

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

---

NO. \_\_\_\_\_

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EQT PRODUCTION COMPANY,

Plaintiff,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OF THE COMMONWEALTH OF PENNSYLVANIA,

Defendant.

---

COMPLAINT IN ACTION FOR DECLARATORY JUDGMENT

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Kevin J. Garber, Esquire  
PA I.D. No. 51189

Leonard Fornella, Esquire  
PA I.D. No. 27921

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Attorneys for Plaintiff,  
EQT Production Company

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EQT PRODUCTION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	
DEPARTMENT OF	)	
ENVIRONMENTAL PROTECTION	)	
OF THE COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Defendant.	)	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by an attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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Harrisburg, Pennsylvania 17101  
Telephone Number (717) 232-7536

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EQT PRODUCTION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	
DEPARTMENT OF	)	
ENVIRONMENTAL PROTECTION	)	
OF THE COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Defendant.	)	

COMPLAINT IN ACTION FOR DECLARATORY JUDGMENT

AND NOW comes plaintiff, EQT Production Company (hereinafter "EPC"), by and through its undersigned counsel, and hereby files this Complaint in Action for Declaratory Judgment, averring as follows:

1. This action is brought pursuant to the Declaratory Judgments Act, 42 Pa. C.S.A. § 7531, et seq., for the purpose of determining the legal rights and obligations of the parties, and involves a question of general and actual controversy that is ripe for consideration, as appears more fully hereinafter.

2. EPC is a Pennsylvania corporation, having its principal office and place of business located at 625 Liberty Avenue, Suite 1700, Pittsburgh, Pennsylvania 15222.

3. The Department of Environmental Protection of the Commonwealth of Pennsylvania (hereinafter "DEP") is an administrative agency of the Commonwealth, having its principal office and place of business located at P.O. Box 2063, 400 Market Street, 16th Floor, Harrisburg, Pennsylvania 17105.

4. This Court has original jurisdiction over this declaratory judgment action pursuant to 42 Pa. C.S.A. § 761, as this is an action against the Commonwealth government and its agency.

5. EPC is presently without a viable administrative remedy for the relief it seeks herein.

#### Facts

6. The DEP is vested with the authority and responsibility, inter alia, to administer and enforce the requirements of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq. (hereinafter "Clean Streams Law").

#### Background of the Site

7. EPC owns and operates several natural gas wells situated on a gas well pad known as "Phoenix Pad S" located in Duncan Township, Tioga County, Pennsylvania. EPC drilled the gas wells pursuant to well

permits that DEP issued under the Pennsylvania Oil and Gas Act of 2012, 58 Pa. C.S. §§ 2301-3504 (also known as Act 13).

8. EPC constructed a subgrade impoundment, known as the “Pad S Impoundment,” near the Phoenix Pad S. The Pad S Impoundment was fitted with an impervious synthetic membrane liner and was originally designed to contain freshwater, but later, with DEP approval, was used for impaired water generated from the hydraulic fracturing of gas wells on Phoenix Pad S and other well pads.

9. On May 30, 2012 EPC concluded that it was more likely than not that the Pad S Impoundment was leaking into the subsurface beneath the impoundment, and therefore reported its conclusion to DEP’s spill reporting hotline.

10. The Pad S Impoundment was completely emptied of impaired water and sludge by June 11, 2012, which was twelve (12) days after the impoundment leak was initially reported to DEP. During this time period, holes were discovered in the impoundment liner on the bottom and lower side of the Pad S Impoundment. EPC reported that finding to DEP.

11. All discharges of material from the Pad S Impoundment ended on or before June 11, 2012.

12. EPC responded promptly to the leak from the Pad S Impoundment by installing sumps and trenches at five (5) locations hydrogeologically downgradient of the Pad S Impoundment to collect and/or intercept groundwater that might become contaminated with any passively migrating impaired water.

13. With DEP's concurrence, EPC entered into the formal cleanup process under the Pennsylvania Land Recycling and Environmental Remediation Standards Act (also known as Act 2), 35 P.S. § 6026.101 et seq., and has been remediating soil and groundwater at the Pad S area to meet Act 2 cleanup standards

14. Since June of 2012, EPC has conducted extensive investigation and remediation activities at the site under continual DEP oversight. EPC has demonstrated attainment with the Act 2 Statewide Health Standards for soil beneath the former Pad S Impoundment, but in conjunction with DEP, is still working toward achieving an Act 2 standard for groundwater at the site.

#### DEP's Penalty Demand

15. By letter dated May 9, 2014, DEP sent a proposed Consent Assessment of Civil Penalty (CACP) to EPC. A copy of the CACP is attached hereto as Exhibit "A."

16. The CACP alleges that the discharge of impaired water from the Pad S Impoundment violated, inter alia, sections 301, 307, and 401 of the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.301, 691.307, and 691.401.

17. The CACP demands that EPC pay a civil penalty of \$1,270,871 to resolve the alleged violations of the foregoing environmental laws.

18. DEP has stated that its penalty demand is not negotiable.

19. DEP has stated that \$900,000 of the total penalty is being assessed for violations of sections 301, 307 and 401 of the Clean Streams Law, which accounts for 71% of the total penalty demand.

20. DEP's proposed penalty of \$900,000 under the Clean Streams Law includes an assumed "ongoing discharge" of contaminants for 150 days, beginning with the date of the initial EPC report of the discharge from the Pad S Impoundment to DEP, although there would have been, at most, twelve (12) days of actual discharges from the Pad S Impoundment.

21. DEP's articulated legal position to support this proposed penalty is that every day that contaminants from the Pad S Impoundment remain in the subsurface soil and passively enter groundwater and/or surface water constitutes a "continuing violation" of sections 301, 307 and 401 of the Clean Streams Law, for which a separate civil penalty may be



assessed for each day of alleged violation. This singular interpretation of the applicable statutory provisions is contrary to the plain wording and meaning of this statute, and is not supported by any judicial precedent. In addition, DEP's interpretation defeats the legislative intent in Act 2 and renders the Act 2 liability protection unachievable for EPC or any other similarly situated party as long as any detectable contaminant is present in the environment after a discharge.

22. DEP has also recently asserted this "continuing violation" legal theory in order to demand penalties in at least one other known case, which is pending before the Pennsylvania Environmental Hearing Board, and is captioned Commonwealth of Pennsylvania, Department of Environmental Protection v. Sunoco Logistics Partners, L.P., and Sunoco Pipeline, L.P., EHB Docket No. 2014-020-CP-R.

23. In the Sunoco Logistics matter, DEP filed a Complaint seeking a civil penalty of \$2,385,610 arising out of a one-hour failure of a gasoline pipeline, on a single day (November 25, 2008), that discharged approximately 12,000 gallons of gasoline into the surrounding environment. A significant portion of the penalty demand is based on a passive migration of constituents in the environment. The Complaint alleges that gasoline and its constituents entered the ground and groundwater subsequent to the

discharge and continued to flow or be discharged into Turtle Creek. The Department's Sunoco Logistics Complaint similarly alleges violations of sections 301, 307, and 401 of the Clean Streams Law.

24. Sunoco Logistics moved for partial summary judgment on the issue of whether a single discharge from its pipeline on a single day may be subject to civil penalties for each day gasoline remained in the environment after the initial release.

25. DEP's memorandum in opposition to Sunoco Logistics' motion for partial summary judgment, filed on July 8, 2014, argues that the Clean Streams Law, sections 301, 307 and 401, prohibits passive migration of contaminants in the environment, such that DEP may assess a civil penalty for each day a contaminant remains in the environment, even where Sunoco Logistics had taken prompt action to stop and then cleanup the release.

26. On August 28, 2014, the Environmental Hearing Board, en banc, heard oral argument on Sunoco Logistics' motion for partial summary judgment concerning its liability for a "continuing violation."

27. At oral argument before the Board, DEP's attorneys argued that if discovery shows soil or groundwater samples which "prove up more days that [the contamination] migrated to groundwater and surface water," DEP

will add those days to its initially demanded penalty. Thus, DEP continues to assert its position that civil penalties may be assessed for the passive migration of material in the environment after the initial discharge into the environment ended. See Exhibit "B" (page 34) attached hereto.

28. As of the date hereof, the Board has not decided the Sunoco Logistics' motion for partial summary judgment.

29. Section 301 of the Clean Streams Law, 35 P.S. § 691.301 provides:

No person or municipality 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.

30. Section 307 of the Clean Streams Law, 35 P.S. § 691.307 provides:

No person or municipality 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.

31. Section 401 of the Clean Streams Law, 35 P.S. § 691.401 provides:

It shall be unlawful for any person or municipality 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 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.

32. Sections 301, 307 and 401, in conjunction with section 605 of the Clean Streams Law, 35 P.S. § 691.605 (establishing civil penalty amounts for violations) grant DEP authority to assess a civil penalty only for the days that pollutants were actually *discharged from* the Pad S Impoundment, not for any days that previously released constituents passively migrate through the environment into groundwater or surface water.

33. DEP's interpretation of the Clean Streams Law is contrived, overbroad, not supported by judicial decisions, and is contrary to the statute and therefore unlawful.

34. DEP's interpretation of the Clean Streams Law also directly conflicts with and undermines the incentives the legislature created in Act 2 because Act 2 (i) authorizes risk-based cleanups that permit regulated substances to remain in the environment if the responsible party attains an Act 2 cleanup standard, and (ii) relieves the responsible party of further liability for remediation of the site under, *inter alia*, the Clean Streams Law.

35. DEP's interpretation of the Clean Streams Law contradicts Act 2 because it means that civil penalties may be asserted against EPC as long as any contaminant remains in the environment. DEP's construction of the Clean Streams Law in direct contradiction to the dictates of Act 2 therefore has created significant uncertainty and potential unending civil penalty liability for EPC or any other entity attempting to remediate a discharge under the DEP-administered Act 2 program.

36. EPC avers that the issues outlined above are adequately developed and are ripe for judicial review, and that EPC will suffer direct, immediate and substantial hardship if review is delayed.

37. EPC avers that this action will settle controversies indicative of immediate and inevitable litigation, or which can be determined more advantageously if settled promptly rather than at a future time when litigation is required.

38. EPC avers further that this action will terminate the controversy giving rise to the proceeding, will be of practical help in terminating the controversy between the parties and/or will resolve uncertainty giving rise to the controversy, and will serve the public interest.


39. EPC also avers that this action presents important issues to the Court regarding the DEP's arbitrary, overly broad and unsupported

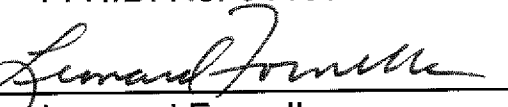
interpretations of the relevant statutes, and which has and will have a statewide impact on a variety of individuals, businesses and other entities.

WHEREFORE, EPC respectfully requests that the Court enter a Declaratory Judgment declaring that DEP's interpretation of sections 301, 307 and 401 of the Clean Streams Law is unlawful, and that the Court grant such other and further relief as may be necessary and appropriate under the circumstances.

Respectfully submitted,

BABST, CALLAND,  
CLEMENTS & ZOMNIR, P.C.

By   
Kevin J. Garber  
PA I.D. No. 51189

By   
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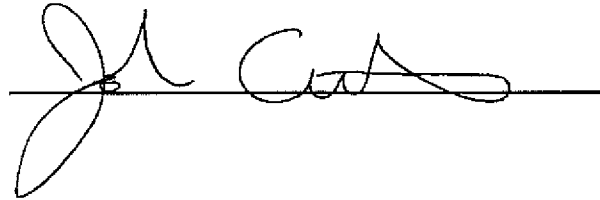
September 19, 2014

### VERIFICATION

I, John Centofanti, Corporate Director, Environmental Affairs of EQT Production Company, do hereby state that I am authorized to execute this Verification on its behalf, and that the averments of fact contained in the foregoing Complaint in Action for Declaratory Judgment, as those facts have been made known to me, are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

9-19-14

Date

A handwritten signature in black ink, appearing to read "John Centofanti", written over a horizontal line.







# pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION

NORTHCENTRAL REGIONAL OFFICE

May 9, 2014

**CERTIFIED MAIL NO. 7012 3050 0001 4216 0686**

EQT Production Company  
Attn: Mr. John Centofanti  
625 Liberty Avenue, Suite 1700  
Pittsburgh, Pennsylvania 15222

Re: Settlement of Violations  
EQT Production Company  
Phoenix 590934 Pad S, Permit #s 117-21148  
Duncan Township, Tioga County

Dear Mr. Centofanti:

Enclosed are four copies of a Consent Assessment of Civil Penalty. If your company is willing to resolve its civil penalty liability by signing the enclosed document, please have two authorized officials sign all four copies of the Consent Assessment of Civil Penalty and return them to me at the letterhead address below by June 6, 2014. Also due at that time are your checks, the first made payable to the "Commonwealth of Pennsylvania," for One Million Two Hundred Seventy Thousand Eight Hundred Seventy-One Dollars (\$1,270,871.00), and the second made payable to the "Pennsylvania Fish & Boat Commission," for Seven Hundred Ninety-Four Thousand Seven Hundred Ninety-Three Dollars (\$794,793.00), as outlined in Paragraphs 1 and 2 of the Consent Assessment of Civil Penalty. If your company's civil penalty liability has to be resolved by a unilateral assessment issued by the Department of Environmental Protection (Department), the penalty amount could be substantially higher.

The documents also provide for an attorney's signature on behalf of EQT Production Company. If you choose to sign these documents without consulting legal counsel, please cross out the attorney's signature block and pen in the word "waived". The entry of the date upon which the Consent Assessment of Civil Penalty is finalized, in the first paragraph of the document, will be completed by the Department's attorney.

Thank you for your efforts in resolving this matter. If you have any questions, please feel free to contact me by phone at 570-327-0525 or by e-mail at [sminium@pa.gov](mailto:sminium@pa.gov).

Sincerely,

Sasha C. Minium  
Environmental Protection Compliance Specialist  
Eastern District Oil and Gas Operations

Enclosure

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EQT Production Company

-2-

May 9, 2014

cc: Permit File 117-21148  
Pennsylvania Fish & Boat Commission

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the matter of:

EQT Production Company	:	Violations of the Oil and Gas Act,
Phoenix 590934 Pad S	:	the Clean Streams Law, the Solid
Permit No. 117-21148	:	Waste Management Act, the
Duncan Township, Tioga County	:	Department's Rules and
	:	Regulations, and Title 30: The
	:	Pennsylvania Fish & Boat Code

**CONSENT ASSESSMENT OF CIVIL PENALTY**

This Consent Assessment of Civil Penalty (hereinafter "CACP") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2014, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter "Department"), the Pennsylvania Fish and Boat Commission (hereinafter "PFBC"), and EQT Production Company (hereinafter "EQT").

A. The Department is the administrative agency vested with the authority and responsibility to administer and enforce the requirements of: The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq. (hereinafter "Clean Streams Law"); the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58 Pa. C.S. §§ 3201-3274 (hereinafter "2012 Oil and Gas Act"); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003 ("Solid Waste Management Act"); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 (hereinafter "Administrative Code"); and the rules and regulations promulgated thereunder.

B. The PFBC is an agency of the Commonwealth vested with the authority and responsibility to administer and enforce the laws and regulations of: Act 1980-175, Title 30, The Pennsylvania Fish & Boat Code § 2502(a) "*Disturbance of Waterways and Watersheds*" (M3), § 2504(a)(2) "*Pollution of Waters*" (M3) and § 2506 "*Commonwealth Actions for Damage to Fish*".

C. EQT is a Pennsylvania Corporation which maintains a business address of 455 Racetrack Road, Suite 101, Washington, PA 15301.

D. EQT owns and operates a natural gas well known as the Phoenix 590934 Pad S (hereinafter "Gas Well Pad"), authorized by Permit Number 117-21148, located in Duncan Township, Tioga County, Pennsylvania.

E. The Gas Well Pad is located in a High Quality ("HQ") watershed.

F. On May 9, 2012, the Department inspected the area surrounding Impoundment 2 and the proposed centralized impoundment at the Gas Well Pad in response to a reported flowback release that had occurred on May 8, 2012 and found the following:

- 1) An estimated 300 to 500 gallons of flowback had been released onto the ground in a channel along the east side of the impoundment access road;
- 2) The release had occurred while pumping flowback from Impoundment 2 through a 12 inch line to the Gas Well Pad to be utilized for hydraulic fracturing;
- 3) The 12 inch line, which had been reused from another site, had a 2 inch hole in the bottom that had not been patched, and the line was not pressure tested prior to beginning the flowback transfer;
- 4) The flowback traveled south for about 250 to 300 feet down the length of the channel and into a rock apron located near the limit of disturbance ("LOD") of Pad S, and evidence of a flow path beyond the rock apron and LOD into the woods was observed; and,
- 5) Field conductivity measurements of standing puddles indicated the release was primarily confined to the channel, but a puddle was located outside the channel near the release start point.

G. The May 9, 2012 inspection report included a Notice of Violation ("NOV") for the following:

- 1) Failure to contain pollutorial substances and wastes from completion of the well(s) in a pit, tank, or series of pits and tanks, in violation of Section 78.56(a) of the Department's Rules and Regulations, 25 Pa Code § 78.56(a);
- 2) Creating the potential to pollute waters of the Commonwealth, in violation of Section 402 of the Clean Streams Law, 35 P.S. § 691.402; and,
- 3) The unpermitted discharge of residual waste onto the ground, in violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301.

H. On May 10, 2012, the Department inspected the Gas Well Pad to verify the spill cleanup status and found the following:

- 1) The length of the impacted channel had been excavated;
- 2) A 3 foot deep sump that had been excavated off the end of the rock apron was full of black colored liquid;
- 3) Standing water was observed in the excavation at the top of the channel, near the beginning of the release;
- 4) Two seeps with elevated conductivity were observed, one emerging within the channel, and the other emerging from the southeast corner of Impoundment 2; and,
- 5) The violations documented on May 9, 2012 remained outstanding, and no new violations were cited.

I. On May 24, 2012, EQT informed the Department that 6 to 7 holes had been observed in the liner of Impoundment 2, concentrated in the northeast corner where fluid transfer

had been occurring. The holes had been discovered on May 21, 2012 during EQT's visual inspection of the liner, and flowback transfer from Pad C to Impoundment 2 was ceased upon discovery. EQT stated that although one hole was located below the high fluid mark visible on the liner, it was undetermined whether that hole existed when the fluid level was at the high fluid mark. EQT also stated that the holes were repaired on May 22, 2012.

J. On May 30, 2012, the Department inspected the spill location and area east of Impoundment 2 at the Gas Well Pad and noted that the violations documented on May 9, 2012 remained outstanding. No new violations were cited.

K. On May 31, 2012, the Department inspected the Gas Well Pad and found the following:

- 1) On May 30, 2012, EQT notified the Department that high conductivity was noted while field testing the groundwater in Monitoring Well-2 ("MW-2"), which had been installed for the proposed centralized impoundment monitoring;
- 2) A spring located 250 feet northeast and downgradient from MW-2 also had high conductivity during field testing by both EQT's consultant ( $>30,000$  umhos/cm) and the Department ( $>19.99$  mS/cm);
- 3) Trees and shrubs along the spring discharge flow path appeared stressed, as evidenced by yellowing/brown leaves and some defoliation;
- 4) Stressed vegetation was observed further downgradient beyond the end of the flow path;
- 5) Field conductivity measurements were also elevated in Rock Run, two unnamed tributaries ("UNTs") to Rock Run and a large upstream wetland; and,
- 6) EQT stated that the hydraulic fracturing of Phoenix Pad S well 590935 had been expedited in order to use a majority of the flowback in the impoundment, and any remaining flowback would be removed and transported to tanks on Phoenix Pad E.

L. The May 31, 2012, inspection report included a NOV for the following:

- 1) Failure to contain pollutorial substances from the drilling, altering or completing of the well(s) in a pit, tank or series of pits and tanks, in violation of Section 78.56(a) of the Department's Rules and Regulations, 25 Pa Code § 78.56(a);
- 2) The unpermitted discharge of production fluids, an industrial waste, into waters of the Commonwealth, in violation of Section 301 of the Clean Streams Law, 35 P.S. § 691.301;
- 3) The unpermitted discharge of industrial waste into waters of the Commonwealth, in violation of Section 307 of the Clean Streams Law, 35 P.S. § 691.307;
- 4) The unpermitted discharge of pollutorial substances into waters of the Commonwealth, in violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401; and,
- 5) The unpermitted discharges of residual waste, in violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301.

M. Between June 1, 2012 and June 8, 2012, the Department inspected Impoundment 2 at the Gas Well Pad six (6) times to collect field conductivity measurements to identify the extent of the flowback release. During this time, the Department noted that Impoundment 2 was being drained, and seep fluid continued to be captured by trenches and sumps. Stressed and dying vegetation was observed on June 4, 2012 and June 5, 2012. Additionally, on June 6, 2012, the PFBC installed data loggers to capture continuous temperature and conductivity readings in Rock Run, Sand Spring and Stream W where the Department had proposed routine sampling. The violations previously cited remained outstanding, and no new violations were cited.

N. On June 11, 2012, the Department inspected Impoundment 2 at the Gas Well Pad and found the following:

- 1) The flowback had been removed, the liner was being pressure washed, and the sediment in the bottom of the pit was being solidified for off-site disposal;
- 2) Approximately 75-100 holes, as estimated by EQT, were observed in the liner;
- 3) Trenches had been excavated to the west of the impoundment to collect liquid exhibiting elevated specific conductance, which was being pumped to a collection tank near the impoundment for disposal;
- 4) EQT installed conductivity recorders in the sumps;
- 5) The Department collected field conductivity measurements; and,
- 6) The violations cited during the inspection on May 31, 2012 remained outstanding.

O. The June 11, 2012, inspection report included a NOV for the following:

- 1) Failure to maintain an impermeable pit or tank that contains pollutorial substances, in violation of Section 78.56(a)(4) of the Department's Rules and Regulations, 25 Pa Code § 78.56(a)(4);
- 2) Failure to manage a pit, when a liner becomes torn or otherwise loses its integrity, to prevent the pit's contents from leaking, in violation of Section 78.56(a)(4)(iv) of the Department's Rules and Regulations, 25 Pa Code § 78.56(a)(4)(iv); and,
- 3) Failure to take necessary measures to prevent pollutorial substances from directly or indirectly reaching waters of the Commonwealth, in violation of Section 91.34(a) of the Department's Rules and Regulations, 25 Pa Code § 91.34(a).

P. On June 12, 2012, the Department conducted a follow-up inspection of Impoundment 2 at the Gas Well Pad and found the following:

- 1) The impoundment remained empty;
- 2) The holes in the liner were observed again, showing that the punctures were up through the liner, rather than down into the subgrade material;
- 3) EQT stated that they had discovered the holes on June 8, 2012, when the flowback fluid was removed;

- 4) The removal of the liner was discussed, along with the excavation of the impacted soil, the staging of the soil pending chemical analysis, and acceptance by a landfill; and,
- 5) The violations previously cited remained outstanding.

Q. Between June 13, 2012 and June 27, 2012, the Department inspected Impoundment 2 at the Gas Well Pad six (6) times to document field measured conductivity at locations previously sampled as part of routine sample collection. During this time, the Department noted that additional trenches to capture seep fluids were being excavated, and field measured conductivity of the Station M seep and nearby UNT remained elevated. Additionally, the Department observed a dying tree along the drainage ditch south of the impoundment on July 27, 2012. The violations previously cited remained outstanding, and no new violations were cited.

R. In the month of July 2012, the Department inspected Impoundment 2 at the Gas Well Pad nine (9) times to complete field conductivity monitoring and routine sampling. Over the course of the month, the Department also documented the presence of stressed vegetation. The violations previously cited remained outstanding, and no new violations were cited.

S. In the month of August 2012, the Department inspected Impoundment 2 at the Gas Well Pad ten (10) times to complete field conductivity monitoring and routine sampling. The violations previously cited remained outstanding.

T. On August 2, 2012, the Department completed an aerial inspection of Impoundment 2 at the Gas Well Pad to confirm the extent of the impacts caused by the flowback release from Impoundment 2. Aerial photographs depicted the extent of stressed vegetation previously documented from the field. New areas of stressed vegetation were also observed to the south of Impoundment 2. The following was documented:

- 1) Stressed beech saplings were observed adjacent to the west side of the impoundment access road;
- 2) Mature trees in the wooded area south of the impoundment were beginning to show signs of stress, including leaves turning brown from the outer edges inward;
- 3) There appeared to be two separate clusters of stressed vegetation south of the proposed centralized impoundment;
- 4) The most apparent stressed vegetation appeared to be in line with the bearing of the Danzer Sumps located along the private road;
- 5) Stressed vegetation was observed in multiple areas south of the proposed centralized impoundment during a field verification walk;
- 6) Further investigation of the impacted areas south of the current and proposed impoundments was necessary to fully characterize and address the flowback release; and,
- 7) The violations previously cited remained outstanding.

U. On August 9, 2012, the Department inspected the Gas Well Pad and found the following:

- 1) Fluid was seeping out from beneath a patched, unbermed liner and discharging onto the ground in the northeast corner of the pad where a row of tanks was staged; and,
- 2) Elevated conductivity was measured in the wetland off the east corner of the pad and in ponded water located at a nearby bedrock outcropping.

V. The August 9, 2012 inspection report included a NOV for the following:

- 1) Failure to control and dispose of fluids in a manner that prevents pollution of the waters of the Commonwealth in violation of Section 78.54 of the Department's Rules and Regulations, 25 Pa Code § 78.54;
- 2) The unpermitted discharge of residual waste, in violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301;
- 3) The unpermitted discharge of industrial waste into waters of the Commonwealth, in violation of Section 307 of the Clean Streams Law, 35 P.S. § 691.307;
- 4) The unpermitted discharge of a pollutorial substance into waters of the Commonwealth, in violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401; and,
- 5) The unpermitted discharge of industrial waste into waters of the Commonwealth, in violation of Section 301 of the Clean Streams Law, 35 P.S. § 691.301.

W. In the month of September 2012, the Department inspected Impoundment 2 at the Gas Well Pad six (6) times to complete field conductivity monitoring and routine sampling. Over the course of the month, the Department also documented that liner removal from the south half of the impoundment floor had been completed on September 12, 2012, and excavation of the impoundment floor soils had begun. The violations previously cited remained outstanding.

X. On September 24, September 25, and September 26, 2012, the Department inspected the Gas Well Pad and found the following:

- 1) A sump discharge with elevated conductivity, located in the southeast corner of the pad, was first observed by the Department on September 24, 2012;
- 2) The Department had notified EQT by e-mail of the discharge on September 24, 2012 along with a request to contain the discharge and identify the source;
- 3) The sump discharge was sampled on September 25, 2012, and it did not appear that remedial containment measures had been implemented yet;
- 4) Field conductivity was still elevated when EQT personnel on site were shown the discharge on September 26, 2012; and,
- 5) Sampling results from September 24, 2012 and September 25, 2012 showed elevated chlorides, sulfate and strontium in the discharge.

Y. The September 26, 2012 inspection report included a NOV for the following:



- 1) Failure to control and dispose of fluids in a manner that prevents pollution of the waters of the Commonwealth, in violation of Section 78.54 of the Department's Rules and Regulations, 25 Pa Code § 78.54;
- 2) Creating the potential to pollute waters of the Commonwealth, in violation of Section 402 of the Clean Streams Law, 35 P.S. § 691.402; and,
- 3) The unpermitted discharge of residual waste into waters of the Commonwealth, in violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301.

Z. Between October 2012 and July 2013, the Department inspected Impoundment 2 at the Gas Well Pad twenty (20) times to complete field conductivity monitoring and routine sampling and to observe the impoundment reclamation. An additional aerial inspection was completed on May 31, 2013. The violations previously cited remained outstanding, and no new violations were cited.

AA. On July 1, 2013, EQT reported that reclamation of Impoundment 2 was completed. Site monitoring and remediation of the Gas Well Pad and the surrounding area are ongoing.

AB. Section 301 of the Clean Streams Law, 35 P.S. § 691.301, states that "[n]o person or municipality shall place or permit to be placed, or discharge 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."

AC. Section 307 of the Clean Streams Law, 35 P.S. § 691.307, states that "[n]o person or municipality 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 ...."

AD. Section 401 of the Clean Streams Law, 35 P.S. § 691.401, states that "[i]t shall be unlawful for any person or municipality 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 into any waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined."

AE. Section 402 of the Clean Streams Law, 35 P.S. § 691.402, states that "[w]henver the Department finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the Department may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the Department or may otherwise establish the conditions under which such activity shall be conducted, or the Department may issue an to a person or municipality regulating a particular activity."

AF. Section 78.54 of the Department's Rules and Regulations, 25 Pa. Code § 78.54, states that "[t]he well operator shall control and dispose of fluids, residual waste and drill cutting,

including top hole water, brines, drilling fluids, drilling muds, stimulation fluids, well servicing fluids, oil, production fluids and drill cuttings in a manner that prevents pollution of the waters of this Commonwealth and in accordance with §§ 78.55-78.58 and 78.60-78.63 and with the statutes under which this chapter is promulgated.”

AG. Section 78.56(a) of the Department’s Rules and Regulations, 25 Pa. Code § 78.56(a), states that “[e]xcept as provided in §§ 78.60(b) and 78.61(b) (relating to discharge requirements; and disposal of drill cuttings), the operator shall contain pollutional substances and wastes from the drilling, altering, completing, recompleting, servicing and plugging the well, including brines, drill cuttings, drilling muds, oils, stimulation fluids, well treatment and servicing fluids, plugging and drilling fluids other than gases in a pit, tank or series of pits and tanks.”

AH. Section 78.56(a)(4) of the Department’s Rules and Regulations, 25 Pa. Code § 78.56(a)(4), requires that “[a] pit or tank that contains drill cuttings from below the casing seat, pollutional substances, wastes or fluids other than tophole water, fresh water and uncontaminated drill cuttings shall be impermeable ....”

AI. Section 78.56(a)(4)(iv) of the Department’s Rules and Regulations, 25 Pa. Code § 78.56(a)(4)(iv), states that “[i]f a liner becomes torn or otherwise loses its integrity, the pit shall be managed to prevent the pit contents from leaking from the pit ....”

AJ. Section 91.34(a) of the Department’s Rules and Regulations, 25 Pa. Code § 91.34(a), states that “[p]ersons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.”

AK. Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301, states that “[n]o person or municipality shall store, transport, process, or dispose of residual waste within this Commonwealth unless such storage, or transportation, is consistent with or such processing or disposal is authorized by the rules and regulations of the Department and no person or municipality shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the Department.”

AL. The unpermitted discharge of production fluids, an industrial waste, to waters of the Commonwealth, as described in Paragraphs K. and U., above, constitutes a violation of Sections 301 and 307 of the Clean Streams Law, 35 P.S. § 691.301, supra and 35 P.S. § 691.307, supra.

AM. The unpermitted discharge of pollutional substances, as described in Paragraphs K. and U., above, constitutes a violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401, supra.

AN. The failure to control and dispose of fluids, residual waste and drill cuttings as described in Paragraphs U. and X., above, constitutes a violation of Section 78.54 of the Department’s Rules and Regulations, 25 Pa Code § 78.54.

AO. The failure to contain pollutional substances and wastes from the drilling, altering, completing, recompleting, servicing and plugging of the well in a pit, tank or series of pits and tanks, as described in Paragraphs F. and K., above, constitutes a violation of Section 78.56(a) of the Department's Rules and Regulations, 25 Pa. Code § 78.56(a).

AP. The failure to maintain an impermeable pit that contains drill cuttings from below the casing seat, pollutional substances, wastes or fluids other than tophole water, fresh water and uncontaminated drill cuttings, as described in Paragraph N., above, constitutes a violation of Section 78.56(a)(4) of the Department's Rules and Regulations, 25 Pa. Code § 78.56(a)(4).

AQ. The failure to manage a pit to prevent the pit contents from leaking if the liner becomes torn or loses integrity, as described in Paragraph N., above, constitutes a violation of Section 78.56(a)(4)(iv) of the Department's Rules and Regulations, 25 Pa. Code § 78.56(a)(4)(iv).

AR. The failure to take necessary measures to prevent substances from directly or indirectly reaching waters of the Commonwealth, as described in Paragraph N., above, constitutes a violation of Section 91.34(a) of the Department's Rules and Regulations, 25 Pa. Code § 91.34(a).

AS. The unpermitted discharge of residual waste, as described in Paragraphs F., K., U. and X., above, constitutes a violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301.

AT. The violations described in Paragraphs AL. through AS., above, constitute unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611; Section 3259 of the 2012 Oil and Gas Act, 58 Pa. C.S. § 3259; and Section 610 of the Solid Waste Management Act, 35 P.S. § 6018.610; and, subject EQT to a claim for civil penalties under Section 605 of the Clean Streams Law, 35 P.S. § 691.605; Section 3252 of the 2012 Oil and Gas Act, 58 Pa. C.S. § 3252; and, Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605.

After full and complete negotiation of all matters set forth in this CACP and upon mutual exchange of the covenants contained herein, the parties desiring to avoid litigation and intending to be legally bound, it is hereby ASSESSED by the Department and the PFBC and AGREED to by EQT as follows:

1. **Assessment.**

- a. **Department Assessment.** In resolution of the Department's claim for civil penalties, which the Department is authorized to pursue under Section 605 of the Clean Streams Law, 35 P.S. § 691.605; Section 3256 of the 2012 Oil and Gas Act, 58 Pa. C.S. § 3256; and, Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605; the Department hereby assesses a civil penalty of One Million Two Hundred Seventy Thousand Eight Hundred Seventy One Dollars (\$1,270,871.00), which EQT hereby agrees to pay.

- b. **PFBC Assessment.** The aforementioned DEP violations of the Clean Streams Law are criminal misdemeanor violations of Title 30: The Pennsylvania Fish & Boat Code. In addition, the PFBC has documented additional violations not included in this assessment but listed in totality in **Appendix PFBC-1**, attached. Based on these violations, the PFBC hereby assesses a civil penalty of Seven Hundred Ninety Four Thousand Seven Hundred Ninety Three Dollars (\$794,793.00), which EQT hereby agrees to pay.

2. **Civil Penalty Settlement.** Upon signing this CACP, EQT shall pay the civil penalties assessed in Paragraph 1. This payment is in settlement of the Department's and PFBC's claims for civil penalties for the violations set forth in Paragraphs AL through AS, above, and Appendix PFBC-1, for the time period set forth in Paragraphs F through AA, above. The Department civil penalty shall be made by corporate check or the like, made payable to the "Commonwealth of Pennsylvania," and shall be forwarded to the East Region Oil and Gas Management, Pennsylvania Department of Environmental Protection, 208 West Third Street, Suite 101, Williamsport, Pennsylvania 17701-6648. The PFBC civil penalty shall be made with a separate corporate check or the like, made payable to the "Pennsylvania Fish & Boat Commission" and shall be forwarded to the PFBC, Bureau of Law Enforcement, North Central Region Office, 1150 Spring Creek Road, Bellefonte, PA 16823.

3. **Findings.**

- a. EQT agrees that the findings in Paragraphs A through AT, above, are true and correct and, in any matter or proceeding involving EQT and the Department and/or the PFBC, EQT shall not challenge the accuracy or validity of these findings.
- b. The parties do not authorize any other persons to use the findings in this CACP in any matter or proceeding.

4. **Reservation of Rights.** The Department reserves all other rights with respect to any matter addressed by this CACP, including the right to require abatement of any conditions resulting from the events described in the findings. EQT reserves the right to challenge any action which the Department may take, but waives the right to challenge the content or validity of this CACP.

IN WITNESS WHEREOF, the parties have caused this CACP to be executed by their duly authorized representatives. The undersigned representatives of EQT certify under penalty of law, as provided by 18 Pa. C.S. § 4904, that they are authorized to execute this CACP on behalf of EQT; that EQT consents to the entry of this CACP as an ASSESSMENT of the Department and PFBC; that EQT hereby knowingly waives its rights to a hearing under the statutes referenced in this CACP; and that EQT knowingly waives its right to appeal this CACP, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 1988-94, 35 P.S. § 7514; the Administrative Agency Law, 2 Pa. C.S. § 103(a) and Chapters 5A and 7A; or any other provision of law. Signature by EQT's attorney certifies only that the agreement has been signed after consulting with counsel.

FOR EQT PRODUCTION COMPANY:

FOR THE COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION:

\_\_\_\_\_  
Signature (Date)

\_\_\_\_\_  
Jennifer W. Means (Date)  
Environmental Program Manager  
Eastern Oil and Gas District

\_\_\_\_\_  
Name (Typed or Printed)

\_\_\_\_\_  
Title for EQT Production Company

\_\_\_\_\_  
Signature (Date)

\_\_\_\_\_  
Geoffrey J. Ayers (Date)  
Regional Counsel  
Northcentral Region

\_\_\_\_\_  
Name (Typed or Printed)

\_\_\_\_\_  
Title for EQT Production Company

FOR THE PENNSYLVANIA FISH AND  
BOAT COMMISSION:

\_\_\_\_\_  
Signature (Date)

\_\_\_\_\_  
Signature (Date)

\_\_\_\_\_  
Name (Typed or Printed): Attorney for EQT  
Production Company

\_\_\_\_\_  
Name (Typed or Printed)

## **APPENDIX PFBC-1**

### **DEP/ PFBC ASSESSMENT OF CIVIL PENALTY** **PFBC OCA #052-07-12 / EQT Production Company**

- A. During the period of May 31, 2012 through August 23, 2012, EQT Production Company, by its own conduct or the conduct of another pursuant to 18 Pa. C.S.A. § 307, did alter or disturb any stream, stream bed, fish habitat, water, or watershed in a manner that might cause damage to, or loss of fish without the necessary permits by allowing the unpermitted discharge of deleterious materials, resulting in the pollution of Commonwealth Waters (Stream W, NE Spring and Danzer Seep #1). This results in 85 separate violations of the Fish & Boat Code, 30 Pa. C.S.A. § 2502a.
  
- B. **STREAM W:** During the period of May 31, 2012 through November 13, 2012, EQT Production Company, by its own conduct or the conduct of another pursuant to 18 Pa. C.S.A. § 307, did allow a deleterious substance to be turned into or allowed to run, flow, wash, or be emptied into waters within the Commonwealth. This results in 157 separate Pollution of Waters violations of the Fish & Boat Code, 30 Pa. C.S.A. § 2504a.
  
- C. **NE SPRING:** During the period of May 31, 2012 through October 16, 2012, EQT Production Company, by its own conduct or the conduct of another pursuant to 18 Pa. C.S.A. § 307, did allow a deleterious substance to be turned into or allowed to run, flow, wash, or be emptied into waters within the Commonwealth. This results in 18 separate Pollution of Waters violations of the Fish & Boat Code, 30 Pa. C.S.A. § 2504a.
  
- D. **DANZER SEEP #1:** During the period of June 6, 2012 through October 16, 2012, EQT Production Company, by its own conduct or the conduct of another pursuant to 18 Pa. C.S.A. § 307, did allow a deleterious substance to be turned into or allowed to run, flow, wash, or be emptied into waters within the Commonwealth. This results in 18 separate Pollution of Waters violations of the Fish & Boat Code, 30 Pa. C.S.A. § 2504a.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

\* \* \* \* \*

COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :  
v : EHB Docket No.  
: 2014-020-CP-R  
SUNOCO LOGISTICS PARTNERS, :  
L.P., and SUNOCO PIPELINE, :  
L.P., Defendants :

\* \* \* \* \*

Verbatim transcript of hearing held at the  
Pittsburgh Office and Court Facility, Piatt Place,  
301 Fifth Avenue, Suite 310,  
Pittsburgh, Pennsylvania,  
Thursday,  
August 28, 2014  
1:30 p.m.

BEFORE:

THOMAS W. RENWAND, Chief Administrative Law Judge  
STEVEN C. BECKMAN, Administrative Law Judge  
MICHELLE A. COLEMAN, Administrative Law Judge  
BERNARD A. LABUSKES, JR., Administrative Law Judge  
RICHARD P. MATHER, SR., Administrative Law Judge

ADELMAN REPORTERS  
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Mars, Pennsylvania 16046  
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APPEARANCES:

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For - Commonwealth of Pennsylvania,  
Department of Environmental Protection

NEIL S. WITKES, ESQUIRE  
401 City Avenue  
Suite 901  
Bala Cynwyd, PA 19004

For - Sunoco Logistics Partners, L.P.,  
and Sunoco Pipeline, L.P.

<p style="text-align: right;">3</p> <p>1 JUDGE RENWAND: Good afternoon, everybody.  2 Please be seated.  3 All right. Welcome everybody to the  4 Environmental Hearing Board. This is the oral argument  5 in the Sunoco Logistics Partners and Sunoco Pipeline  6 case at Docket Number 2014-020.  7 Sunoco can go first. We are not going to have  8 any time eliminations unless it starts to get real late.  9 MR. WITKES: I will try not to bump it up. Thank  10 you, Your Honors. May it please the Board, my name is  11 Neil Witkes representing the defendants in this action,  12 the two Sunoco entities.  13 Our motion raises a -- what we think is a truly  14 legal issue based upon allegations made in the  15 Department's complaint that present two facts that are  16 critical to this motion.  17 The first fact is that on November 25th, 2008,  18 there was a release of 12,000 gallons of gasoline from  19 Sunoco's pipeline that lasted about an hour; and the  20 second alleged fact is that the gasoline entered waters  21 of the Commonwealth from that release directly on that  22 day and then indirectly on days thereafter.  23 The Department's complaint asserts claims of  24 penalties in seven counts, four sections of the Clean  25 Streams Law, three sections of the Department's</p>	<p style="text-align: right;">5</p> <p>1 So, we start, of course, with the language of the  2 statute. All of the three sections have two  3 requirements: first, that there be a discharge of flow,  4 a placement or a putting of an industrial waste or  5 permit or allow or continue to permit/allow discharge or  6 put. And we, sort of, combined that to say it is a  7 discharge; and secondly, that there be an entry into  8 waters of the Commonwealth.  9 JUDGE MATHER: Mr. Witkes, as I understand it,  10 12,000 gallons of gasoline was released in one hour and  11 it went somewhere, but do you know when the gasoline --  12 all of it reached the ground water? Did it all happen  13 within minutes or hours within the same day?  14 MR. WITKES: Well, for that, Your Honor, we need  15 to accept the Department's allegations in the complaint  16 because this is a motion for partial summary judgment  17 and the allegation is that it reached directly on that  18 day and indirectly on many days thereafter.  19 So, the claim is that there was one release, as  20 you said, 12,000 gallons over one hour. That was  21 stopped and then single release entered waters over  22 multiple days.  23 We would, of course, if we proceed past this,  24 contest that and that allegation would be the subject of  25 proof but the claim is that there was one release which</p>
<p style="text-align: right;">4</p> <p>1 regulations and one violation of a Department order.  2 Our motion addresses four of the counts: the  3 three sections of the Clean Streams Law and two of the  4 Department regulations. So, there will be issues left  5 in this case, of course, even if we prevail on this  6 motion which we hope we can convince the Board that we  7 should do.  8 We challenge the 2.335 million in penalties,  9 approximately \$983,000 of the claim penalty; and as I  10 said, the issue is purely legal, that is a one hour  11 release of gasoline from a pipeline that is alleged to  12 enter waters of the Commonwealth directly and indirectly  13 over multiple days and constitute one violation of  14 Sections 301, 307 and 401 of the Clean Streams Law and,  15 of course, the Department's regulation as well or  16 multiple violations of each of those sections.  17 The position that the Department is taking, that  18 this one-hour release constitutes multiple violations of  19 these sections of the Clean Streams Law has never been  20 adopted by this Board in any decision that we have found  21 or that has been cited to the Board in the briefing.  22 The Board has always taken the position that to  23 find multiple violations of these sections of the Clean  24 Streams Law, the Department is required to show multiple  25 releases that enter waters of the Commonwealth.</p>	<p style="text-align: right;">6</p> <p>1 entered over multiple days.  2 JUDGE MATHER: And you would agree then that some  3 of the gasoline that entered ground water entered it the  4 next day and the following day and the day after that?  5 MR. WITKES: I would agree that is the  6 allegation, correct.  7 JUDGE MATHER: Okay. And the same would be the  8 same for surface waters which would have been impacted  9 by the release?  10 MR. WITKES: Over multiple days, correct.  11 JUDGE MATHER: Okay.  12 MR. WITKES: And our position is, of course, that  13 the multiple day entry alone is not enough to constitute  14 separate violations of Sections 301, 307 and 401, as  15 well as the Department's regulation because there are  16 two requirements.  17 There is a requirement of a discharge or the  18 other verbs that I used, put, placed flow or permit, one  19 of those things to occur; and secondly, that there be an  20 entry into the water.  21 So, for the Department's position to be adopted  22 by the Board, the sections of the Clean Streams Law  23 would need to be rewritten to say that, "No person shall  24 allow or permit industrial waste to enter into waters of  25 the Commonwealth." That is not what the sections say.</p>

<p style="text-align: right;">7</p> <p>1 The sections say that no person shall discharge  2 or continue to discharge flow, all those other verbs,  3 and industrial waste that enters into the water. So,  4 there are two requirements.</p> <p>5 JUDGE MATHER: So, your argument is that the  6 release that happened over one hour is the defining time  7 period for when a release or a discharge occurred and  8 that no other discharges occurred on subsequent days; is  9 that correct?</p> <p>10 MR. WITKES: Correct. That is correct, Your  11 Honor.</p> <p>12 JUDGE MATHER: All right.</p> <p>13 MR. WITKES: If you look at the cases from the  14 Board, I think they support our position. Indeed, they  15 unanimously are in support of that position.</p> <p>16 The Department relies on the CBS case. The CBS  17 case was a case that was decided on a demurrer which was  18 not frankly materially different from what we have where  19 we are testing and assuming the truth of the allegations  20 in the complaint and what the Board ---</p> <p>21 What the Department argued in that case and they  22 looked to --- it is referring to page 1623 of the ---  23 where the decision is reported. And again, it was on  24 demurrer and the Board discussed passive migration.  25 And what the Department argued is that the Board</p>	<p style="text-align: right;">9</p> <p>1 that there were discharges into the lagoon and  2 discharges from the lagoon into waters of the  3 Commonwealth.</p> <p>4 So, CBS does not at all stand for what the  5 Department is claiming that it stands for. In fact, if  6 you infer from the Board's unwillingness to use the  7 passive migration analysis to address the discharge  8 language under the Clean Streams Law in the same way  9 that it did disposal under the Solid Waste Management  10 Act, it actually goes against what the Department is  11 arguing.</p> <p>12 We, of course, cited to the Board in the  13 Commonwealth Court's decision in the Westinghouse case,  14 the lengthy Board decision that has detailed findings of  15 fact and very comprehensive analysis of the law; and  16 there, we were dealing with contamination from an  17 operating facility of ground water that impacted  18 multiple wells.</p> <p>19 And there was a finding that the contamination  20 would last for thousands of years if left unabated. So,  21 clearly in the Westinghouse case, you have a situation  22 where there is migration from within waters of the  23 Commonwealth over an extended period of time.</p> <p>24 What the Commonwealth -- what the Board did and  25 what the Commonwealth Court referred to in its averments</p>
<p style="text-align: right;">8</p> <p>1 said that passive migration could be a release or a  2 discharge within the meaning of the Clean Streams Law.  3 But if you look carefully at that page of the Board's  4 opinion, what the Board was talking about at that point  5 was disposal under the Solid Waste Management Act; and  6 disposal, it was a defined term and there was also ---  7 the definition was taken both from the Federal RCRA  8 Statute and from the Federal Superfund Statute.</p> <p>9 And there were cases at the time that were  10 unclear as to whether passive migration constituted  11 disposal within the meaning of RCRA; and thus, the Board  12 wondered whether passive migration might also be  13 disposal under the Solid Waste Management Act.</p> <p>14 When the Board, in the very next paragraph, went  15 to talk about discharge under the Clean Streams Law, it  16 did not use that analysis. Perhaps by not using that  17 analysis, the Board was suggesting that it was  18 insufficient to support the Department's position.</p> <p>19 Instead of that analysis, what the Board did was  20 rely upon the fact that there were allegations in the  21 complaint which, of course, needed to be accepted as  22 true on demurrer, that CBS had dumped into the lagoon  23 and the lagoon had discharged into waters of the  24 Commonwealth over multiple days.  25 So, in that situation, there were allegations</p>	<p style="text-align: right;">10</p> <p>1 and then remand on other issues was not looking at the  2 presence, the mere presence of contaminants in the  3 ground water to establish the number of violations of  4 the Clean Streams Law.</p> <p>5 What the Commonwealth Court did and what the  6 Board had done was look at the activities of  7 Westinghouse, and it limited it to three separate  8 violations. So, they talked about discharges from  9 distinct operations at the Westinghouse facility that  10 entered into the Commonwealth's waters.</p> <p>11 So, it makes very clear that you have to look at  12 the action or inaction by the regulated entity,  13 Westinghouse; or in our case, Sunoco. And that is the  14 first step.</p> <p>15 And the second step is that you have to then  16 trace that action or inaction and release the discharge,  17 whatever you want to call it, that then migrates  18 directly or indirectly into waters of the Commonwealth.</p> <p>19 So, by finding only three proven releases that  20 entered waters of the Commonwealth, I believe,  21 conclusively establishes that you need in the first  22 instance a release. And a release that lasts only for  23 one day is only one day's violation.</p> <p>24 Now, of course, you can have a release or  25 discharge that is not a Clean Streams Law violation.</p>

<p style="text-align: right;">11</p> <p>1 The Board and the Westinghouse adjudication have found  2 that. There were discharges that the Board found did  3 not enter waters of the Commonwealth. So, therefore, it  4 is not a violation of any of those sections of the Clean  5 Streams Law.  6 But you can never have more violations than you  7 have releases because you need in the first instance a  8 release. And by finding only three releases that  9 entered waters of the Commonwealth that created a ground  10 water plume that would last un-remediated for thousands  11 of years conclusively establishes that you need both a  12 release and an entry to establish a violation under  13 those sections.  14 JUDGE MATHER: Mr. Witkes, can you have a release  15 from contaminated soil to ground water, say under a  16 hypothetical, if there is a release from the pipe that  17 gets to soil in one day and it takes several days for it  18 to drain down?  19 MR. WITKES: Your Honor, the release is from the  20 pipe which enters the soil.  21 JUDGE MATHER: Okay. And --  22 MR. WITKES: If a contamination in the soil never  23 enters ground water, it is not a violation of the Clean  24 Streams Law. If it then migrates from soil to ground  25 water, then you have the entry component. But the</p>	<p style="text-align: right;">13</p> <p>1 what we would say would be an indirect release from  2 wherever it started that indirectly entered into the  3 Commonwealth's waters through soil and presumably ground  4 water migration.  5 JUDGE RENWAND: Is Westinghouse really a good  6 case to cite though? I mean, Westinghouse was not like  7 what happened here where there is a discreet release  8 that everybody knows when it occurred.  9 Westinghouse occurred over years and years and  10 years; and as you say, the plume would last, you said,  11 1,000 years. I don't remember that, but it was a big  12 plume. It wasn't just from one release.  13 I recall the evidence in Westinghouse, that it  14 was over scores of years and various components to it  15 and, you know, contaminants that were dumped and buried  16 and so forth on this industrial site. I mean --  17 MR. WITKES: It is a good case to cite, because  18 it is the Board's decision and there are a few on this  19 point. It is not precisely factually analogous to ours.  20 We have others that we did cite. I think it is the Mele  21 case involved --  22 JUDGE RENWAND: The 1973 case?  23 MR. WITKES: Right. That was a pipeline  24 discharge. I think it is a good case, Your Honor, and I  25 think it is for this point as Your Honor intimated the</p>
<p style="text-align: right;">12</p> <p>1 release is the release into the soil.  2 JUDGE MATHER: You can't have release from a  3 pollutant that is contained within a soil area to ground  4 water being a release?  5 MR. WITKES: That is not what the statute speaks  6 of in terms of a discharge put placement flow or  7 release. It is not what the Board has found to be  8 releases; because again, if you were dealing with the  9 Westinghouse case where you have operations that are  10 discharging contaminants into soil and are eventually  11 making their way into ground water, clearly those --  12 that migration, that passive migration is occurring over  13 an extended period of time over days, weeks, months,  14 perhaps years.  15 That is why in Westinghouse, there was a ground  16 water plume that would take 1,000 years to  17 self-remediate.  18 So, it is the initial discharge or release from  19 outside the environment into the environment, into soil,  20 into ground water, perhaps directly into surface water.  21 That is the release.  22 Sometimes they can happen simultaneously. The  23 release can be directly into waters of the Commonwealth,  24 but the release can be indirect as well.  25 I think the hypothetical that Your Honor posed is</p>	<p style="text-align: right;">14</p> <p>1 question.  2 There were clearly multiple days over which  3 whatever was released from the operations of the  4 Westinghouse facility where it entered ground water and  5 moved within ground water over multiple days.  6 The Board in its analysis and the Commonwealth  7 Court in adopting the Board's analysis and approving it  8 didn't look to only how many days that the contaminants  9 moved into ground water or remained within ground water  10 or migrated from ground water to surface water or  11 wherever.  12 What it did was it combed through the record and  13 looked to see where the release is. It found two from  14 one area and one from another area. And to suggest that  15 there were only three times or that those releases on  16 those three days was what caused this ground water plume  17 would be, I would suggest, Your Honor, preposterous.  18 What happened in that case presumably was a  19 failure of proof by the Department. The Department's  20 focus, as it seems to be here, on the contamination of  21 the ground water without establishing that the discreet  22 releases on discreet days entered waters of the  23 Commonwealth. And again, you need both of those things.  24 JUDGE RENWAND: Here, we know when the release  25 occurred.</p>

1 MR. WITKES: We do. And that is why we think  
2 that this is really the perfect case to raise this issue  
3 on summary judgment motion, because there is no dispute  
4 that we are talking about a release for about an hour  
5 from a pipeline that entered the environment and the  
6 dispute would be what happened after this one-hour  
7 release.

8 Did it enter ground water or waters of the  
9 Commonwealth on one day as Your Honor asked or did it  
10 enter over multiple days? The allegations are both, and  
11 we have to accept that at this point.

12 What we are saying is that doesn't matter because  
13 it matters, not only matters when there was entry or  
14 that there was entry but it also matters that there be  
15 distinct releases or releases on distinct days. If  
16 there is only a one-hour release defined on one day,  
17 then that can either be no violation to the Clean  
18 Streams Law if it --

19 JUDGE RENWAND: Your argument is there is no  
20 violation until it hits the water?

21 MR. WITKES: Yes, sir

22 JUDGE RENWAND: Water of the Commonwealth which I  
23 assume you would concede would be ground water, surface  
24 water, whatever.

25 MR. WITKES: Of course.

1 MR. WITKES: Correct. And so --

2 JUDGE RENWAND: But your argument on that would  
3 be there are no other releases.

4 MR. WITKES: No other releases.

5 JUDGE RENWAND: There could be some penalties  
6 that would cause you to cooperate and so forth because  
7 you don't want to incur those for separate violations.  
8 That is your argument?

9 MR. WITKES: Correct, that there would be other  
10 sections of the regulations, perhaps even the statute.  
11 And the Department could issue an order in that event  
12 and we could be held to have violated those and be  
13 penalized for that; and, of course, the robustness of  
14 the clean up could be a factor in determining the amount  
15 of the penalty.

16 JUDGE MATHER: Okay. In looking at the release  
17 to the environment, are you saying that once a release  
18 happens and it enters say ground water, that is the only  
19 time that it enters distinct waters of the Commonwealth?

20 If it then flows through the ground water and  
21 enters a stream and impacts a stream, that is all part  
22 of the same -- it is almost like a unitary theory, that  
23 once it enters the waters of the Commonwealth, because  
24 they are everywhere, it can't enter other waters of the  
25 Commonwealth.

1 JUDGE RENWAND: Okay. So, under your fact  
2 pattern, if it is all cleaned up in one day, I don't  
3 think you are alleging that, we have one release and one  
4 find.

5 But here, the allegation is that it went into the  
6 soil and so forth and it released from there on multiple  
7 days and you concede that for purposes of this argument.  
8 Why aren't those separate releases?

9 MR. WITKES: They are not releases by Sunoco or  
10 the industrial waste. The release occurred when the  
11 pipeline --

12 JUDGE RENWAND: That puts the bunny in the hat  
13 for you, doesn't it? There is one release. That is it.

14 MR. WITKES: Right. There is one release from  
15 outside the environment into the environment and then --

16 JUDGE RENWAND: But then there would be no  
17 incentive to clean up.

18 MR. WITKES: That is not true at all. We have,  
19 of course, multiple incentives to clean up because there  
20 are other sections and that is an issue in this case  
21 about whether our cleanup was robust enough. There is  
22 an order and there is an allegation that we didn't  
23 comply with the order.

24 JUDGE RENWAND: Well, the vacuuming as opposed to  
25 the constant pumping.

1 So, if the ground water is impacted, it seeps  
2 into surface water which then flows into another surface  
3 water. That is all just entering the environment one  
4 time?

5 MR. WITKES: It may enter the environment one  
6 time. Well, it entered the environment one time. It  
7 entered waters of the Commonwealth. It may continue to  
8 enter waters of the Commonwealth from the soil or it may  
9 move within waters of the Commonwealth over multiple  
10 days as well if it moved from ground water to surface  
11 water or stayed within surface water or stayed within  
12 ground water. That would be entry or movement within  
13 waters of the Commonwealth.

14 But the waters of the Commonwealth, as Your  
15 Honors intimated, are waters of the Commonwealth. And  
16 so, the entry is the entry but our argument is that you  
17 need both.

18 You need entry and the discharge placement flow  
19 of those other verbs. You need both of those things.  
20 An entry alone is not enough.

21 The sections of the Clean Streams Law do not say  
22 that it is a violation whenever we permit industrial  
23 waste to enter waters of the Commonwealth. What the  
24 statutes say is that is a violation when we place  
25 discharge, permit to place, permit to flow industrial

1 waste into. So, you need both of these things.

2 JUDGE RENWAND: You left out the part that has me  
3 troubled in following your argument, "Or continued to  
4 discharge or permit to flow." Isn't that -- why would  
5 that be in the statute if that didn't mean anything?

6 MR. WITKES: Well, we didn't continue to  
7 discharge anything. We stopped the discharge within an  
8 hour.

9 JUDGE RENWAND: Well, how about permit the flow?  
10 It is permitted -- if it is still in the ground water,  
11 aren't you permitting it to stay there? Isn't that a  
12 separate violation arguably under this?

13 MR. WITKES: I don't think so, Your Honor. I  
14 don't think so because if that were a separate violation  
15 then the Board, in every one of these cases we cited,  
16 would have found many more violations than what was  
17 found.

18 The -- we talked about the CBS case. We talked  
19 about the Westinghouse case. Again, the opinion says,  
20 "One thousand years without remediation, 20 years with  
21 remediation." Leeward Construction was --

22 JUDGE RENWAND: Let me ask, I don't remember a  
23 \$30,000 penalty.

24 MR. WITKES: I'm sorry?

25 JUDGE RENWAND: I don't remember the Board

1 one violation of these sections of the Clean Streams  
2 Law.

3 Mele, a case very much like ours, was a pipeline  
4 that was within the stream actually beneath the bed of  
5 the stream. 98,500 gallons of oil escaped from that  
6 pipeline that contaminated the river stream, created an  
7 oil slick and there were contaminants that were measured  
8 five and a half miles downstream in that case.

9 The Board found one violation. So, if you look,  
10 the Department talks about equity. If you look there,  
11 there is one violation, Mele, where everything  
12 entered -- I mean, was in the stream.

13 So, it entered -- the majority of it entered in  
14 the stream upon the discharge and that was one  
15 violation. So, there is more damage from that release  
16 because more of it entered directly into the stream on  
17 that one day.

18 And if talking about a matter of commonsense or  
19 equity, it would make little sense to call that one  
20 violation when the impact of the stream was so extensive  
21 and to cause multiple violations -- because it took time  
22 for some of the release to enter and some of the  
23 release, of course, never entered.

24 So, it is not about commonsense or equity. The  
25 legislature could have decided to forbid any type of

1 assessing a \$30,000 penalty in Westinghouse.

2 MR. WITKES: In Westinghouse, that's correct.  
3 What the penalty was for was a failure to report. And  
4 so, there was a failure to report over several days.  
5 There is no allegation in this complaint about a failure  
6 to report.

7 And so, the bulk of the penalty in Westinghouse  
8 had to do with the failure to report the discharges to  
9 the Department; and I think as well, failure to identify  
10 it in a deed over multiple days or weeks or months,  
11 maybe even years.

12 And so, that is where the bulk of the penalty --  
13 the penalty for violations of these sections that we're  
14 challenging of the Clean Streams Law were three and was  
15 the -- I mean, it was the highest assessment, 10,000 per  
16 penalty. But it was three violations of those sections.  
17 I think it was \$60,000 for the discharge that entered,  
18 much more in penalties for the failure to report.

19 Burns and Associates is a case we cited on the  
20 Board's decision. There were two lagoons that gave way  
21 releasing 3,000,000 gallons of oil compounds that  
22 covered both banks of the Schuylkill River for over a  
23 30-mile stretch. Clearly, a case where there is  
24 continuing movement from the river banks into the river,  
25 continuing movement within the river. The Board found

1 conduct. It made a choice here though. The choice was  
2 that there be two requirements: the discharge and the  
3 entry. You need both, not just one.

4 Trindle was another case. That was oil from the  
5 tanker that affected waters for, at least, one year, one  
6 violation in that case.

7 Froehlke was a case where there was a continuous  
8 discharge from a hydraulic system for over a year, and  
9 the evidence that was submitted was that the discharge  
10 had been sampled on certain days and not on other days.

11 And the Board found that the evidence of what was  
12 in the discharge on one day, on the days that were  
13 sampled were -- was sufficient to establish what was in  
14 the discharge on days that discharge was not sampled;  
15 and there, the Board assigned the number of violations  
16 for the number of discharges that occurred.

17 Federal Oil and Gas, another similar case where  
18 there were violations on six discreet days when oil was  
19 discharged from drilling operations but not on the days  
20 when the drilling operations were shut down; and clearly  
21 again, those are situations where the previous  
22 discharges are continuing to migrate from soil to ground  
23 water, from ground water to surface water, within ground  
24 water, within surface water on multiple days but the  
25 Board limited to the six days when the drilling

1 operations were going.

2 I think demonstrating the distinction between the  
3 discharge into the environment and then the movement  
4 from the discharged material once it enters the  
5 environment is not enough to establish that first puron  
6 (phonetic) of the discharge plus entry requirement of  
7 the statutes.

8 The extent of the harm is a statutory factor that  
9 the Board is to consider in assessing the amount of the  
10 penalty for each violation. It is not a factor to  
11 determine the number of daily violations.

12 So, when you have a discharge, as you did here,  
13 of 12,000 gallons that the Department will claim caused  
14 certain damage, that may be a factor that affects how  
15 much of a penalty is assessed for the violation that  
16 occurred when the discharge occurred. It is not to also  
17 be used to multiply the number of violations that  
18 occurred.

19 JUDGE RENWAND: Was the Department doing that?

20 MR. WITKES: I think that is what the Department  
21 is doing here is by saying because we had such a big  
22 discharge, that some of it took a long time or took time  
23 to enter waters or took time to move within waters of  
24 the Commonwealth.

25 JUDGE RENWAND: Aren't they saying those are

1 sensible scheme? There may be lots of different things  
2 to -- that might make sense to different people.

3 Our job, of course, is to interpret what the  
4 general assembly said and I think the Board has done  
5 that repeatedly; and as I said, in every case, the Board  
6 has adopted our position and has never adopted the  
7 Department's position.

8 JUDGE LABUSKES: Would you consider just in your  
9 list of cases, a federal case called Penn Environment  
10 versus PPG Industries that talks about the Clean Streams  
11 Law that distinguishes between discharge and flow?

12 MR. WITKES: I'm not sure if we cited to that  
13 case.

14 JUDGE LABUSKES: You didn't cite to it, but I  
15 wanted to give you an opportunity to comment on it if  
16 you wanted to during oral argument.

17 MR. WITKES: Frankly, Your Honor, I am not  
18 familiar with it. So, I don't think I can talk about  
19 it.

20 JUDGE LABUSKES: All right.

21 JUDGE BECKMAN: Can I ask, does Sunoco concede  
22 that it was industrial waste, the gasoline?

23 MR. WITKES: For this purpose, we are not  
24 challenging that, no. That is the allegation, and we  
25 accept that on this motion.

1 violations?

2 MR. WITKES: Those are violations. Those are  
3 separate violations. The statute says that is a factor  
4 in determining what the penalty is for the discharge  
5 violation. It is not a factor to multiply the  
6 violations.

7 And the Department's brief talked about the  
8 distinction between an eye dropper dropping, let's call  
9 it, oil into, let's say, directly into water because I'm  
10 not sure if you just have one drop how that may or may  
11 not get into water but over multiple days.

12 So, those are multiple discharges. They can  
13 support multiple violations of these sections. What you  
14 assess in terms of a penalty for those is a factor that  
15 would be evaluated based upon the factors that the Board  
16 considers, the extent of the harm, the intent and all  
17 those sorts of things.

18 But there is nothing illogical or contrary to  
19 commonsense to say that supports multiple violations  
20 when a one-time, one-day discharge of a larger amount  
21 can support only one violation because that is the  
22 choice that the legislature made.

23 It is not a matter of the Department or the Board  
24 or us trying to think what would be a sensible penalty  
25 scheme here, what would we do in terms of establishing a

1 I want to speak just a moment, if I could, about  
2 the regulation, Section 91.34A, which is very similar.  
3 The Westinghouse case looked to that and looked at the  
4 things that the company did or didn't do before the  
5 discharges and said that is the conduct that constitutes  
6 the violation of the regulation.

7 The Department quoted from the -- I think from  
8 Westinghouse citing to a case called Marileno which is a  
9 Board decision. The quote frankly, and we say this in  
10 our brief, was selective; because if you read the very  
11 next sentence, the Board stated there is no indication  
12 in that opinion, this is the Commonwealth Court speaking  
13 about Marileno, there is no indication in that opinion  
14 that one can be liable for multiple violations of  
15 Section 101.3A for events surrounding one release and  
16 101.3A was the section that is now Section 91.34A of the  
17 Department's regulation.

18 So, that is essentially our argument. We had  
19 raised some other issues in the briefing. I presume the  
20 Board is primarily interested in this single discharge  
21 issue. That is why I focused my argument on that.

22 Again, it is our job to interpret what the  
23 legislature said in those sections. The Board has done  
24 that over and over. It has never adopted the  
25 Department's position; and for the Department's position

1 to be sustained, the statute would need to be rewritten  
2 to say that, "No person shall allow or permit industrial  
3 waste to enter into or remain within waters of the  
4 Commonwealth because they seek violations just for  
5 measurements without even proof of entry on those days."

6 That is not what the sections of the Clean  
7 Streams Law say. So, unless there are any other  
8 questions, that is my argument. Thank you.

9 JUDGE RENWAND: Okay. Thank you very much.

10 MS. TRUSCHEL: May it please the Court, Mary  
11 Martha Truschel for the Department of Environmental  
12 Protection. With me is regional counsel, Sam Clark and  
13 my colleague, Matt Kessler.

14 Your Honors, the Pennsylvania Clean Streams Law  
15 imposes a duty on every person to keep his or her  
16 industrial waste out of the waters of the Commonwealth  
17 every day all day.

18 When, as happened in this case, more than 12,000  
19 gallons of gasoline escape from your pipeline, you have  
20 an obligation every day to keep that gasoline from  
21 entering into waters of the Commonwealth.

22 Every day that your industrial waste gets into  
23 waters of the Commonwealth, you have failed in that duty  
24 and you have violated the Clean Streams Law. It is not  
25 sufficient for Sunoco to say -- to stand on the

1 discharges and proceeds to cover much, much more  
2 continuing to discharge, continuing to permit the  
3 industrial waste of flow, continuing to permit the  
4 industrial waste to be placed are all prohibited under  
5 the Clean Streams Law.

6 In this case, Sunoco discharged its gasoline  
7 directly and indirectly into waters of the Commonwealth  
8 and continued to do so.

9 In this case, it permitted its gasoline to flow  
10 into waters of the Commonwealth; and for days, months  
11 and weeks later, it continued to let it flow.

12 In this case, it placed its gasoline; and for  
13 days, weeks and months later, continued to allow it to  
14 be placed. There is no dispute about any of that  
15 because they conceded in their uncontested facts.

16 Under Section 401, you can't allow pollutorial  
17 substances to get into waters of the Commonwealth. The  
18 same principals apply to 91.34 which requires that  
19 Sunoco take all necessary measures to prevent the  
20 substances from directly or indirectly reaching waters  
21 of the Commonwealth.

22 That obligation doesn't end the day the gasoline  
23 stops coming out of the pipeline. It continues. They  
24 have to take all necessary measures to keep the gasoline  
25 from getting in every day.

1 shoreline and say, "We stopped it from coming out of the  
2 pipeline. That is enough. We are finished."

3 That is the Department's position, because the  
4 statute itself so provides. The language chosen by the  
5 general assembly in these sections evinces its intent to  
6 impose the broadest possible obligation to protect the  
7 waters of the Commonwealth.

8 Sunoco seems to have been seduced, blinded  
9 really, by its exposure to the Federal Clean Water Act.  
10 That statute only regulates the addition of pollutants  
11 from a point source from a discrete conveyance.

12 That is where this idea of it has to come out of  
13 the environment, out of a facility and into waters of  
14 the Commonwealth comes from, not so Pennsylvania law.

15 JUDGE RENWAND: The Clean Streams, you claim,  
16 applies to non-point source discharges?

17 MS. TRUSCHEL: The Clean Streams Law applies to  
18 both, point and non-point source discharges and protects  
19 surface and ground water.

20 Sunoco's single discharge theory is exterminated  
21 like a vampire exposed to sunlight when it is subjected  
22 to the disinfecting light of the text of the Clean  
23 Streams Law.

24 Unlike the Clean Streams Law, the -- unlike the  
25 Clean Water Act, the Clean Streams Law only starts with

1 JUDGE RENWAND: But if it is already in, that is  
2 their argument, as I understand it. It is already in.  
3 That is the violation.

4 MS. TRUSCHEL: No, they concede that it continued  
5 to migrate into the ground water and into the surface  
6 water thereafter.

7 JUDGE RENWAND: Okay.

8 MS. TRUSCHEL: So, they failed to take all the  
9 necessary measures to keep it out; therefore, 91.34 is  
10 violated. They didn't even mention 95.2.

11 In Westinghouse, Westinghouse isn't really a  
12 great case for them. It is mostly about the failure to  
13 notify and there is simply nothing in Westinghouse that  
14 comes up with this, it has to be released. Released  
15 isn't a term used in the Clean Streams Law.

16 The Clean Streams Law talks about discharges and  
17 permitting to flow and permitting to be placed. It is a  
18 much broader concept than the release from the pipeline.

19 The problem in Westinghouse for the Department  
20 was a failure of proof. In that famous footnote 29 of  
21 the Westinghouse adjudication, the Board all but begged  
22 the Department to induce evidence of how many times the  
23 pollutants entered ground water and surface water. We  
24 intend to do that in this case. We are prepared to do  
25 that in this case.



1 The current matter pending before the Board is  
2 only a motion for partial summary judgment. So, it is  
3 too soon to try to evaluate that evidence; but rest  
4 assured, we intend to put it before you and we have that  
5 proof.

6 JUDGE COLEMAN: Do you have information in  
7 reference to the idea given to us today by your opponent  
8 that this was a one-time release and therefore should be  
9 considered a one-time release as opposed to other cases  
10 where there were things that seemed to be, as he said,  
11 an eye dropper reaction so that it is one here, one drop  
12 there, one drop there?

13 Do you consider that to be similar to this case  
14 or do you consider that to be completely opposite so  
15 that when you look at the overall release, and it is one  
16 release, you can continue to say that is one release as  
17 opposed to something that happened over time?

18 MS. TRUSCHEL: No and yes, Your Honor. The Clean  
19 Streams Law does not talk about release. That is a  
20 foreign concept that is being imported here.

21 The Clean Streams Law talks about discharges,  
22 permitting something to flow, permitting something to be  
23 placed, continuing to do those things. Those are the  
24 concepts we are talking about under the Clean Streams  
25 Law.

1 someone has had the temerity to raise this argument.  
2 This has not come before the Board very often. The  
3 language is very clear. It is far broader than  
4 discharge.

5 JUDGE BECKMAN: If hypothetically there is a  
6 pipeline, an aerial pipeline going across Lake Erie, it  
7 springs a leak, the water never reaches the shore or,  
8 excuse me, the contamination never reaches the shore,  
9 one violation or multiple violations?

10 MS. TRUSCHEL: One violation.

11 JUDGE BECKMAN: All right. And if you test the  
12 waters on the day of the release and you test the waters  
13 a week later and there is contamination on day one and  
14 there is still contamination in the lake on day seven,  
15 still just one violation?

16 MS. TRUSCHEL: Correct. Because that is the only  
17 day they permitted it to flow into the lake. If it is  
18 an aerial pipeline and it doesn't continue — they don't  
19 continue to allow it to flow. That is not a violation.

20 JUDGE MATHER: How did they continue to allow it  
21 to flow?

22 MS. TRUSCHEL: They didn't intercept it. They  
23 didn't keep it out. It continued to move. They didn't  
24 intercept it and keep it from getting there.

25 JUDGE BECKMAN: Short of digging up though — for

1 Once the stuff gets out of your pipeline, you  
2 can't let it get into waters of the Commonwealth today,  
3 tomorrow or ever. That is your obligation under the  
4 Clean Streams Law.

5 So, an eye dropper or passive migration through  
6 the soil, to the ground water, to the stream, it is all  
7 covered. It is all prohibited. If you let your stuff  
8 get to the waters of the Commonwealth, you have violated  
9 the Clean Streams Law.

10 JUDGE BECKMAN: If Westinghouse isn't a good case  
11 for your opponent, what is the Department's best case to  
12 back up your arguments?

13 MS. TRUSCHEL: I will give you two: any  
14 statutory construction case and CBS. CBS tried this  
15 single discharge —

16 JUDGE BECKMAN: CBS is decided on a procedural  
17 basis very early on without really much discussion at  
18 all about the theory that the Department is using in  
19 this case.

20 MS. TRUSCHEL: It is the same theory. There is  
21 not a lot of discussion. We are at the same sort of  
22 procedural point with this case as we were in CBS.

23 JUDGE BECKMAN: But CBS is the best case the  
24 Department has?

25 MS. TRUSCHEL: Yeah. This is the first time that

1 instance, short of digging up I don't know how many tons  
2 of soil, how exactly would the Department propose that  
3 they should have done it?

4 MS. TRUSCHEL: I don't know the answer to that.  
5 That is outside my scope of expertise. I don't know how  
6 they would go about it, Your Honor.

7 JUDGE BECKMAN: The Department asked for 189  
8 violations in this case up and through June of 2013.  
9 That is in your complaint, essentially?

10 MS. TRUSCHEL: That's correct.

11 JUDGE BECKMAN: What happened in July of 2013  
12 that convinced the Department that it was time not to  
13 collect any additional penalties? Did the sampling  
14 stop? Did the sampling go to non-detect?

15 MS. TRUSCHEL: That is when we stopped sampling,  
16 because we weren't seeing it. We don't know what — we  
17 haven't done discovery yet. So, we don't know what  
18 Sunoco's evidence is. If they have samples that prove  
19 up more days that the stuff migrated to ground water and  
20 surface water, we will add those.

21 JUDGE BECKMAN: So, in the multiple days of  
22 violation, it is essentially every time you guys sample  
23 ground water and find parts per million of benzene, it  
24 is a violation that day? Because the ground water has  
25 contamination in it on that day; therefore, you assume

1 it has been released on that day into the ground water,  
2 discharge permitted to flow, what have you?

3 MS. TRUSCHEL: Sort of, Your Honor, with the  
4 caveat that --

5 JUDGE BECKMAN: All right. Let me ask this then.  
6 How is it that you know that contamination wasn't from  
7 gasoline that was released a week ago or left -- you  
8 know, presumably at some point, gasoline and ground  
9 water and soil reaches an equilibrium. You are going to  
10 continue every day you test it after it has reached that  
11 equilibrium. You are still going to see contamination,  
12 right?

13 MS. TRUSCHEL: That's correct, Your Honor.

14 JUDGE BECKMAN: So, how do you know that the  
15 discharge or the permitting of the flow has continued on  
16 those later dates?

17 MS. TRUSCHEL: Let me inject a caveat that I'm  
18 going to very quickly exhaust my scientific  
19 understanding here.

20 The answer to your question is that we continued  
21 to see fluctuations in the ground water, in the levels  
22 of contamination in the ground water.

23 When that happens, that is an indication that  
24 more is continuing to migrate. It is the nature of the  
25 stuff that when you have a layer of free product, it

1 permitted discharges.

2 Both the text of the regulation and all of the  
3 materials surrounding the promulgation of that  
4 regulation indicates that it applies also to non-point  
5 source discharges.

6 The base flow of contaminated ground water and  
7 the base flow of the gasoline are non-point sources  
8 here. So, when those non-point sources show up in the  
9 stream and create sheen, that is prohibited under 95.2.

10 JUDGE BECKMAN: The City of Harrisburg, at least  
11 as I read it, was a 401 certification case.

12 MS. TRUSCHEL: It was. But one of the issues  
13 there was whether the 401 certification also addressed  
14 non-point sources. So, the Board had to decide whether  
15 401 certifications applied under the Clean Streams Law.

16 JUDGE BECKMAN: Again, as I read it, it talked  
17 about dirt and silt as the non-point sources that were  
18 raised in that case, not an oil sheen; and there was  
19 certainly no mention of 95.2 or any predecessor of 95.2  
20 at any point in the City of Harrisburg.

21 Is there a case that you can point to that says  
22 that a non-point source discharge of oil bearing ground  
23 water is subject to 95.2?

24 MS. TRUSCHEL: I believe so, Your Honor. I  
25 believe the Board said in the Ron's Auto Service case

1 wants to move from the dense contamination of the free  
2 product into the ground water, that we would plan to  
3 elude expert testimony that was the mechanism that  
4 occurred here, that every day it continued to migrate  
5 from the free product into the ground water.

6 Again, Westinghouse was a failure of proof and we  
7 intend to offer the proof. Does that --

8 JUDGE BECKMAN: Well, I understand what you are  
9 saying.

10 MS. TRUSCHEL: Okay. I'm ready to sum up unless  
11 somebody else has a question.

12 JUDGE BECKMAN: I wanted ask about 95.2. They  
13 did not touch on it extensively, but one of the  
14 arguments, at least presented in the briefs, is that  
15 does not apply in this kind of non-point discharge  
16 situation.

17 You cite to the City of Harrisburg case which  
18 I've read. Can you explain to me how you think the City  
19 of Harrisburg case is relevant on the point?

20 MS. TRUSCHEL: Yes, I can, Your Honor. City of  
21 Harrisburg stands for the proposition that the Clean  
22 Streams Law regulates both point and non-point sources.

23 The argument presented by Sunoco in its brief,  
24 main brief, was that 95.2 did not apply because it only  
25 applies to these facts because it only applies to NPDES

1 that gasoline contaminated ground water is an oil  
2 bearing waste water. Oil bearing waste water is  
3 regulated under 95.2.

4 JUDGE BECKMAN: But you would agree with me that  
5 it talks about affluent limits for oil bearing waste  
6 water, 95.2?

7 MS. TRUSCHEL: It does. It does. But the  
8 promulgation materials talk about the effluent limits  
9 for more than point sources. The definition that Sunoco  
10 relies on is that of the 92A regulations; those  
11 regulations -- the definitions in those regulations only  
12 apply in the 92A NPDES permits.

13 JUDGE BECKMAN: But the Environmental Quality  
14 Board talks about oil creating a sheen in both NPDES and  
15 non-NPDES discharge. It doesn't speak to point and  
16 non-point NPDES.

17 MS. TRUSCHEL: That's correct. I read NPDES  
18 there to be shorthand for point sources.

19 JUDGE BECKMAN: All right.

20 JUDGE LABUSKES: I thought I was following your  
21 argument until you answered Judge Beckman's question  
22 which is that a release from pipeline into a body of  
23 surface water would only be one release.

24 I don't understand your answer there. Why is  
25 that different than a release into ground water?

39

1 MS. TRUSCHEL: Well, it could be more releases if  
 2 it moved from one body of water to another.  
 3 JUDGE LABUSKES: So, it has to move from one body  
 4 of water to another for it to be a separate violation?  
 5 MS. TRUSCHEL: It has to continue to flow,  
 6 continue to discharge.  
 7 JUDGE LABUSKES: If continue to flow is different  
 8 than continue to discharge, continue to flow, as long as  
 9 it in is in water, I guess I'm not seeing the  
 10 distinction between that hypo and the hypo in this case.  
 11 JUDGE RENWAND: If it is in ground water, I'm  
 12 thinking the ground water is one body. Are you thinking  
 13 of it as several bodies?  
 14 MS. TRUSCHEL: I'm thinking the ground water as  
 15 one manifestation of waters to the Commonwealth and the  
 16 surface waters.  
 17 JUDGE RENWAND: He has Lake Erie. It is just in  
 18 one part of the lake. You are saying that is only one  
 19 violation even though it is in there for, you know,  
 20 multiple days.  
 21 I thought the Department's argument was if it is  
 22 in ground water today, that is a violation. If it is  
 23 still in there tomorrow, that is a violation.  
 24 JUDGE LABUSKES: That is what I thought.  
 25 MS. TRUSCHEL: That is different than surface

40

1 water, Your Honor.  
 2 JUDGE LABUSKES: Why is that different? I don't  
 3 understand that.  
 4 MS. TRUSCHEL: Because it is the nature of  
 5 surface water that it moves. If --  
 6 JUDGE LABUSKES: Ground water moves. And if it  
 7 is the body of water that matters, that means if you  
 8 discharge into an unnamed tributary and then that moves  
 9 into another stream, only that is a violation; and then  
 10 it moves into the river, that is another violation.  
 11 MS. TRUSCHEL: I might have been too quick in  
 12 answering that question. I might have been too quick.  
 13 There might be multiple violations. I was construing it  
 14 as when they allowed it to flow.  
 15 JUDGE LABUSKES: I know this is a small issue in  
 16 the scheme of things; but 95.2, why is the Perano case  
 17 where I talked about or we talked about 93 is the  
 18 definition of pollution, it is not a separate violation,  
 19 I didn't follow the Department's basis for  
 20 distinguishing that decision for this case.  
 21 MS. TRUSCHEL: With respect, I'm not sure you got  
 22 it right in Perano.  
 23 JUDGE LABUSKES: Well then, that makes sense. I  
 24 think it answers the question then, there really isn't  
 25 much difference between those two decisions.

41

1 MS. TRUSCHEL: You could be wrong in Perano, and  
 2 I could still be right about this.  
 3 JUDGE LABUSKES: It would be my first time ever.  
 4 MS. TRUSCHEL: Oh, come on. When Perano, as I  
 5 understood it, turned on the fact that in your view the  
 6 water quality criteria were not independently  
 7 enforceable unless they were applied through a permit.  
 8 JUDGE LABUSKES: No, not through a permit,  
 9 through a discharge or a permitting of flow. There has  
 10 to be some action. But the action, if you wanted to say  
 11 this very broadly, is thou shall not pollute.  
 12 All that 95.2 does, in my view, is define what it  
 13 means to pollute. One of the ways you can pollute is  
 14 you can exceed your discharge limits. You can do  
 15 something that causes alarm to the public or you can  
 16 cause an oil sheen. But I'm having trouble  
 17 understanding why that would be a separate violation.  
 18 MS. TRUSCHEL: Well, it is a separate regulation,  
 19 it is a separate performance obligation. If you have  
 20 oil bearing waste water and you have an NPDES permit for  
 21 it, you have to comply with all the parameters but you  
 22 must also comply with not creating a sheen on waters of  
 23 the Commonwealth.  
 24 JUDGE LABUSKES: Did you want to comment on this  
 25 federal case that I cited?

42

1 MS. TRUSCHEL: I did, Your Honor. I have to be a  
 2 little careful because I'm handling the Department's  
 3 action against PPG but --  
 4 JUDGE RENWAND: You haven't been handling it for  
 5 42 years.  
 6 MS. TRUSCHEL: I could have, but that would  
 7 involve the Department's violation of the child labor  
 8 laws at the time. PPG -- the Federal Court in PPG  
 9 considered a motion to dismiss by the plaintiffs or by  
 10 the defendants, wanted to get rid of the claims that the  
 11 seeps and other non-point source kinds of discharges  
 12 were subject to the citizens. What the court said is,  
 13 "Under the Clean Streams Law, this is all fair game."  
 14 JUDGE LABUSKES: So, it seems to support the  
 15 Department's position in this case?  
 16 MS. TRUSCHEL: It does.  
 17 JUDGE LABUSKES: That case wasn't ever overruled  
 18 or anything like that?  
 19 MS. TRUSCHEL: No, that litigation continues to  
 20 pend. Sunoco, in this case, asks the Board to hold that  
 21 it is no violation of the Clean Streams Law for Sunoco's  
 22 gasoline to continue to enter into ground water and the  
 23 stream day after day after the gasoline left the  
 24 pipeline.  
 25 They say the only violation is when the gasoline

<p style="text-align: right;">43</p> <p>1 left the pipeline. That is a sophistic and pernicious  2 argument. If that were the case, if that be the case,  3 then Sunoco would be at liberty to allow its gasoline to  4 attenuate to the environment over geologic time without  5 any obligation to prevent that from happening.  6 JUDGE RENWAND: Couldn't you issue an enforcement  7 order?  8 MS. TRUSCHEL: I beg your pardon?  9 JUDGE RENWAND: According to their argument when  10 I asked that same question, you said you could issue an  11 enforcement order which then they incur, you know, a  12 legal reason not to comply, they could incur penalties  13 and so forth by not complying with your enforcement.  14 MS. TRUSCHEL: Their first argument in resisting  15 that order is going to be there is no violation.  16 Therefore, you are without authority to make us clean it  17 up. There is no violation. There is no authority.  18 JUDGE RENWAND: Well, they would say there is one  19 violation. It occurs once, whether it lasts for a day  20 or whether it lasts for 100 years.  21 MS. TRUSCHEL: We could not order them to keep  22 their stuff out of the ground water if there is no  23 violation or out of the stream if there is no violation.  24 JUDGE RENWAND: You said there has to be a  25 violation every day. I mean, as long as it is in there,</p>	<p style="text-align: right;">45</p> <p>1 The Department has lots of mechanisms to address  2 contamination of the waters of the Commonwealth. It has  3 asserted that here. The Department regulation is in  4 order and we are required to do it and we will litigate  5 the issue of the robustness of our cleanup. And believe  6 me, we are anxious to do that.  7 So, to say that we are done is just preposterous.  8 That is not our position. And in order to deflect our  9 argument to, you know, so grossly misstate our position,  10 I think, suggests how out of line the Department's  11 position is from the language of the statute.  12 It is stunning that when the Department was asked  13 the question, "What is your best case," they can't cite  14 to a single case from this Board under the Clean Streams  15 Law. They say, "Rules of statutory construction." That  16 is a stunning concession that there is absolutely no  17 authority from this Board that supports the Department's  18 position and to suggest that this hasn't been raised or  19 hasn't been litigated is just to ignore all of the cases  20 that have been cited.  21 When pressed, I guess the CBS case was a position  22 and is best; and again, I'm reading from page 1623. It  23 was a demurrer. So, it was a procedural issue largely,  24 but the issue of passive migration, which is what they  25 are talking about, was only asserted by the Board under</p>
<p style="text-align: right;">44</p> <p>1 there has to be a violation every day.  2 MS. TRUSCHEL: That is going to be their  3 argument. That is going to be their argument. The  4 Department urges the Board to reject Sunoco's argument  5 in stronger possible terms in adjudicating this motion  6 to dismiss. Thank you. Thank you for hearing us.  7 MR. WITKES: If I may? Thank you. I would like  8 to respond to a number of statements that were made  9 which I think just really overstate and mischaracterize  10 — overstate the position and mischaracterize our  11 position.  12 The assertion that we stop the gasoline from  13 exiting the pipeline within an hour, our position is  14 that is just patently false. That is not our position  15 at all.  16 In count four of the Department's complaint, the  17 Department seeks \$397,000 in civil penalties under  18 Section 91.33B for essentially failing to clean up the  19 contamination that is in the ground water and water and  20 to prevent pollution downstream.  21 So, we have a challenge to that here. We will  22 litigate that issue differently, but the let's not  23 overstate our position in order to make it so absurd  24 that you are left with a position from the Department  25 that is inconsistent with the statute.</p>	<p style="text-align: right;">46</p> <p>1 the Solid Waste Management Act.  2 When the Board talked in the CBS case on page  3 1623 about the Clean Streams Law, it turned first to  4 Section 301. We find that the Department has  5 sufficiently alleged the violation of that provision.  6 In paragraphs 22 to 34, referring to the complaint, the  7 Department states inter alia that, "CBS dumped waste into  8 Lagoon Y which drains into a detention pond, then to a  9 drainage ditch and onto the Conestoga River and that  10 CBS's chemical handling practices have contributed to  11 contamination of ground water at the site. For purposes  12 of this demurrer, these allegations suffice."  13 So, CBS was arguing there is no allegation  14 alleged of a violation of the Clean Streams Law because  15 everything was historical. The allegation in the  16 complaint, of course, alleged post-statute conduct.  17 And again, if the Board felt as it did when  18 responding to the Solid Waste Management Act claim that  19 passive migration was enough, I suggest the Board would  20 have started and ended there rather than referring to  21 the Department's allegations.  22 Agreed that the language in the Clean Streams Law  23 sections don't use the word release, but the  24 Department's complaint does repeatedly. It refers to  25 the one-hour release from the pipeline and then it goes</p>

1 on to talk about conduct subsequent to the release.

2 So, it is clear that what we are talking about is  
3 a one-hour release which we would concede for this  
4 purpose satisfies the discharge, placement, put, flow  
5 component of the two-component test and the Clean  
6 Streams Law sections; and then, of course, you need to  
7 get to the entry into it as well.

8 The waters of the Commonwealth are the waters of  
9 the Commonwealth. That is what the language of the  
10 Clean Streams Law says. You cannot discharge, or those  
11 other things, into waters of the Commonwealth.

12 So, to say that this ground water is different  
13 than that ground water or ground water is different than  
14 surface water, they are just different parts of the  
15 waters of the Commonwealth.

16 The failure of proof in Westinghouse was a  
17 failure to show the discharges that entered into waters.  
18 It wasn't that they didn't show the contamination. They  
19 sampled the ground water there over multiple times. It  
20 was shown to be and there was expert testimony that was  
21 accepted by the Board that contamination would persist  
22 for years.


23 So, if all that were required was a sample of  
24 waters of the Commonwealth to show the presence of  
25 constituents, that would be a very different penalty

1 enjoyed preparing for this argument. We enjoyed the  
2 argument. I will try to have a decision for you  
3 shortly.

4  
5 (The oral argument terminated at 2:38 p.m.)  
6  
7

8 I hereby certify that the proceedings and  
9 evidence taken by me in the above-entitled matter are  
10 fully and accurately indicated in my notes and that  
11 this is a true and correct transcript of same.

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Heidi Smith, Reporter

1 scheme than what the Clean Streams Law speaks of.

2 Section 95.2, we didn't mean to waive it. We  
3 were relying on our briefs for that. That speaks in  
4 terms of oily waste water. The Ron's Auto case was a  
5 tank act case. It wasn't a case under Section 95.2.

6 And we cite to case law that says that the --  
7 that section only applies to oily waste water, that the  
8 discharge of gasoline in this case in our refined  
9 petroleum product is not the discharge of an oily waste  
10 water.

11 And the entry of petroleum, in this case  
12 gasoline, into waters of the Commonwealth doesn't  
13 convert the Commonwealth's water into Sunoco's oily  
14 waste water. That would be a perversion of that  
15 section.

16 Finally, the Perano case, I think the Board was  
17 correct in its decision and I think we are correct in  
18 citing it. I think it applies. It is not  
19 self-enforcing those provisions. Any other questions?

20 (No response.)

21 MR. WITKES: That is my response to the  
22 Department's arguments.

23 JUDGE RENWAND: Thank you. Anything else?

24 (No response.)

25 JUDGE RENWAND: Okay. Thank you very much. We