If the Commonwealth Court had not confined its analysis to Section 301 and had also construed Sections 307 and 401 of the Clean Streams Law, should the statutory construction parallel that of Section 301, concluding that those provisions "prohibit acts or omissions resulting in the initial active discharge or entry of industrial waste [and polluting substances] into waters of the Commonwealth and [are] not provision[s] that authorize[] the imposition of ongoing penalties for the continuing presence of an industrial waste [or pollutant] in a waterway of the Commonwealth following its initial entry into the waterways of the Commonwealth?"

   The Commonwealth Court did not answer this question.

3. Were the questions presented to the Commonwealth Court pure legal question that can be decided without the need of a factual record and without waiting for the Commonwealth Court to resolve the pending appeals of the Environmental Hearing Board's Adjudication?

   The Commonwealth Court answered in the affirmative.

COUNTER-STATEMENT OF THE CASE

I. Form of the Action

This appeal originated as a declaratory judgment action within the Commonwealth Court's original jurisdiction. The Department of Environmental Protection ("Department" or "DEP") has appealed the Commonwealth Court's grant of summary relief to EQT Production Company ("EPC") on the legal issue of the proper interpretation of Sections 301, 307 and 401 of the Pennsylvania Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001.

II. Factual Background and Procedural History

In the fall of 2011, EPC built an impoundment with a synthetic membrane liner, known as the "Pad S Impoundment," which had the capacity to store six million gallons of flowback and produced water to hydraulically fracture gas wells on its Phoenix Pad S well pad in Duncan Township, Tioga County. (R. 20-21a (EPC Complaint, ¶ 7); R. 66a (DEP Answer, ¶ 7))

On May 30, 2012, EPC reported to the Department that it was likely that the Pad S Impoundment was leaking to the subsurface beneath the impoundment. (R. 3-4a (DEP Answer, ¶ 9)) EPC emptied the Pad S Impoundment and the Department confirmed that the Pad S Impoundment had been drained of fluids by June 11, 2012. (R. 95a (EPC's Application for

Summary Relief, ¶ 3); R. 138a (DEP's Answer to EPC's Application for Summary Relief, ¶ 3))

EPC patched the damaged liner in the drained Pad S Impoundment by June 15, 2012. It also installed trenches and sumps at five locations hydrogeologically downgradient from the Pad S Impoundment by June 15, 2012 to collect groundwater that might be affected by the release. (R. 22a (EPC Complaint, ¶ 12); R. 68a (DEP Answer, ¶ 12)) EPC entered into the formal cleanup process under the Pennsylvania Land Recycling and Environmental Remediation Standards Act of 1995, 35 P.S. §§ 6026.101-6026.909 (known as "Act 2").[1] (R. 22a (EPC Complaint, ¶¶ 13-14); R. 68-69a (DEP Answer, ¶¶ 13-14)) EPC excavated the affected soils under the Pad S Impoundment liner by September 27, 2012. (R. 154a (DEP Response to EPC's RFA 23))[2] EPC has demonstrated attainment with the Act 2 Statewide Health Standards for soil beneath the former Pad S Impoundment and is working toward meeting groundwater cleanup standards. (R. 22a (EPC Complaint, ¶ 14); R. 68-69a (DEP Answer, ¶ 14))

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[1] A party may clean up soil or groundwater under Act 2 to defined risk-based standards that the Department has previously determined protect the environment. Act 2 does not require the remediator to entirely remove a released constituent from the environment, if even technically feasible, but rather provides standards that, when met, release a party from further cleanup liability for that constituent. *See* 35 P.S. § 6026.501(a).

[2] "DEP Response to EPC's RFA 23" refers to the Department's June 4, 2015 Response to EPC's First Request for Admissions.

On May 9, 2014, the Department proposed a Consent Assessment of Civil Penalty of $1,270,871 to settle EPC's civil penalty liability related to the release from the Pad S Impoundment. (R. 31-45a (EPC Complaint, Ex. A); R. 69a (DEP Answer, ¶ 15)) EPC believed the Department's excessive demand reflected an unlawful interpretation of the CSL. The Department advised EPC that it was not willing to settle the matter for less than $1.2 million. (R. 70a (DEP Answer, ¶ 18))

Facing an excessive non-negotiable demand with no forum to resolve the matter, EPC filed an original jurisdiction declaratory judgment action in the Commonwealth Court on September 12, 2014 to challenge the Department's legal position that EPC is liable under Section 301, 307 or 401 of the CSL for each day that a pollutant continues to be present in waters of the Commonwealth. Two weeks later, on October 7, 2014, the Department filed a Complaint for Civil Penalties with the Environmental Hearing Board (the "EHB Complaint") in which it asked the Board to impose a civil penalty of $4,532,296 for alleged violations ongoing through September 25, 2014 plus an undetermined penalty for each day of alleged continuing violations after September 25, 2014. (R. 120a (EPC's Application for Summary Relief, Ex. A [EHB Complaint, ¶ 89])) On May 26, 2017, the Board issued its Adjudication and assessed a civil penalty of $1,137,295.76. *Com., Dep't of Envtl. Prot. v. EQT*

Prod. Co., EHB Dkt. No. 2014-140-CP-L (May 26, 2017) (the "Adjudication"). Both parties have appealed the Adjudication to the Commonwealth Court.[3]

On October 20, 2014, the Department filed Preliminary Objections asserting that the Commonwealth Court lacked jurisdiction, which that court sustained on February 20, 2015. *EQT Prod. Co. v. Dep't of Envtl. Prot. of Com.*, 114 A.3d 438 (Pa.Cmwlth. 2015). This Court reversed, holding that this case presents "a sufficient, actual controversy and [falls] within the class of disputes that are a proper subject of pre-enforcement judicial review." *EQT Prod. Co. v. Dep't of Envtl. Prot. of Com.*, 130 A.3d 752, 758 (Pa. 2015) ["*EQT Prod. Co. II*"]. This is especially the case "given [EPC's] potential exposure to potent, ongoing civil penalties for which DEP maintains the company is liable." *Id.*

On remand, following EPC's Application for Summary Relief and briefing, the Commonwealth Court granted summary relief in favor of EPC on January 11, 2017, holding that Section 301 of the CSL "is a provision that prohibits acts or omissions resulting in the initial active discharge or entry of industrial waste into waters of the Commonwealth and is not a provision that authorizes the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway of the Commonwealth following its initial

[3] EPC filed its appeal on June 23, 2017, and DEP filed its appeal on June 26, 2017. Petition for Review of EQT Prod. Co., *EQT Prod. Co. v. Com., Dep't of Envtl. Prot.*, No. 844 CD 2017 (Pa.Cmwlth. June 23, 2017); Petition for Review of Com., Dep't of Envtl. Prot., *Com., Dep't of Envtl. Prot. v. EQT Prod. Co.*, No. 852 CD 2017 (Pa.Cmwlth. June 26, 2017).

entry into the waterways of the Commonwealth." *EQT Prod. Co. v. Dep't of Envtl. Prot. of Com.*, 153 A.3d 424, 437 (Pa.Cmwlth. 2017) ["*EQT Prod. Co. III*"].

The Department has appealed to this Court, seeking review of its legal position, a construction of Clean Streams Law that would allow the daily accrual of penalties for the presence or passive dispersal of constituents in waters of the Commonwealth after the initial entry of constituents into waters, and would create potentially unending penalty liability.

SUMMARY OF THE ARGUMENT

This appeal involves the proper interpretation of three sections of Pennsylvania's Clean Streams Law; it is a declaratory judgment action necessitated by the improper actions of the Department of Environmental Protection seeking penalties based upon its unique and erroneous interpretation of the law. Declaratory relief was necessary so that the Department, the public, and the Pennsylvania Environmental Hearing Board would have clear notice of when violations occur, and more importantly, when they end. This Court previously held that this action was an appropriate means to clarify the statutory interpretation.

The Commonwealth Court provided that clarity and confirmed that a violation of Section 301 of the CSL ends when the industrial waste no longer enters into waters of the Commonwealth. Contrary to the Department's theory, the CSL does not authorize penalties for days on which pollutants are merely present, or simply move within water once entry into water has stopped.

Ignoring the plain text of the statute, and providing no case law on point, the Department urges this Court to interpret CSL penalty liability as continuous, beyond the entry of substances into waters of the Commonwealth, positing the false notions that ongoing, and therefore unlimited, penalties are the only way to protect streams and promote remediation. Penalties imposed after the fact of a violation, however, do not protect streams or promote

remediation. It is the clarity of the law itself that enables and facilitates both compliance and enforcement. The CSL consists of many prohibitions and many powers, the penalty provision being just one piece of a statute that protects the waters of the Commonwealth.

The Department also argues that expertise and facts are needed before anyone, including this Court, can know what the CSL means. This cannot be, and is not, what the General Assembly intended when it drafted a statute with which the public must comply. The question before the Court is a pure question of law, one that is answered by the text of the statute, rather than the Department's desire for penalties higher than those provided in the statute. This Court previously rejected the Department's argument.

The Commonwealth Court decision is fully consistent with the text, the context, the purpose and the policies of CSL. This Court should affirm.

ARGUMENT

I. THE COMMONWEALTH COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE PLAIN LANGUAGE OF THE CLEAN STREAMS LAW REQUIRES THE DEPARTMENT TO PROVE AN ENTRY INTO WATERS OF THE COMMONWEALTH FOR EACH DAY ON WHICH IT SEEKS TO ASSESS A PENALTY.

In 2014, the Department sought penalties from EPC based on Sections 301, 307 and 401 of the CSL by interpreting those provisions in a manner that defies the plain language of the statute. After EPC sought declaratory relief in the Commonwealth Court's original jurisdiction, the Department filed a complaint for civil penalties with the Pennsylvania Environmental Hearing Board. In that complaint, the Department asked the EHB to impose civil penalties against EPC under these three sections, among others. The Commonwealth Court, reviewing these sections of CSL in this action for declaratory relief, confined its analysis to Section 301 of the CSL. This section states:

> No person . . . shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, *into* any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

35 P.S. § 691.301 (emphasis added).

The express text of the statute has four elements to establish a violation of this Section and requires the Department to prove that:

1) a person allowed

2) an industrial waste
3) to enter
4) *into* waters of the Commonwealth.

The Commonwealth Court decision applies the text of the statute as written, respects the context and legislative history of the CSL, and protects the waters of the Commonwealth.

A. The Statutory Text Compels the Commonwealth Court's Holding.

The Commonwealth Court concisely stated the scope of liability contemplated under Section 301:

> For the reasons set forth above, we hold that Section 301 of The Clean Streams Law is a provision that prohibits acts or omissions resulting in the initial *active discharge or entry* of industrial waste into waters of the Commonwealth and is not a provision that authorizes the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway of the Commonwealth following its initial entry into the waterways of the Commonwealth.

EQT Prod. Co. III, 153 A.3d at 437 (emphasis added). The Commonwealth Court reached its holding by analyzing the language of the statute and the framework of the Clean Streams Law and applying the rules of statutory construction.[4]

[4] The Commonwealth Court cited, *inter alia*, three sections of the Statutory Construction Act of 1972: 1 Pa.C.S. § 1921(a) (apply the plain language of the statute); § 1921(b) (resort to statutory construction only when the words are not explicit); and § 1922(l) (General Assembly does not intend a result that is absurd, impossible of execution or unreasonable). *EQT Prod. Co. III*, 153 A.3d at 428 n.7.

The fundamental rule of statutory construction is to apply the statute as written. 1 Pa.C.S. § 1903(a) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage"). "The Statutory Construction Act, 1 Pa.C.S. §§ 1501–1991, makes clear that the 'polestar' of construction is determining the intent of the legislature." *S & H Transp., Inc. v. City of York*, 140 A.3d 1, 7 (Pa. 2016) (citing *Griffiths v. W.C.A.B. (Seven Stars Farm, Inc.)*, 943 A.2d 242, 254 (Pa. 2008); 1 Pa.C.S. § 1921(a)). Thus, "[w]hen the language of the statute is clear, that language is dispositive of legislative intent and [ ] vitiates the need for further interpretation." *Id.* (citing 1 Pa.C.S. § 1921(b)). Generally, this Court "give[s] particular weight to the express language of the statute." *A. Scott Enterprises, Inc. v. City of Allentown*, 142 A.3d 779, 786 (Pa. 2016).

Sections 301, 307 and 401 each prohibit specified actions that cause an industrial waste or a substance resulting in pollution to enter "*into* any of the waters of the Commonwealth." (35 P.S. §§ 691.301, 691.307 and 691.401) (emphasis added).[5] The Commonwealth Court recognized the key to

[5] Section 307 provides that "No person . . . shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, *into* any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department." 35 P.S. § 691.307 (emphasis added). Section 401 provides that "It shall be unlawful for any person . . . to put or place *into* any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality

interpreting Section 301 is the meaning of the phrase "into any waters of the Commonwealth." The word "into" is a preposition that means "expressing entrance, or a passing from the outside of a thing to its interior parts; following verbs expressing motion; as . . . one stream falls or runs into another." WEBSTER DICTIONARY, http://www.webster-dictionary.net/definition/into (last visited July 5, 2017). As used in Sections 301, 307 and 401, an industrial waste or polluting substance must pass from its location outside the waters of the Commonwealth into surface water or groundwater. The Statutory Construction Act directs that words must be construed according to common and approved usage unless they are technical words that have acquired a peculiar and appropriate meaning. 1 Pa.C.S. § 1903(a); *see also Pennsylvania Envtl. Defense Foundation v. Commonwealth*, No. 10 MAP 2015, ___ A.3d ___, 2017 WL 2645417, at *13 (Pa. June 20, 2017) (construing the language of the Pennsylvania Constitution in its popular sense, as understood by the people at the time of adoption). The word "into" must be construed as it was and is commonly understood—moving from outside to the inside of an object. It is certainly not common to consider movement of material within water to be an entry "into" the water. There is nothing to indicate that the General Assembly intended any meaning other than the common meaning in using such a term.

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into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance." 35 P.S. § 691.401 (emphasis added).

In addition, each section prohibits a discharge into "any waters of the Commonwealth" not any "water of the Commonwealth," demonstrating that these sections include a collective group of waters, the entry into any one of which is a violation. The use of the term "waters" does not, and need not, distinguish between parts of water, as the Department would have it. The Department's effort to expand penalty liability by asking this Court to separate different parts of waters to determine liability contradicts the statutory language, which treats waters of the Commonwealth as a collective unit for purposes of liability under these sections of the CSL.[6]

The definition of "waters of the Commonwealth" further supports this interpretation:

> "'Waters of the Commonwealth' shall be construed to include *any and all* rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth."

35 P.S. § 691.1 (emphasis added). It is allowing the entry of a polluting substance into any of these waters for which one incurs liability—there is no

[6] Amici Sierra Club and PennFuture contend that a "unitary waters theory" which has developed under federal Clean Water Act case law does not apply to this case. EPC never argued, and the Commonwealth Court did not conclude, that a unitary waters concept should apply here. Rather, the Commonwealth Court interpreted Section 301 of the CSL in accordance with Pennsylvania statutory construction principles. The amici's unitary waters theory discussion is beside the point and a distraction from the issues on appeal.

language in the CSL creating liability for mere presence or passive movement of constituents.

Having considered all four elements of liability under Section 301 of the CSL, the Commonwealth Court held that neither the mere presence nor the movement or flow of waste within waters of the Commonwealth is a violation of Section 301. *EQT Prod. Co. III*, 153 A.3d at 435–36. Reviewing the express text, the Commonwealth Court properly concluded that the General Assembly did not intend to establish endless violations under Section 301. If it had, it would have clearly stated so. *Id.* at 436.

B. The Statutory Text and the Commonwealth Court's Reasoning Apply Equally to Sections 307 and 401.

The Commonwealth Court's reasoning that Section 301 prohibits acts or omissions resulting in the initial active discharge or entry of waste into waters of the Commonwealth and does not authorize ongoing penalties for the continuing presence or dispersal of contaminants in waters applies to Sections 307 and 401 as well.[7] The salient phrase "into any of the waters of the Commonwealth" is used in all three sections. There is no logical basis to construe the language of Section 307 or 401 differently from Section 301.

[7] The Commonwealth Court confined its analysis to Section 301 of the Clean Streams Law as the only section implicated by this matter, concluding that Sections 307 and 401 were not applicable to the undisputed facts. *EQT Prod. Co. III*, 153 A.3d at 433–34.

While the Commonwealth Court did not consider Section 307 to be applicable to the undisputed facts of this matter, and refrained from analyzing it, the language that differs from Section 301, "directly or indirectly," does not alter the conclusion that liability under either section attaches only when industrial waste enters "into" waters of the Commonwealth. The remainder of Section 307 clarifies what "indirect" discharge means under that section, which would require permits even where a discharge is first to a storm sewer that ultimately flows into a river or stream. This text contradicts the Department's theory, which would require permits under this section for the subsequent flow of industrial waste within waters, or within parts of waters, of the Commonwealth after entry, revealing the absurdity of the Department's position. No such permits are available or appropriate.

Likewise, the plain text of Section 401 makes it unlawful for a person to put or place, allow or permit a discharge of substances resulting in pollution "into" any of the waters of the Commonwealth. As in Sections 301 and 307, liability under Section 401 attaches to the entry of the pollutant into waters of the Commonwealth, and it ends when such entry ends. To rule otherwise would effectively punish all violators indefinitely.

Therefore, each day of violation under Section 301, 307 or 401 of the Clean Streams Law requires proof of entry into waters of the Commonwealth.

C. The Context and Location of Sections 301, 307 and 401 in the Clean Streams Law Support the Commonwealth Court's Holding.

The Commonwealth Court properly considered the framework and organization of the CSL in which these sections appear. Three articles of the statute address three different types of pollution (Article II (sewage), Article III (industrial waste) and Article IV ("other" pollution)) and provide for the permitting and prohibitions for each. Article VI (enforcement) authorizes enforcement actions and penalty assessments for violations of the earlier sections. Article VII (scope and purpose) further clarifies that collection of penalties does not estop the Department from taking action necessary to abate pollution or nuisance. This framework is consistent with and supports the conclusion that violations are plainly provided in the express text of the substantive provisions, text that is consistent so that it is clear every time it is used. Without a permit, discharge of industrial waste or substances causing pollution into any waters of the Commonwealth is a violation of the statute. Persons violating these provisions in the statute are subject to both penalties and any other enforcement actions necessary to abate pollution and nuisance.

The unavoidable and natural dispersion of contaminants within waters of the Commonwealth is to be addressed through enforcement other than penalties, which may require cleanup to a standard developed or chosen under Act 2. The CSL itself does not establish any cleanup standards.

Accomplishing the purposes of the CSL necessarily depends upon the two statutes complementing each other, working in tandem. The penalty provisions of the CSL are not tied to any cleanup standard in that statute and cannot, therefore, be tied to the time or manner by which industrial waste or pollution is removed from waters of the Commonwealth. If the General Assembly had intended violations or penalties to be dependent on the final cleanup, rather than the discrete violations themselves, it would have provided an additional article in the CSL and an express penalty provision related to cleanup obligations. It did not.

D. The Commonwealth Court's Holding Fully Comports with Legislative History of the Civil Penalty Provision.

While the Court need not go beyond the statutory text of Sections 301, 307 and 401, it is apparent that the amendatory history of the civil and criminal penalty provisions, Sections 605 and 602, also supports the Commonwealth Court's holding. In 1970, the CSL was amended to add Section 605 and provide for civil penalties. At that time, the provision referenced continued violations:

> "[T]he board, after hearing, may assess a civil penalty . . . The civil penalty so assessed shall not exceed ten thousand dollars ($10,000), *plus five hundred dollars ($500) for each day of continued violation*."

See H. LEG. JOURNAL, at 2751, Section 605 (July 15, 1970) (enacted version of H.B. 1353, 1970 Act 222, P.L. 653 (July 31, 1970)) (emphasis added). The provision, however, was amended just six years later to remove the reference:

> "The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) [plus five hundred dollars ($500) for each day of continued violation] per day for each violation."

See H.B. 797, Act 222, P.L. 1099 (Oct. 7, 1976), Printer's No. 3621, at p. 3 (underscoring and brackets in original to denote deleted and added text). Thus, in 1976, the General Assembly omitted Section 605's reference to "continued violations," and in its place specified the ten thousand dollar maximum civil penalty applies "per day for each violation." *Id.*[8]

The deliberate removal of a reference to "continued violations" for civil penalties is in contrast with the longstanding reference in the criminal penalty provision to "continued violations." *See* 35 P.S. § 691.602(d) ("Each day of continued violation of any provision of this act . . . shall constitute a separate offense"). Unlike the civil penalty provision, the CSL has contained criminal penalty provisions since its original passage in 1937. *See* S. LEG. JOURNAL, at 6566, Sections 309 and 401 (June 2, 1937) (enacted version of H.B. 158, Act 394, P.L. 1987 (June 22, 1937)). The term "[e]ach day of continued violation"

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[8] The primary case relied upon by the Department, *Commonwealth v. Harmar Coal Company*, discussed further below, was decided by this Court in 1973, between the addition and subsequent deletion of Section 605's reference to "continued violations." 306 A.2d 308 (Pa. 1973).

was added to the criminal penalty provision the same year the civil penalty provision was created and has not been removed since. *See* 35 P.S. § 691.602(d); *see also* H. LEG. JOURNAL, at 2751, Section 602 (July 15, 1970) (enacted version of H.B. 1353) ("Each day of continued violation of any provision of this act . . . shall constitute a separate offense").

The General Assembly last amended the civil penalty provision in 1980, primarily to add a separate subsection for civil penalties related to mining operations. This subsection provides, in part:

> "If the violation involves the failure to correct, within the period prescribed for its correction . . . a civil penalty of not less than seven hundred fifty dollars ($750) *shall be assessed for each day the violation continues beyond the period prescribed for its correction*."

35 P.S. § 691.605(b)(3) (emphasis added); S.B. 992, 1980 Act 157, P.L. 894 (Oct. 10, 1980), assigned Printer's No. 2035, at 40-41.

This history demonstrates the General Assembly is capable of drafting text—and in fact, originally inserted such text in Section 605—that penalizes a continuing or "continued" violation. The Department's interpretation would eliminate a deliberately chosen distinction between these different types of penalties.

The absence of any statutory language in the CSL supporting "endless" violations was "striking" to the Commonwealth Court. *EQT Prod. Co. III*, 153 A.3d at 436. To rule otherwise, the court stated, "would be tantamount to

punishing a polluter indefinitely, or at least as long as the initially-released industrial waste remains in the waters of the Commonwealth," which would vastly expand potential liability "even where a polluter is taking aggressive steps to remediate." *Id.*

II. THE DEPARTMENT'S INTERPRETATION CONTRAVENES THE PLAIN READING OF THE CLEAN STREAMS LAW AND IS UNREASONABLE.

The Department's theory of continuing liability under the CSL has evolved over the course of the litigation but, in each form, has been contrary to the plain language and purposes of the statute. Initially, the Department's assertion of continuing liability was premised on a theory "that each day in which contaminants remain in the subsurface soil and passively enter groundwater and/or surface water constitutes a violation, thus implicating serial, aggregating penalties." *EQT Prod. Co. II*, 130 A.3d at 754. On remand, the Department contended for the first time that each day that an industrial waste or pollutant migrates from water or one part of a water of the Commonwealth to or through another water constitutes a violation of Sections 301, 307 and 401 of the CSL. *See EQT Prod. Co. III*, 153 A.3d at 429. Thus, the Department shifted its liability theory from the mere presence of pollutants in water to the passive flow of pollutants within water after initially entering into water. Each of these theories would rewrite the CSL in a way that gives the

Department authority to threaten, and the EHB authority to assess, far higher civil penalties than the General Assembly provided.

The Department's continuing liability theory and argument contradicts the statutory text, requires reading words into the statute that are not there, has no limiting principle, ignores the Department's comprehensive enforcement powers, and contradicts the policy of the Clean Streams Law, leading to perpetual penalties and absurd results.

A. Neither the Text nor Context of Section 301 Supports the Department's Interpretation of the Clean Streams Law.

The language in Sections 301, 307 and 401 and the definition of "waters of the Commonwealth" show that the Department's continuing liability theory—where "a new violation occurs when industrial waste moves from one part of a water of the Commonwealth into another part"—is not the law. (Brief for Appellant "DEP Brief," at 41.) The Department's interpretation ignores the word "into" as used in each of Sections 301, 307 and 401 (*See* DEP Brief at 21-22), which defies the statutory construction principle that each word of a statute must be given effect. *Mishoe v. Erie Insurance Co.,* 824 A.2d 1153, 1155 (Pa. 2003) ("if possible, statutes must be construed so that *every word* is given effect") (emphasis added); *see also* 1 Pa.C.S. § 1922(2) ("the General Assembly intends the entire statute to be effective and certain). The Department instead prefers to focus entirely on the word "flow," but detaches

the word from the sentences in which it appears. There is no violation of the CSL for days on which a pollutant simply flows *within* water after having entered into it. The CSL's express language, as well as the absence of any language describing or prohibiting the movement of pollutants from one part of water to another, compels that conclusion.

The Department's interpretation erroneously assigns ongoing liability for the passive movement of substances in the environment, not the actions or inactions of the party who released the substance or allowed it to enter waters of the Commonwealth. This concept of liability would result in limitless continuing penalties for a single release as long as any molecule of the substance remains in any water of the Commonwealth.

The Department also overlooks the important word "all" in the definition of "waters of the Commonwealth." "All" refers to "whole quantity, extent, duration, amount, quality, or degree of" a particular subject or thing. WEBSTER DICTIONARY, http://www.webster-dictionary.net/definition/all (last visited July 5, 2017); *see also* 1 Pa.C.S. § 1903(a) (non-technical words "shall be construed . . . according to their common and approved usage). Courts "must read the words in their context and with a view to their place in the overall statutory scheme." *Commonwealth v. Giulian*, 141 A.3d 1262, 1267–68 (Pa. 2016) (quoting *King v. Burwell,* 135 S.Ct. 2480, 2489 (2015)). To give meaning to this term, the statute must mean that, for any prohibited action under Sections 301,

307 and 401, waters of the Commonwealth must refer to a collective group of "all" of the identified types of water. Because "all" waters are "waters of the Commonwealth," the Department's theory cannot be employed unless the word "all" is deleted from the definition, making its interpretation improper. *See* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed . . . to give effect to all of its provisions"); *Robinson v. County of Snyder*, 664 A.2d 652, 655 (Pa.Cmwlth. 1995) (the "Statutory Construction Act requires that every statute shall be construed, if possible, to give effect to all its provisions").

B. The Department's Interpretation Would Require Judicial Amendment by Adding Words to the Text of the Clean Streams Law.

"[A]lthough one is admonished to listen attentively to what a statute says[,] one must also listen attentively to what it does not say." *Giulian*, 141 A.3d at 1268 (citations omitted) (reversing the Superior Court, which had "resorted to adding words to the statute in order to dismiss appellant's argument"). Accordingly, courts "should not add, by interpretation, a requirement not included by the General Assembly." *Id.*

The Department seeks to rewrite the CSL by making "parts" of water the key for determining liability, ignoring the necessary elements of a violation under the law. But the Department cannot rewrite the CSL in a way that gives it authority not provided to it by the General Assembly. *Aetna Cas. And Sur. Co. v. Commonwealth, Ins. Dept.*, 638 A.2d 194, 200 (Pa. 1994) ("[A]n

administrative agency can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language"). Nor can this Court do what the Department is asking it to do. *See Robinson Township v. Commonwealth of Pennsylvania*, 147 A.3d 536, 583 (Pa. 2016) ("It is not our Court's role under our tripartite system of governance to rewrite a statute once we have fulfilled our constitutional duty of judicial review; that is a function reserved to the policymaking branch").

Nothing in the CSL states or suggests that a violation occurs when a pollutant merely remains, moves or flows within water. As the Department notes, "[a] central feature of these water resources is that they are dynamic and intimately linked together . . . and manifests a constant, inexorable flow from one point to another, horizontally, laterally or vertically, or in all three directions." (DEP Brief at 17.) The General Assembly, however, did not separately define each different type of water that makes up waters of the Commonwealth (e.g. rivers, streams, creeks, rivulets), it did not explain, because it could not have explained, what constitutes a "part" of water or where a part of water begins and ends, and it did not identify every specific type of water that makes up the definition (e.g. "all other bodies or channels of conveyance of surface and underground water"). The General Assembly could not have intended for courts or the regulated community to speculate what these undefined terms mean to determine where "parts" of water begin and

end to determine penalty liability. *See Pennsylvania Sch. Boards Ass'n, Inc. v. Com., Pub. Sch. Employees' Ret. Bd.*, 863 A.2d 432, 439 (Pa. 2004) ("It is not this Court's function to read a word or words into a statute that do not actually appear in the text where, as here, the text makes sense as it is, and the implied reading would change the existing meaning or effect of the actual statutory language").

The broad definition of waters of the Commonwealth warns the public to be careful, because liability attaches at *any* point where industrial wastes or substances resulting in pollution *enter into* any and all of the many types of waters identified or described in the statute.[9] Nothing in the statutory language states that there is a separate violation each time an industrial waste or pollutant passively moves within water or from one water to another. If that were the General Assembly's intention, it would have said so in the statute.[10]

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[9] Contrary to any implication by the Pennsylvania Fish and Boat Commission in its Brief as Amicus Curiae, the Commonwealth Court decision is fully consistent with the Statutory Construction Act, Section 1922(5), and does favor the public interest. The public interest is served when everyone knows what constitutes unlawful action or inaction and when penalty provisions of statutes are clearly tied to such action or inaction.

[10] The General Assembly knows how to address migration in express terms when it intends to do so, such as Act 2, Section 307, discussing interim responses to releases of regulated substances. *See* 35 P.S. § 6026.307(b). The CSL never references migration.

C. The Department's Interpretation Has No Limiting Principle.

Despite self-serving references to the Department's "practice" of limiting penalties so that they end when Act 2 cleanup standards are met (DEP Brief at 59), there is no limiting principle under its theory where violations continue as long as materials remain in or flow within waters of the Commonwealth. The Department simply says that responsible parties should trust the Department's "practice" and the Environmental Hearing Board to be reasonable. That is not an objective, legally enforceable standard; the Department's practice can change at any moment. This position allows the Department to threaten exorbitant penalties, as it did in the penalty case, to leverage penalty settlements that are higher than legally permissible.

The Department's position also is internally inconsistent. Act 2 standards are risk-based, which means that contaminants legally may remain present in soil, surface water or groundwater after the responsible person demonstrates compliance with a standard. It is not a legally enforceable limiting principle for the Department to say it will cap penalties at an Act 2 cleanup standard, where pollutants often may continue to be present in waters after an Act 2 standard is achieved. In the penalty case, in its appeal of the Adjudication, the Department contends that the EHB erred by not imposing penalties for releases from the Pad S Impoundment area up through the date of

the EHB hearing that ended on August 5, 2016. Petition for Review of Com., Dep't of Envtl. Prot., *supra* note 3, at ¶ 9. EPC had met the Act 2 statewide health standard for soil by December 2012. Adjudication, p. 37, ¶ 264. Under the Department's theory, however, EPC would be liable for penalties from December 2012 through August 2016 simply if rain or snowmelt washes substances from soil that meets an Act 2 standard into the groundwater beneath. Such a conception renders the attainment of Act 2 standards and its relief from further cleanup liability meaningless.

Despite the protestations of the Department and the Amici (*see, e.g.*, DEP Brief at 61), endless potential penalties cannot provide incentives for a cleanup to be completed any more quickly than technology and science allow. For example, a groundwater contamination incident involving environmentally persistent chemicals might take decades to remediate.[11] Massive penalties do

[11] According to the U.S. Environmental Protection Agency's National Priorities List, one of the earliest Superfund sites requiring soil and groundwater remediation at a seventeen-acre site was active for over twenty-one years. *See* U.S. ENVTL. PROT. AGENCY, *Superfund Site: LOVE CANAL NIAGARA FALLS, NY*, https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0201290 (last visited July 5, 2017). Several other Superfund sites required groundwater and surface water cleanup activities lasting over twenty years. *E.g.*, U.S. ENVTL. PROT. AGENCY, *Superfund Site: DOVER CHEMICAL CORP. DOVER, OH*, https://cumulis.epa.gov/supercpad/Cursites/csitinfo.cfm?id=0504150&msspp=med (last visited July 5, 2017). This Court may take judicial notice of these public records. *See In re F.B.*, 726 A.2d 361, 366 n.8 (Pa. 1999) (taking judicial notice of the contents of the Philadelphia School Code Policy and Procedure Manual because the document is a public record).

not incentivize remediation or alter the physics and chemistry of cleanups. Under the statute, damage or injury to waters of the Commonwealth is relevant to the *amount* of a daily civil penalty, not the *number* of violations. *See* 35 P.S. § 691.605 ("damage or injury to waters of the Commonwealth" is a relevant factor in determining the amount of a daily penalty).[12] And, massive penalties do not deter unforeseeable events, such as the incident that caused the leak in EPC's impoundment here.[13]

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[12] The Department conflates the statutory factors listed in Section 605 required for the consideration of the penalty amount with the delineation of the violations themselves in Section 301, 307 or 401. (DEP Brief at 48.) It is, however, logical and consistent for the statutory framework to require consideration of the severity of harm in calculating the penalty amount separately from a determination of how many days of violation occurred. The days of violation is the threshold consideration, providing the multiplier for a penalty amount. If the General Assembly intended the extent of harm to be considered in determining the days of violation, it would have provided some indication of that intent in text of Section 301, 307 or 401. There is no such language in these sections. Regardless of the type or amount of pollutant, a violation occurs only when a person allows the substance to enter into waters of the Commonwealth.

[13] The example of the Norfolk Southern train derailment and lye spill cited by Amicus Fish and Boat Commission is a red herring because the $7.35 million settlement in that case was for restitution, reimbursement of agency administrative costs, and civil claims under various legal authorities, not based simply on the Department's erroneous theory of CSL liability. In fact, the Department's complaint filed with the EHB in that matter, Exhibit A to the Department's brief, sought over $5 million under its improper interpretation of the CSL, but the Department ended up settling its CSL claim for what appears to be a $75,000 payment to the Clean Water Fund under paragraph 6(c) of the November 2007 Settlement Agreement. Contrary to the argument of Amicus Fish and Boat Commission, had the Commonwealth Court opinion been

Under the Department's theory, penalty liability continues to accrue as long as a pollutant remains in or flows within waters or parts of waters. If the mere presence of pollutants in waters is evidence of flow, each day of presence makes one liable for another day of penalties.[14] Liability so conceived has no perceptible endpoint.

D. The Department's Interpretation Leads to Undesirable Consequences and Absurd Results.

The Department's proposed interpretation is absurd because it means that CSL penalty liability depends on the complexity of the affected water system. But this Court presumes to be erroneous any interpretation that leads to "a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S.

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applied to this "real life" example, the settlement under the various legal authorities, including the Fish and Boat Code, the Pennsylvania Hazardous Sites Cleanup Act and others, would have been exactly the same.

[14] This Court should disregard the suggestion by Amici Clean Air Council, Citizens for Pennsylvania's Future, and Sierra Club to declare that the "presence" of pollutants in water may constitute evidence of a prohibited "flow" of pollutants. Presence of pollutants in water is not itself a violation of these sections of the CSL. For there to be liability, each of Sections 301, 307 and 401 requires an entry of a pollutant *into* waters of the Commonwealth—not the flow of previously released constituents within or between waters. Once the *entry into* groundwater or surface water ends, constituents will remain present at some concentration, even following an approved Act 2 cleanup; constituents cannot be retrieved from water like discarded material from the ground surface. As the Commonwealth Court recognized, the Department's position that constituents flowing in water continue to "constitute a violation until remediation is completed is not supported by statutory provisions and framework or the rules of statutory construction . . . [and] would result in potentially limitless continuing violations for a single unpermitted release." *EQT Prod. Co. III*, 153 A.3d at 435.

§ 1922(1); *accord Sch. Dist. of Borough of Speers v. Commonwealth of Pennsylvania*, 117 A.2d 702, 703 (Pa. 1955). The General Assembly could not have intended the absurd result that "parts" of groundwater, or parts of a surface water body, must be delineated and described by experts for persons to have notice of, or for the Department, the Environmental Hearing Board, or any court to determine, when, where or how violations occur.

For example, someone who discharges a pollutant into a lake on a single day would be liable for a single violation. However, under the Department's theory, someone who discharged the same pollutant on a single day into, for instance, an unnamed tributary to Stony Brook (a 7th order stream in Elk County), which is a tributary to Spring Run (Elk County), which is a tributary to Trout Run (Elk County), which is a tributary to the Bennet Branch of the Sinnemahoning Creek (Cameron County), which is a tributary to Sinnemahoning Creek (Cameron County), which is a tributary to the West Branch of the Susquehanna River (Northumberland County), and which is a tributary to the Susquehanna River would be liable for an unpredictable and unknowable number of violations on each day that the pollutant is detected in any of these streams.[15] One cannot dam up the West Branch of the Susquehanna River to stop dissolved or suspended constituents from flowing

[15] The tributary streams in this hypothetical are all identified in Drainage List L, Susquehanna River Basin in Pennsylvania, West Branch of the Susquehanna River, of the Department's water quality regulations in 25 Pa. Code § 93.91.

to the main stem of the river, and, therefore, it is impossible to stop penalties from accumulating day after day, under the Department's interpretation.

The Commonwealth Court appropriately admonished the Department for its position:

> The Department must confine its actions to the statutory framework of the Clean Streams Law, recognizing that Section 301 of the Clean Streams Law does not provide for a violation based on the movement of industrial waste from one water of the Commonwealth to another. Rather, a violation of Section 301 occurs when a person or municipality does what is prohibited—i.e., allows industrial waste to enter into the waters of the Commonwealth—and *once it ceases that conduct, violations cease.*

EQT Prod. Co. III, 153 A.3d at 436 (emphasis added). The General Assembly could not have intended to write a statute that does not allow the regulated community to understand the extent of penalty liability under the CSL.

E. The Commonwealth Court's Decision Respects and Sustains the Department's Enforcement Powers.

The briefs of the Department and the Amici consistently confuse penalty liability and cleanup obligations. The CSL does not make the two in any way interdependent; neither requires the other. The question before this Court is simply about penalty liability that would attach to violations under Sections 301, 307 and 401. Neither the Commonwealth Court decision nor this Court's affirmance of that decision will affect the Department's authority to compel, or the regulated community's obligation to undertake, remediation of waters of the Commonwealth.

The Department relentlessly asserts that its continuing liability theory is necessary to provide its authority to require cleanups to protect the Commonwealth's waters, even claiming that the Commonwealth Court decision "would neuter the Department's power to enforce the statute." (DEP Brief at 50.) The conclusion is erroneous and the drama is misplaced. While the Commonwealth Court's decision does remove the Department's ability to threaten unlawful and exorbitant penalties to obtain unwarranted settlements from the public, it does nothing to threaten or diminish the Department's broad and lawful enforcement authority.

First, the remedies that the Department outlined in its brief—ordering cessation of discharge, requiring remediation, requiring permits with conditions for continuing discharge, or requiring civil penalties—do not depend on a continuing violation theory. (DEP Brief at 19, 47.) Contrary to its dire warnings, nothing in the CSL precludes the Department from taking appropriate enforcement action based upon a single violation, i.e., an incident that occurs on one day and for which a person is liable under Section 301 for one day. Enforcement authorities provided in Articles VI and VII are based upon a violation or condition, whether the violation is one day or one hundred days. The civil penalty provision states that "[i]n addition to proceeding under any other remedy available at law or in equity. . .," the Department may assess a civil penalty. 35 P.S. § 691.605(a). The Department is not required to elect

remedies. *Com., Dep't of Envtl. Res. v. Peggs Run Coal Co.*, 423 A.2d 765, 766 (Pa.Cmwlth. 1980). The Department can issue administrative orders and enforce them via injunctions in the Commonwealth Court's original jurisdiction. *See Commonwealth v. Coward*, 414 A.2d 91, 92 (Pa. 1980) (affirming injunction granted by the Commonwealth Court at DER's request, enjoining Coward Contracting Company from operating a landfill in Westmoreland County, and requiring appellants to remedy the pollution discharged from that landfill). The Department's attempts to read its enforcement powers out of the CSL if the Commonwealth Court decision stands are a distraction and a red herring. There is no such impact on the Department's valid statutory enforcement authority.

Second, independent of Sections 301, 307 and 401, the Department may order responsible parties under Section 316 or 701 of the CSL to clean up contamination.[16] Section 316 authorizes the Department to issue administrative orders whenever it "finds pollution or a danger of pollution," and Section 701 authorizes proceedings to abate pollution or a nuisance,

[16] Section 316 provides that "Whenever the department finds that a pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department. . . ." 35 P.S. § 691.316. Section 701 provides "The collection of any penalty under the provisions of this act shall not be construed as estopping the Commonwealth . . . from proceeding in courts of law or equity to abate pollutions forbidden under this act, or abate nuisances under existing law. . . ." 35 P.S. § 691.701.

whether penalties have been assessed or not. The Department may assess civil penalties and judicially enforce an administrative order against anyone who does not comply with an administrative order. 35 P.S. §§ 691.605(a), 691.610. These enforcement options under the CSL do not end when civil penalty liability ends. The Department need not rely upon continuing violations of Section 301, 307 or 401 to utilize these powers.

Finally, the Commonwealth has additional enforcement tools under other statutes that may apply to pollutional incidents, statutes that authorize not only enforcement actions but recovery for costs and impacts to natural resources. *See*, *e.g.*, Pennsylvania Hazardous Site Cleanup Act, 35 P.S. §§ 6020.101-6020.1305, Pennsylvania Fish and Boat Code, 30 Pa.C.S. §§ 101-930, and the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101-6021.2104. Each of these statutes has provisions to protect waters of the Commonwealth, including prohibitions, penalties and powers available to the Department for enforcement.

F. The Commonwealth Court's Decision Promotes the Purposes of the Clean Streams Law.

Despite the Department's limited characterization of the purposes of the CSL, the Declaration of Policy clearly acknowledges and emphasizes the need to balance environmental protection with Pennsylvania's economic vitality and future. 35 P.S. § 691.4 (Declaration of Policy). Clean streams are "essential if

Pennsylvania is to attract new manufacturing industries. . . ." Preventing water pollution is "directly related to the economic future of the Commonwealth." *Id.* Promoting recreation, tourism, manufacturing and industry is aligned with the purposes of the statute, and these can flourish only when the statutory obligations and prohibitions are clear to the public. The Commonwealth Court decision recognizes and reinforces the need for accountability—the statute cannot accomplish its purposes if the regulated community cannot understand where liability begins and ends. The Commonwealth cannot accomplish its purpose of a vibrant economy if business and property owners are held to excessive and unreasonable standards, subject to penalties in perpetuity for conditions that may well be entirely beyond their ability to control.

III. THE DEPARTMENT'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

The Department argues that, if the Court holds that the CSL does not unambiguously support its theory, then the Department's "longstanding interpretation of The Clean Streams Law" as encompassing a "continuing violation" theory for civil penalties is entitled to deference.[17] (DEP Brief at 52.)

[17] The Department appears to concede that its deference arguments are only relevant if the Court concludes that the civil penalty sections are ambiguous. (DEP Brief at 51) ("Even if the text, structure, history, and purpose of The Clean Streams Law left some ambiguity regarding the proper interpretation of the statute (and they do not), any ambiguity should be resolved in favor of the Department's construction"). While EPC disagrees with the Department's analysis regarding the text of the CSL—and contends that the CSL

The Department, however, misunderstands basic principles of administrative deference under Pennsylvania law. Those principles demonstrate that an administrative interpretation of a statute which, like the Department's view of the CSL, is not embodied in properly promulgated regulation, is only entitled to deference to the extent it actually tracks the statute in question and has the power to persuade the Court that it is correct. As the Department's "continuing violation" theory is decidedly unpersuasive, it is not entitled to deference of any kind.

A. *Chevron*-type Deference Is Inapplicable Because the Department's "Continuing Violation" Theory Is Not Embodied in a Regulation.

In its seminal decision regarding administrative deference, this Court explained the difference "between the authority of a rule adopted by an agency pursuant to what is denominated by the textwriters as Legislative rule-making power and the authority of a rule adopted pursuant to Interpretative rule-

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unambiguously contradicts the Department's interpretation, *see*, *supra*, at Section I—EPC agrees that the absence of ambiguity renders the agency's interpretation irrelevant. *See SugarHouse HSP Gaming, LP v. Pennsylvania Gaming Control Bd.*, 136 A.3d 457, 477 (Pa. 2016) ("[I]f the statutory language is unambiguous, . . . then deference is not required, and our Court treats the question of interpretation as purely a matter of law"); *Seeton v. Pa. Game Comm'n*, 937 A.2d 1028, 1037 (Pa. 2007) ("[D]eference never comes into play when the statute is clear."). Thus, if the CSL is unambiguous on the contested issue, the Department's interpretation of the statute is irrelevant.

making power." *Pennsylvania Human Relations Comm'n v. Uniontown Area Sch. Dist.*, 313 A.2d 156, 169 (Pa. 1973) (opinion announcing judgment).[18]

This first category, "often connoted as *Chevron* deference, occurs where an agency steps in by formal rulemaking (such as notice-and-comment procedures) where the legislative body has been silent or ambiguous."[19] *Wirth v. Commonwealth of Pennsylvania*, 95 A.3d 822, 841 n.18 (Pa. 2014) (citing *Chevron USA, Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). "When an agency fills a statutory void with a promulgated regulation, it creates what are referred to as 'legislative rules,' which are accorded a high degree of deference so long as they are based upon a permissible construction of the statute and are reasonable." *Id.*; *see also Northwestern Youth Servs. v. Com., Dep't of Pub. Welfare*, 66 A.3d 301, 311 (Pa. 2013) ("Under federal and Pennsylvania jurisprudence, properly-enacted legislative rules enjoy a presumption of reasonableness and are accorded a particularly high measure of deference—often denominated *Chevron* deference—by reviewing courts").

In seeking to invoke this highly deferential standard, the Department cites this Court's decisions in *Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878 (Pa. 2000), *American Airlines, Inc. v. Commonwealth*, 665 A.2d 417 (Pa.

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[18] The *Uniontown* plurality's analysis of administrative deference is considered the binding holding of the Court. *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1236 n.5 (Pa. 2009).

[19] *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1995), and *Tool Sales & Serv. Co., Inc. v. Com., Bd. of Fin. and Revenue,* 637 A.2d 607 (Pa. 1993). (DEP Brief at 51, 53.) In each case, the Court considered an administrative interpretation formally promulgated in a *legislative* rule. *Winslow-Quattlebaum*, 752 A.2d at 882 (citing 31 Pa. Code § 68.103); *Am Airlines*, 665 A.2d at 420 (citing 61 Pa. Code § 32.34); *Tool Sales*, 637 A.2d at 611 (citing 61 Pa. Code § 155.26(g)). There is no dispute in this case that the Department's interpretation of the CSL is not embodied in any promulgated regulation. *See EQT Prod. Co. III*, 153 A.3d at 427 (explaining that "the Department elaborated on the [basis of the] penalty amount that the Department is currently seeking from [EPC]" in discovery responses in the original jurisdiction action before the Commonwealth Court). Therefore, the Department is not entitled to whatever deference is accorded "properly-enacted legislative rules" under Pennsylvania law. *Northwestern Youth Servs.*, 66 A.3d at 311. Cases like *Winslow-Quattlebaum*, *American Airlines* and *Tool Sales* are simply inapplicable to this appeal.

B. The Department's Interpretation of the Clean Streams Law Is Not Entitled to Deference for a Number of Reasons.

For the reasons already described, and as cogently explained by the Commonwealth Court, the Department's interpretation of the CSL lacks validity and, thus, the power to persuade. *See EQT Prod. Co. III*, 153 A.3d at 437 ("Section 301 of The Clean Streams Law is a provision that prohibits acts

or omissions resulting in the initial active discharge or entry of industrial waste into waters of the Commonwealth and is not a provision that authorizes the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway of the Commonwealth following its initial entry into the waterways of the Commonwealth"). The Department's reading of the statute creates a result "that is absurd, impossible of execution or unreasonable," contrary to the presumptions contained in the Statutory Construction Act. 1 Pa.C.S. § 1922(1); *see also EQT Prod. Co. III*, 153 A.3d at 429.

> Moreover, if a new violation occurs as industrial waste moves from one water of the Commonwealth to another water or part thereof, it would be impossible for the Department to prosecute a case without the Commonwealth of Pennsylvania first delineating all of the boundaries for each water and each *part* thereof. The General Assembly did not intend for these sections to establish seemingly endless violations following but a single release of industrial waste or other prohibited substances from a point source or otherwise into a water of the Commonwealth.

Id. at 435–36.

Because the Department's interpretation is invalid under ordinary rules of statutory interpretation, no deference is appropriate. *See Malt Beverages Distributors Ass'n v. Pennsylvania Liquor Control Bd.*, 974 A.2d 1144, 1154 (Pa. 2009) (refusing to defer to the Liquor Control Board's construction of the Liquor Code because it was "contrary to the clear legislative scheme" adopted by the General Assembly).

The Department's only argument in favor of deference—again, inappropriately citing cases applying *Chevron* deference—is that its "continuing violation" interpretation of the CSL is a "longstanding" one. (DEP Brief at 52.) Two responses are evident immediately. The first is that the Department's supposedly "longstanding" interpretation is demonstrated solely by reference to litigation positions the Department has taken in previous complaints filed before the Environmental Hearing Board or resolved by settlement agreements.[20] (DEP Brief at 51–53.) The Department is unable to point to any instance in which the Environmental Hearing Board has adopted the Department's theory. The Department's inability to do so is fatal given that "*only the Environmental Hearing Board* (and not the Department) has the authority to adjudicate whether a person has violated The Clean Streams Law and to assess an appropriate penalty." (DEP Brief at 56) (emphasis added). Because the General Assembly lodged power to assess the amount of the civil penalty in the Board, the Department's untested, unadopted theories are therefore of little import.

Even if it were appropriate for this Court to defer to the Department's "longstanding consistency" on a question in which its role is "'merely advisory'" to the final decisionmaker (i.e., the Board) (DEP Brief at 57),

[20] Few, if any, of these materials are included in the certified record. Notably, the Department offers no citation to authority or rationale explaining how this Court can consider such extra-record documents.

deference would still be improper. Though consistency can be a factor weighing in favor of applying deference,[21] the Department's interpretation is invalid for the reasons already stated. "Being consistently wrong does not afford the agency more deference than having valid reasoning." *Flores v. United States Citizenship & Immigration Servs.*, 718 F.3d 548, 555 (6th Cir. 2013); *Medina v. Beers*, 65 F. Supp. 3d 419, 437 (E.D. Pa. 2014) (same); *cf.* RALPH WALDO EMERSON, *Self Reliance,* ESSAYS: FIRST SERIES (1841) ("foolish consistency is the hobgoblin of little minds"). Therefore, even if the Department has been consistent, a conclusion that is undermined by its evolving theories in the present case, that consistency is of little help to it in validating the legal merits of the Department's current interpretation.

For these reasons, this Court's cases do not require—indeed, do not permit—a court to accord deference to the Department's interpretation of the CSL.

IV. EVEN IF THE COURT CONCLUDES THE CLEAN STREAMS LAW IS AMBIGUOUS, THE COMMONWEALTH COURT CORRECTLY INTERPRETED THE STATUTE.

It is unnecessary to go beyond the statutory text in this case because the language of CSL Sections 301, 307 and 401 is clear and the meaning is unambiguous. But even if this Court were to look beyond the plain language

[21] *See Northwestern Youth Servs*, 66 A.3d at 312 (listing "consistency with earlier and later pronouncements" as a factor giving an interpretation "power to persuade").

of the CSL, prior case law does not support the Department's position, and canons of statutory construction and the relationship between the CSL and Act 2 all confirm that the Commonwealth Court correctly decided the case.

A. Prior Case Law Does Not Support the Department's Interpretation.

Far from having any case law to support its position, the Department's legal position contradicts the few relevant cases, including the Commonwealth Court's previous decision in *Westinghouse Elec. Corp v. Dep't of Envtl. Prot.*, 705 A.2d 1349 (Pa.Cmwlth. 1998) [*Westinghouse II*]. *Westinghouse II* held that the Department has the burden of proving that an industrial waste or pollutant entered into a water of the Commonwealth on each day for which a party could be liable for penalties under Section 301, 307 or 401 of the CSL.

Westinghouse had released degreasers containing trichloroethylene and 1,1,1-trichlorethane into the soil during operations at an elevator manufacturing plant near Gettysburg from approximately 1968 until at least 1984. *Id.* at 1350. The release caused extensive groundwater contamination. *Westinghouse Elec. Corp v. Dep't of Envtl. Prot.*, 1996 EHB 1144, 1996 WL 650060, at *66 (Nov. 5, 1996) [*Westinghouse I*]. With active remediation, the constituents were expected to continue to be present in the groundwater near the release for at least twenty years and, without remediation, would persist for thousands of years. *Westinghouse II*, 705 A.2d at 1351; *Westinghouse I*, 1996 WL 650060, at *68.

Despite the presence of contaminants as demonstrated by sampling, the Board held that the Department proved only two instances of actual entry into waters of the Commonwealth, and thus only two violations of Sections 301, 307 and 401. *Id.* What mattered for the calculation of violations was the number of days on which there was an entry into groundwater, not the days of continued presence, or any presumed movement therein. *Westinghouse II*, 705 A.2d at 1352–57; *Westinghouse I*, 1996 WL 650060, at **51, 71.

Had the Department's continuing liability theory been applied in *Westinghouse*, given the groundwater remediation was expected to last for at least twenty years, the Board or the Commonwealth Court would have reached the absurd conclusion that Westinghouse was liable for at least 21,900 separate daily violations of CSL Sections 301, 307 and 401, with exposure to $219 million in potential penalties. The Department's continuing liability theory was not and is not the law. Then, as now, the number of violations is based on the number of days on which a polluting substance enters into waters of the Commonwealth. Neither the presence of regulated substances in waters, nor their movement within different types of waters, is relevant to the number of daily violations. The *Westinghouse* opinions confirm the express language of the CSL that "waters of the Commonwealth" refer to a collective group of "any and all" of the identified types of water.

The primary case cited by the Department, *Harmar Coal*, is inapplicable to the statutory interpretation at issue and was correctly distinguished by the Commonwealth Court. (DEP Brief at 36–39, 63 (citing 306 A.2d 308).) The *Harmar Coal* court held that under Section 315 of the CSL (which applies specifically to discharges *from* a mine), a coal mine operator was *required to treat all* acid mine drainage that it *actively discharged* into waters of the Commonwealth even though some of the acid mine drainage originated from adjacent inactive mines. 306 A.2d at 319, 321 ("Therefore, we conclude that the Cleans Streams Law requires an operator of an active mine to treat the entire discharge from the active mine and a discharge from an adjacent inactive mine necessary to protect the active workings"). This holding is entirely consistent with the Commonwealth Court decision in this case.

The language cited by the Department to conclude otherwise simply reflects the specific facts of that case, which included re-entry of polluted waters into waters of the Commonwealth. The discharge being permitted from the Hutchinson Mine in *Harmar Coal* can be likened to the active removal of polluted water from one location and subsequent discharge, or re-entry, into another location. The polluted water was being directed into surface water from outside the surface water. This subsequent discharge from the mine in *Harmar Coal* required a permit under Section 315; this holding does not contradict or undermine the conclusion that a violation of Section 301 can only

be found where a person allows industrial waste to enter into the waters of the Commonwealth. *Harmar Coal* did not consider or address whether *passive migration* of a regulated substance within or from one type of water to another results in an independent Clean Streams Law violation. Here, as elsewhere, the Department fails to acknowledge the presence and significance of the word "into" in the statutory text.

The Department is also mistaken to conclude that a continuing violation under Section 315, which requires a permit for discharge from a mine, has any significance as to when a violation continues under Section 301, which is not a provision that permits continued discharges. (DEP Brief at 39.) The violation under Section 315 continues as long as one fails to obtain a permit for an ongoing discharge. The violation under Section 301 continues as long as there is a discharge into waters of the Commonwealth. The former contemplates and provides for a permit for an ongoing discharge; the latter requires cessation of the discharge altogether. Neither section creates a continuing violation for the natural flow of substances following the entry into waters of the Commonwealth.

The fact that the Department does not identify a single case adopting its revised continuing liability theory despite the applicable CSL language having been in existence for more than forty years is further evidence that the Department's interpretation is not the law. *See McDonald Land & Mining Co.,*

Inc. v. DER, EHB Dkt. No. 91-173-E, 1991 WL 225855, at *9 (Oct. 1, 1991) (interpreting the CSL, "where there is a lack of case law after all the years of this statute's enforcement, this raises questions for us as to whether [the Department's] position can be sustained in an adjudication"). This Court has recognized that a novel legal position at odds with the plain language of a statutes and lacking support in prior case law may offend due process and/or lack legal authority. *See Commonwealth v. Maggiocco*, 883 A.2d 479, 487 (Pa. 2005) (acknowledging courts may not apply a judicial construction of a criminal statute that "is at odds with the statute's plain language, [and] lacks any support in prior case law"); *In re Saeger's Estates*, 16 A.2d 19, 21–22 (Pa. 1940) ("In the absence of controlling precedent and particularly in the absence of such requirement in the statutory law . . . we conclude that . . . there is no authority in the law of this State for the [interpretation proposed] by appellants").

B. The Commonwealth Court's Decision Is Consistent with the Canons of Statutory Construction.

This Court has long recognized that a penalty provision is "a punishment for [an omission] required by law." *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 150 (1882) (declining to allow a penalty to be applied where penalty provisions had been repealed, and collection of a penalty was not simply a remedy for enforcement). Here, the CSL provisions under consideration create prohibitions and obligations with attendant penalties that

may be sought under Section 605 of the CSL. These provisions should be strictly construed as penal provisions because punishment, rather than enforcement, is what the Department's construction would impose.

The Statutory Construction Act requires that penal provisions of statutes be strictly construed. 1 Pa.C.S. § 1928(b). This Court has clarified that strict construction is neither necessary nor appropriate where the words of the statute are free from ambiguity. *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001)(reversing a conviction where ambiguity existed and the language was construed in the light most favorable to the accused); *see also Commonwealth v. Reaser*, 851 A.2d 144, 149 (Pa.Super. 2004) (reversing and vacating a conviction, quoting *Booth* and noting that strict construction is to assure fairness to persons subject to the law, and that any ambiguity in a penal statute must be resolved in favor of lenity).

As argued above, EPC believes that the CSL provisions are clear and free from ambiguity, but, if the Court decides otherwise, the provisions should be construed in a manner that provides clear notice of the unlawful conduct and the potential penalties. *See Commonwealth v. Heinbaugh*, 354 A.2d 244 (Pa. 1976) (upholding a conviction where the statute provided an ascertainable standard to guide conduct).

The Department does not dispute that penal provisions in statutes must be strictly construed but, instead, incorrectly argues that the statutory

provisions at issue are "substantive" and "remedial," not penal. (DEP Brief at 54–55.) Unlike the statutes in the cases relied upon in the Department's brief, however, the Department's interpretation of the provisions at issue seeks to punish EPC rather than enforce compliance with the CSL. (DEP Brief at 49.)[22]

Sections 301, 307, 401 and 605 of the CSL are penal provisions because they define and penalize unlawful conduct. Each section begins with "No person . . . shall" or "It shall be unlawful to. . . ." 35 P.S. §§ 691.301, 691.307, 691.401. A key consequence stemming from this Court's decision will be the nature of the Department's authority to seek and the Environmental Hearing Board's authority to assess civil penalties for violations of the CSL. *See* 35 P.S. § 691.605. Indeed, this Court has already confirmed that the question before it is the scope of penalty liability contemplated by the CSL. *See EQT Prod. Co. II*, 130 A.3d at 753 ("In this direct appeal, we consider whether a company threatened by an administrative agency with ongoing, *multi-million-dollar penalties per such agency's interpretation of a statutory regime* has the right, immediately, to seek a judicial declaration that the agency's interpretation is erroneous" (emphasis

[22] *Accord EQT Prod. Co. III*, 153 A.3d at 436 ("Civil penalties are designed to punish wrongful conduct, as the Department concedes in its brief"). A primary goal of the Department appears to be punishment of EPC because it is a large company. *See* DEP Brief at 47–48; *accord* Petition for Review of Com., Dep't of Envtl. Prot., *supra* note 3, at ¶ 12 ("The Board erred in failing to impose additional penalties as a deterrent to EQT, based upon the fact that EQT is a multi-billion dollar company"). Such a motive does not authorize rewriting the CSL.

added)); ("EPC is entitled to clarification by [the Commonwealth Court] concerning the *statutes establishing the parameters of the company's penalty exposure*, so that it may have the opportunity to organize its affairs accordingly" (emphasis added)).

Given the evolving contours of the Department's continuing liability theory, EPC and the public would remain without clarity with respect to what actions or inactions give rise to penalty liability under the CSL, and the potential duration of those penalties, if the Commonwealth Court decision is not affirmed. And in spite of the Commonwealth Court opinion, the Environmental Hearing Board's Adjudication erroneously held that EPC's violations associated with the Pad S Impoundment extend through the present, despite the fact the Pad S Impoundment has not existed since 2013. *See* Adjudication, at pp. 36, 85. In the penalty matter, neither EPC nor anyone else could have had clear notice that penalties could or would be applied for years after the release ended, following attainment of cleanup standards for soil and active remediation of groundwater. Adoption of the Department's interpretation cannot provide a "clear and unequivocal" warning of what actions or inaction expose someone to liability under the CSL. *Reaser*, 851 A.2d at 149.

Here, the Commonwealth Court properly concluded that the CSL requires some action or inaction by the polluter to give rise to a violation. *EQT*

Prod. Co. III, 153 A.3d at 436. The Department's interpretation, on the other hand, would sever the violation from the actions or inactions of the violator and vastly expand the scope of liability to include circumstances where remediation is complete and yet some concentration of constituents remains in groundwater, continually flowing and moving within the hydrologic cycle. To reach such a conclusion, this Court would have to ignore the active terms—"permit," "place," or "discharge"—in the CSL and insert language that "plainly appears" to impose liability on a violator for the mere presence of contaminants that remain present in or simply move within water after the entry into waters of the Commonwealth has ceased. *See Commonwealth v. Raban*, 85 A.3d 467, 478 n.7 (Pa. 2014) (acknowledging, along with the dissent, that the term "permit . . . clearly involv[es] an intent element").

Rather than construing the CSL to punish a person indefinitely for the mere detection of constituents or movement of constituents within waters of the Commonwealth, this Court should affirm the Commonwealth Court's decision, which clarified the scope of unlawful conduct in the CSL to actions or inaction that can be understood, giving fair notice of both liability and the potential for daily penalties. The General Assembly would not have intended, and did not intend, the absurd results that stem from the Department's interpretation. *See*, *supra*, Section II.D. This is especially true given that the CSL's penalty provisions must be strictly construed.

C. The Department's Interpretation Conflicts With and Undermines Act 2.

The rules of statutory construction require statutes in pari materia to be construed together as one statute when possible. *S & H Transp.*, 140 A.3d at 7 (citing 1 Pa.C.S. § 1932(a)) ("Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things"). Act 2 and the CSL relate to the same persons and things, namely remediators of environmental contamination. The CSL and Act 2 can be read in pari materia in a manner that is consistent with EPC's construction, which is that a person only violates the CSL for days on which there is entry into waters of the Commonwealth and the cleanup that follows a violation can be accomplished under Act 2. Penalties attach to the former, the initial violation, and are not affected by the latter, the cleanup, unless one fails to comply with a cleanup order. The plain meaning of the CSL, as determined by the Commonwealth Court, is the only way to harmonize it with the provisions and purposes of Act 2.

Act 2 rests on two critical principles: uniform cleanup standards and liability relief from future cleanup requirements under state law. Act 2 cleanup standards are risk-based; none requires the remediator to remove all constituents so they are no longer present or detectable in groundwater or prevent constituents from flowing from one water or part of water to another.

See 35 P.S. § 6026.102(6) ("Cleanup plans [under Act 2] should be based on the actual risk that contamination on the site may pose to public health and the environment . . . not on cleanup policies requiring every site in this Commonwealth to be returned to a pristine condition"); 35 P.S. §§ 6026.301, 6026.302, 6026.303, 6026.304 (identifying the different cleanup standards available under Act 2). Once an Act 2 standard is achieved, Section 501(a) of Act 2 relieves anyone who is required to clean up or who voluntarily cleans up soil or groundwater contamination from further cleanup liability. 35 P.S. § 6026.501(a).

The Department's position allows it, at any time, to threaten exorbitant civil penalties for some long-ago spill, even one that lasted a few minutes or hours, as long as a contaminant is detectable in the waters of the Commonwealth. Given the detection technology now available and the ability to analyze various constituents at parts per billion and parts per trillion concentrations, neither EPC nor any other party cleaning up contaminated sites in the Commonwealth could ever achieve a cleanup that would preclude the perpetual penalty liability posited under the Department's interpretation. Very few parties would take the financial, legal, or business risk of voluntarily entering into Act 2 to clean up or redevelop a brownfield site having historic groundwater contamination knowing the Department could seek a penalty for

the intervening years or decades that have passed since the release. The Legislature could not have intended, and did not intend, this result.

The Department's position also allows it to threaten exorbitant civil penalties as long as contaminants passively move within waters of the Commonwealth, which they inevitably must do, rendering Act 2 liability protection meaningless. Recognizing this, the Department simply responds that its "practice" is to cap its claims for civil penalties when an Act 2 cleanup standard has been met. (DEP Brief at 59.) The public should not have to know or trust the Department's or an administration's benevolence, discretion, or alleged internal practices to understand where civil penalty liability begins and ends, especially when, like in this case, the applicable statutory language provides those answers.[23] The Department's interpretation of the CSL would thus frustrate the purposes of Act 2 by eviscerating uniform cleanup standards and making liability relief illusory. By assigning ongoing penalty liability when previously released constituents remain present or flow within waters of the

[23] The Department needles EPC that it has "not identified a single case in the history of the Clean Streams Law that supports its dire predictions of limitless liability." (DEP Brief at 59.) But the penalty case here is just that case. The Department's appeal of the Adjudication asserts that the Board erred by not imposing higher penalties up through the date of the hearing in August 2016, when the Adjudication found (erroneously, as EPC contends in its appeal) that penalty liability did not accrue beyond June 2013. *See* Petition for Review of Com., Dep't of Envtl. Prot., *supra* note 3, ¶ 9. The liability sought here by the Department is indeed without limit.

Commonwealth, the Department would effectively create a new standard that all constituents must be removed from soil and groundwater. This position directly contradicts Section 106(a) of Act 2, under which Act 2 cleanup standards must be used when remediation is required under the CSL. The Department's continuing liability theory must be rejected because it is wholly incompatible with Act 2 liability protection.

The Department's interpretation would nullify the environmental liability protection afforded by Act 2 and significantly curtail the future redevelopment of thousands of former industrial and commercial sites, which is antithetical to the very purpose of Act 2. The Legislature could not have intended such a result. *See Speers*, 117 A.2d at 703; *see also*, *supra*, Section II.D.

V. THE QUESTIONS PRESENTED TO THE COMMONWEALTH COURT ARE PURE LEGAL QUESTIONS.

There is no sound reason for this Court to delay its review of the legal issue in this case, awaiting the possibility of judicial review of the EHB's Adjudication as the Department suggests. (DEP Brief at 63.) As this Court recognized, EPC's "complaint is centered on discrete legal questions, primarily, whether the mere presence of contaminants in the environment represents a 'discharge' under the Clean Streams Law." *EQT Prod. Co. II*, 130 A.3d at 756. This Court already concluded that the question of what constitutes a "discharge" under the Clean Streams Law "does not entail a fact-based inquiry

subject to essential vetting through the administrative hearing process." *Id.* at 756.[24]

In *EQT Prod. Co. II*, this Court did not order the Commonwealth Court to resolve any factual issues related to the underlying penalty calculation that gave rise to the legal controversy between the parties. Rather, it directed the Commonwealth Court to decide the legal issue because "EPC is entitled to clarification by [the Commonwealth Court] concerning the statutes establishing the parameters of the company's penalty exposure, so that it may have the opportunity to organize its affairs accordingly." *Id.* at 759.

The Amici's and Department's requests that this Court rule in such a manner to "penalize" EPC indefinitely for the natural flow of de minimis concentrations of constituents within or between waters further confirm the

[24] Both parties have appealed the EHB's Adjudication to the Commonwealth Court. *See, supra*, at note 3. Vacating the Commonwealth Court's decision, or postponing review until the Commonwealth Court hears the appeals of the Adjudication, would waste substantial judicial and party resources. Affirming the threshold legal issue settles the law and allows the Commonwealth Court to apply it to the appeals of the Adjudication. Furthermore, the Commonwealth Court's decision on the appeals of the Adjudication will not be appealable to this Court as of right because further appeals of cases within Commonwealth Court's appellate jurisdiction are within the discretion of this Court. *See* 42 Pa.C.S. § 724(a); *see also Com., Dep't of Envtl. Prot. v. Cromwell Twp., Huntingdon Cty.*, 32 A.3d 639, 649 (Pa. 2011) (holding the Commonwealth Court's review of enforcement proceedings is not appealable to this Court as of right). Thus, if either court should await the other's determination, it should be the Commonwealth Court, not this Court. *See, e.g.*, *Mizener's Estate*, 71 Pa. Super. 216, 216 (1919) (waiting for then adopting a decision issued by this Court when the same questions were involved in a separate appeal pending before the Superior Court).

need for affirmance of the legal question from this Court. As this Court has acknowledged, this declaratory action is not about "trying to avoid doing what the law requires," or trying to avoid the assessment of a penalty that might result from the related administrative process. *EQT Prod. Co. II*, 130 A.3d at 756. Like the United States Supreme Court in *Sackett v. E.P.A.*, this Court appeared to recognize that the Clean Streams Law, like the Clean Water Act, is not "designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Id.* at 757 (quoting *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012)). The proper interpretation of Sections 301, 307 and 401 of the CSL, as a purely legal matter, should be made without being driven by the facts of a particular penalty case.

CONCLUSION

This Court should affirm the judgment of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
WORD COUNT LIMIT FOR PRINCIPAL BRIEF

I, Kevin J. Garber, hereby certify that the within Brief for Appellee EQT Production Company contains fewer than 14,000 words, exclusive of any tables or addenda, as prescribed by Pa.R.A.P. 2135.

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