

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EQT PRODUCTION COMPANY,	:	
	:	
Petitioner,	:	
	:	
v.	:	NO. 485 M.D. 2014
	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION OF THE COMMONWEALTH	:	
OF PENNSYLVANIA,	:	
	:	
Respondent.	:	

DEPARTMENT OF ENVIRONMENTAL PROTECTION’S
ANSWER AND NEW MATTER IN RESPONSE TO EQT PRODUCTION
COMPANY’S
COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to Pa. R.C.P. Nos. 1017, 1029, and 1030, the Pennsylvania Department of Environmental Protection (hereinafter “Department”), by and through its undersigned attorney, files this Answer and New Matter in response to Petitioner EQT Production Company’s (hereinafter “EQT’s”) “Complaint in Action for Declaratory Judgment.”

ANSWER

1. The averments made in ¶1 of the Complaint are conclusions of law to which no response is required. By way of further answer, after reasonable investigation the Department is without knowledge or information sufficient to form a belief as to EQT's true "purpose" in bringing this action, and that averment is therefore denied.

2. Admitted.

3. Admitted.

4. Admitted.

5. Denied as stated. EQT's averment in this paragraph is based on the erroneous presumption that the circumstances existing when EQT filed its "Complaint in Action for Declaratory Judgment" gave rise to the need for any administrative remedy. No such remedy was necessary at that time because when EQT filed its "Complaint in Action for Declaratory Judgment," the Department had not yet presented EQT with any formal penalty demand and EQT was not subject to any penalty liability. Moreover, since the time that EQT's Complaint was filed in the case at bar, the Department filed a Complaint for Civil Penalties before the Environmental Hearing Board. That proceeding provides a complete administrative remedy to EQT.

6. The averments made in ¶6 of the Complaint are conclusions of law to which no response is required.

7. Admitted as to accuracy. By way of further answer, no averment of fact in this paragraph is relevant to the legal issue before this Court.

8. Admitted in part and denied in part. The averments in the first sentence are admitted as to accuracy. The Pad S Impoundment was lined with a single synthetic membrane which EQT may have believed to have been designed to remain impervious. The documents EQT initially submitted to the Department indicated that the Pad S Impoundment was going to contain only freshwater. It is denied that the Department issued any formal approval for the Pad S Impoundment to be used to store industrial waste in the form of contaminated water from its natural gas wells. An operator's compliance with 25 Pa. Code § 78.56 allows the operator to store industrial waste without obtaining any approval from the Department to do so. By way of further answer, no averment of fact in this paragraph is relevant to the legal issue before this Court.

9. Denied as stated. After reasonable investigation the Department is without knowledge or information sufficient to form a belief as to the truth of any averment regarding what EQT may or may not have concluded on May 30, 2012, and those averments are denied. It is admitted that on May 30, 2012, EQT contacted the Department to report that the Pad S Impoundment was leaking into the

subsurface beneath the impoundment. The Pad S Impoundment was leaking prior to May 30, 2012. By way of further answer, no averments of fact in this paragraph are relevant to the legal issue before this Court.

10. Denied. It is specifically denied that the Pad S Impoundment was completely emptied of sludge by June 11, 2012. Upon information and belief, on June 11, 2012, the Pad S Impoundment liner was in the process of being pressure washed and on that date sediment remained present in the bottom of the pit. It is admitted that additional holes in the liner were discovered in the liner at that time. It is admitted that at some unspecified time EQT reported its findings with respect to those holes to Department. By way of further answer, no averments of fact in this paragraph are relevant to the legal issue before this Court.

11. The averments made in ¶11 of the Complaint are conclusions of law to which no response is required.

To the extent that the averments in ¶11 are construed to encompass any averments of fact, those facts are denied. As written, this paragraph fails to specify the point EQT which has in mind as the receiving end of any “discharge.” The paragraph is also unclear as to whether any “discharge” referenced in this paragraph is to any water of the Commonwealth. By way of further answer, no averments of fact in this paragraph are relevant to the legal issue before this Court.

12. Admitted in part and denied in part. It is specifically denied that EQT responded promptly to the leak from the Pad S Impoundment. It is admitted that EQT installed sumps and trenches at five locations hydrogeologically downgradient of the Pad S Impoundment to collect and/or intercept groundwater contaminated by the Pad S Impoundment leak. By way of further answer, no averments of fact in this paragraph are relevant to the legal issue before this Court.

13. Denied. It is specifically denied that the Department “concurred” in EQT’s decision to follow the voluntary, formal cleanup process under the Pennsylvania Land Recycling and Environmental Remediation Standards Act (also known as “Act 2”). It is admitted that EQT has been remediating soil at the Pad S Impoundment. It is specifically denied that EQT has been remediating groundwater at the site. It is admitted that EQT has been collecting groundwater contaminated by the industrial waste which was to have been contained within the Pad S Impoundment. After reasonable investigation the Department is without knowledge or information sufficient to form a belief as to the truth of the averment that EQT’s remedial efforts have been “to meet Act 2 cleanup standards,” and those averments are denied. By way of further answer, no averments of fact in this paragraph are relevant to the legal issue before this Court.

14. Admitted in part and denied in part. It is admitted that EQT has conducted some investigation and remediation activities at the site. After reasonable

investigation the Department specifically denies the averments that EQT's investigation and remediation activities at the site have been: 1) "extensive," or 2) "under continual Department oversight." The Department denies the averments that EQT's investigation has been "extensive," in part, because EQT has not provided to the Department all of the information that EQT has gathered in connection with its investigation and remediation activities at the Pad S Impoundment. It is admitted that EQT has demonstrated attainment with the Act 2 Statewide Health Standards for soil beneath the former Pad S Impoundment. It is admitted that EQT, as of the date of this answer, still has not met any Act 2 standard for groundwater at the site. By way of further answer, no averments of fact in this paragraph are relevant to the legal issue before this Court.

15. Admitted in part and denied in part. It is admitted that on May 9, 2014, the Department sent a letter offering to settle EQT's civil penalty liability for various violations of environmental laws through a proposed Consent Assessment of Civil Penalty that was sent with that letter. It is admitted that Exhibit "A" attached to EQT's complaint is a copy of that settlement offer. It is specifically denied that the letter itself constituted the entire settlement offer.

16. Admitted in part and denied in part. It is admitted that the Department, in its settlement offer, characterized certain of EQT's actions and failures to act, and the results and impacts of those actions and failures to act, as violations of the

Pennsylvania Clean Streams Law. It is admitted that a number of those violations relate to discharges from the Pad S Impoundment to waters of the Commonwealth. It is specifically denied that every violation addressed in the Department's settlement offer is based solely on a "discharge" as that term is used in EQT's complaint.

17. Denied. It is specifically denied that the Department's settlement offer "demands" anything.

18. Admitted in part and denied in part. It is specifically denied that, as of the date EQT initiated this action, the Department had sent any "penalty demand" to EQT as of the filing of EQT's "Complaint in Action for Declaratory Judgment." It is admitted that the Department advised EQT that the Department was not willing to settle this matter for less than \$1,200,000.00.

19. Denied. It is specifically denied that, as of the date EQT initiated this action, the Department had sent any "penalty demand" to EQT as of the filing of EQT's "Complaint in Action for Declaratory Judgment." It is admitted that \$900,000.00 of the Department's settlement offer was based on violations of the Clean Streams Law sections cited by EQT in this paragraph, and that \$900,000 is approximately 71% of \$1,270,871.00.

20. Admitted in part and denied in part. It is specifically denied that the Department's proposed settlement offer "assumed" anything. EQT's industrial

waste was intended to remain within the Pad S Impoundment, but it did not. It is admitted that \$900,000.00 of the Department's proposed settlement offer was based in part on reliable and accurate information – collected through a period of one hundred and fifty (150) separate days – which demonstrate new, continuing, and ongoing impacts to multiple waters of the Commonwealth, resulting from EQT's (i) continuing to permit its industrial wastes to flow or to be placed into waters of the Commonwealth, (ii) permitting its industrial wastes to discharge into waters of the Commonwealth directly and indirectly, (iii) putting or placing its industrial waste into waters of the Commonwealth, causing those waters to be polluted and (iv) allowing or permitting its industrial wastes to be discharged from its property into waters of the Commonwealth, causing those waters to be polluted. It is also specifically denied that “there would have been at most twelve (12) days of actual discharges from the Pad S Impoundment.”

21. Denied. It is specifically denied that EQT has, in this paragraph, fairly, adequately, or thoroughly characterized the “Department's articulated legal position.” The Department's articulated legal position is grounded entirely in the specific language used by the General Assembly in enacting the Clean Streams Law. With respect to the second sentence of this paragraph, it is specifically denied that the Department's interpretation of the applicable statutory provisions is in any way inconsistent with any of those provisions. It is specifically denied that the

Department's interpretation of the applicable statutory provisions is not supported by any judicial precedent.

In contrast to the overly-simplistic characterization of the Department's legal position, as described by EQT, the Department's legal position takes into consideration all of the text in the relevant statutory provisions, and all of the factual circumstances that are to be developed on the record before the Environmental Hearing Board. The legal concepts and material facts considered by the Department, and not addressed by EQT in its complaint, compel the Department to articulate its legal position in full detail below in paragraphs 40 through 81, which constitute the Department's New Matter and where it is appropriate to present such matters to the court. Moreover, it is specifically denied that the Department's interpretation of Sections 301, 307 and 401 of The Clean Streams Law "defeat[s] the legislative intent in Act 2"; or renders "the Act 2 liability protection unachievable for EPC."

22. Denied. The *Sunoco* case cited in this paragraph sought civil penalties under The Clean Streams Law for gasoline, which had burst out of a pipeline, continuing to flow on discrete days into groundwater and an adjacent stream. The Sunoco case is only marginally analogous to The Clean Streams Law penalty liability issues which EQT raises in this case. In Sunoco, a complaint for penalties had been filed by the Department before the Environmental Hearing Board. It is specifically denied that the case cited is one "other" case in which the Department

made a penalty “demand” pursuant to the relevant legal theory because, when EQT initiated this action, the Department had issued no penalty demand to EQT and had filed no penalty complaint. By way of further answer, the Department and Sunoco have settled the civil penalty litigation.

23. The averments made in ¶23 of the Complaint refer to the Department’s complaint for penalties filed in the *Sunoco* case, which is a document that speaks for itself and any characterization thereof is denied.

24. The averments made in ¶24 of the Complaint refer to the documents filed by Sunoco in the *Sunoco* case, which are documents that speak for themselves and any characterization thereof is denied.

25. The averments made in ¶25 of the Complaint refer to the Department’s memorandum of law in opposition to a dispositive motion Sunoco filed in the *Sunoco* case, which is a document that speaks for itself and any characterization thereof is denied. By way of further response, the Department does not argue in its Memorandum of Law in Opposition to Sunoco’s Motion for Partial Summary Judgment that The Clean Streams Law prohibits “passive migration.” Rather, the Department there argued that The Clean Streams Law prohibited, in Section 301, 35 P.S. § 691.301, any person from placing or permitting industrial waste to be placed, or discharging industrial waste or permitting industrial waste to flow, or continuing to discharge industrial waste, or continuing to permit industrial waste to flow into

any waters of the Commonwealth. Further, the Department argued that Section 307 of The Clean Streams Law, 35 P.S. § 691.307, prohibited any person from discharging industrial wastes, directly or indirectly, into waters of the Commonwealth or permitting the discharge of industrial wastes, directly or indirectly, into waters of the Commonwealth. Further, the Department argued that Section 401 of The Clean Streams Law, 35 P.S. § 691.401, prohibited any person from putting or placing any substance into waters of the Commonwealth that would result in pollution of those waters, or allowing permitting any such substance to be discharged from any property owned or occupied by any person into waters of the Commonwealth. Finally, Sunoco and the Department disputed whether Sunoco had “taken prompt action to stop and then clean up” the gasoline. As noted above, the parties have settled that litigation.

26. Admitted to the extent that the Environmental Hearing Board, *en banc*, heard oral argument on a motion for partial summary judgment. The averments as to the characterization of the issue of liability before the Environmental Hearing Board are denied.

27. Admitted in part and denied in part. The averments in the first sentence are admitted. At oral argument, as in its Memorandum of Law in Opposition to Sunoco’s Motion for Partial Summary Judgment, the Department argued that The Clean Streams Law prohibited, in Section 301, 35 P.S. § 691.301, any person from

placing or permitting industrial waste to be placed, or discharging industrial waste or permitting industrial waste to flow, or continuing to discharge industrial waste, or continuing to permit industrial waste to flow into any waters of the Commonwealth. Further, the Department argued that Section 307 of The Clean Streams Law, 35 P.S. § 691.307, prohibited any person from discharging industrial wastes, directly or indirectly, into waters of the Commonwealth or permitting the discharge of industrial wastes, directly or indirectly, into waters of the Commonwealth. Further, the Department argued that Section 401 of The Clean Streams Law, 35 P.S. § 691.401, prohibited any person from putting or placing any substance into waters of the Commonwealth that would result in pollution of those waters, or allowing permitting any such substance to be discharged from any property owned or occupied by any person into waters of the Commonwealth. Finally, Sunoco and the Department disputed whether Sunoco had “taken prompt action to stop and then clean up” the gasoline. As noted above, the parties have settled that litigation.

28. Admitted in part and denied in part. The Environmental Hearing Board denied Sunoco’s Motion for Partial Summary Judgment on October 24, 2014, which was after EQT filed its Complaint in this matter. As noted above, the parties have settled that litigation.

29. The averments made in ¶29 of the Complaint refer to 35 P.S. § 691.301, which is a statutory provision that speaks for itself and any characterization thereof is denied.

30. The averments made in ¶30 of the Complaint refer to 35 P.S. § 691.307, which is a statutory provision that speaks for itself and any characterization thereof is denied.

31. The averments made in ¶31 of the Complaint refer to 35 P.S. § 691.401, which is a statutory provision that speaks for itself and any characterization thereof is denied.

32. The averments made in ¶32 of the Complaint are conclusions of law to which no response is required. By way of further answer, the averments of this paragraph refer to 35 P.S. §§ 691.301, 691.307, 691.401, and 691.605 which are statutory provisions that speak for themselves and any characterization thereof is denied. By way of further answer, it is specifically denied that the cited statutory provisions grant the Department the 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.” The express text of the cited Sections of The Clean Streams Law, coupled with Section 605 thereof, 35 P.S. §

691.605, grant the Department the authority to assess a civil penalty where a violation of one or more of those provisions has been established.

33. Denied. The interpretation of the Clean Streams Law expressed by the Department in support of its proposed Consent Assessment of Civil Penalty in this case is supported by the well-established principles of statutory construction; relevant judicial precedent; the express purposes of The Clean Streams Law; the explicit language of the Clean Streams Law; the express purposes of the Land Remediation and Recycling Standards Act; the explicit language of the Land Remediation and Recycling Standards Act; the furtherance of sound public policy; and Article I, Section 27 of the Pennsylvania Constitution.

34. The averments made in ¶34 of the Complaint are conclusions of law to which no response is required. By way of further answer, the averments of this paragraph refer to Act 2 which is a statute that speaks for itself and any characterization thereof is denied. By way of further answer, EQT's averments in this paragraph (which are not based on any citation to Act 2 itself) are conclusively refuted by Act 2's: explicit declaration of the "necess[ity] for the General Assembly to adopt a statute which provides a mechanism to establish cleanup standards without relieving a person from any liability for ... civil or criminal fines or penalties otherwise authorized by law and imposed as a result of illegal disposal of waste or for pollution of the ... waters of this Commonwealth on an identified

site[,]” 35 P.S. § 6026.102(5); 2) “Disclaimer” stating that “[n]othing in this act is intended to nor shall it be construed to amend, modify, repeal or otherwise alter any provision of any act cited in this section relating to civil and criminal penalties ... or in any way to amend, modify, repeal or alter the authority of the department to take appropriate civil or criminal action under these statutes[,]” 35 P.S. § 6026.106(b); 3) the “Enforcement” provision stating that “[t]he department is authorized to use the enforcement and penalty provisions applicable to the environmental medium or activity of concern, as appropriate, established under the act of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams Law, ...”; and 4) the “Enforcement” provision stating that “[t]he provisions of this act do not create a defense against the imposition of criminal and civil fines or penalties or administrative penalties otherwise authorized by law and imposed as a result of the illegal disposal of waste or for the pollution of ... waters of this Commonwealth on the identified site[,]” 35 P.S. § 6026.905(b).

35. The averments made in ¶35 of the Complaint are conclusions of law to which no response is required. By way of further answer, the averments of this paragraph refer to Act 2 which is a statute that speaks for itself and any characterization thereof is denied. By way of further answer, in contrast to the overly-simplistic characterization of the Department’s legal position, as described by EQT, the Department’s legal position takes into consideration every relevant

statutory provision, and the entire universe of relevant factual circumstances to be presented on the evidentiary record developed before the Environmental Hearing Board in connection with the Department's civil penalty complaint.

36. The averments made in ¶36 of the Complaint are conclusions of law to which no response is required.

37. The averments made in ¶37 of the Complaint are conclusions of law to which no response is required.

38. The averments made in ¶38 of the Complaint are conclusions of law to which no response is required.

39. The averments made in ¶39 of the Complaint are conclusions of law to which no response is required.

NEW MATTER

Fatal Defects in EQT's Claim for Relief

40. In its complaint EQT misrepresents the legal position expressed by the Department in connection with the settlement offer which EQT rejected.

41. In its complaint EQT misrepresents a number of facts which the Department believes to be material The Clean Streams Law civil penalty liability of EQT.

42. EQT's claim for relief in its complaint erroneously presumes that EQT's Clean Streams Law civil penalty liability may be based only upon what it characterizes as "actual discharges."

43. The phrases "actual discharge" or "actual discharges" are neither defined nor used in any provision of the Clean Streams Law.

44. The Department does not know what EQT views to be an "actual discharge."

45. EQT's claim for relief in its complaint erroneously presumes that EQT's Clean Streams Law civil penalty liability may not be based upon "passive migration," a phrase that is neither used in any provision of the Clean Streams Law, nor defined by EPC.

Statutory Provisions Defining EQT's Clean Streams Law Civil Penalty Liability

46. In the Clean Streams Law, Pennsylvania's General Assembly defined "pollution" to

be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it

can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.

35 P.S. § 691.1.

47. In the Clean Streams Law, Pennsylvania's General Assembly defined "industrial waste" to "be construed to mean any liquid ... resulting from any manufacturing or industry" 35 P.S. § 691.1.

48. In the Clean Streams Law, Pennsylvania's General Assembly defined "waters of the Commonwealth" to

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

35 P.S. § 691.1.

This definition includes separate parts of ground water and surface water.

49. In the Clean Streams Law, Pennsylvania's General Assembly expressly provided that "[e]ach day of continued violation of any provision of this act ... shall constitute a separate offense." 35 P.S. § 691.602(d).

50. In the Clean Streams Law, Pennsylvania's General Assembly expressly provided the following with respect to civil penalty liability:

In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed

whether or not the violation was wilful [sic]. The civil penalty so assessed shall not exceed ten thousand dollars (\$10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfulness [sic] of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

35 P.S. § 691.605.

51. Precedent decided by the Environmental Hearing Board further establishes that the deterrent effect of the penalty is one of the ‘other relevant factors’ the Board may consider under Section 605.” *Whitemarsh Disposal Corp., Inc. and David S. Miller v. DEP*, 2000 EHB 300, 346 (citation omitted).

52. In the Clean Streams Law, Pennsylvania’s General Assembly made it unlawful to

place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

35 P.S. § 691.301.

53. In the Clean Streams Law, Pennsylvania’s General Assembly made it unlawful to

discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.

35 P.S. § 691.307.

54. In the Clean Streams Law, Pennsylvania's General Assembly made it unlawful

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.

35 P.S. § 691.401 (emphasis added).

EQT's Exposure to Clean Streams Law Civil Penalty Liability

55. Evidence to be introduced before the Environmental Hearing Board will establish that EQT's own consultants have represented to the Department that industrial waste from EQT's Pad S Impoundment remained in the bedrock and soil underneath the impoundment's liner for a period of time far longer than any time period set forth in EQT's complaint.

56. Evidence to be introduced before the Environmental Hearing Board will establish that material such as EQT's industrial waste can bind to the soil or perch above an aquifer, continually polluting new groundwater as groundwater flows through the column of bound or perched industrial waste.

57. Evidence to be introduced before the Environmental Hearing Board will establish that EQT's plume of pollution, created by its release of industrial waste, progressively and over time moved into regions of uncontaminated areas of surface and groundwater.

58. Evidence to be introduced before the Environmental Hearing Board will establish that a plume of pollution, such as that caused by EQT in this case, could contaminate over a period of months a series of individual drinking water wells, one after another, on separate properties extending consecutively farther way from the original source of the pollution.

59. Evidence to be introduced before the Environmental Hearing Board will establish that pollution, such as that caused by EQT in this case, will continue to enter streams and springs from groundwater, and thereby repeatedly enter into and pollute waters of the Commonwealth, each day for months or years.

60. At a hearing before the Environmental Hearing Board, the Department will establish that, on numerous days, EQT unlawfully placed or permitted to be placed, or discharged or permitted to flow, or continued to discharge or permit to flow, its industrial waste into waters of the Commonwealth.

61. EQT's ongoing violation of Sections 301 and 307 of the Clean Streams Law will end when it no longer places or permits to be placed, or directly or indirectly discharges or permits to flow, or continues to directly or indirectly discharge or permit to flow, its industrial waste into any of the waters of the Commonwealth.

62. EQT is subject to a civil penalty to be assessed by the Environmental Hearing Board pursuant to the Clean Streams Law for each day that the evidence

introduced before the Environmental Hearing Board proves that EQT unlawfully placed or permitted to be placed, or directly or indirectly discharged or permitted to flow, or continued to directly or indirectly discharge or permit to flow, its industrial waste into any waters of the Commonwealth.

63. At a hearing before the Environmental Hearing Board, the Department will establish that, on numerous days, EQT unlawfully put or placed into waters of the Commonwealth, or allowed or permit to be discharged from property owned or occupied by EQT into waters of the Commonwealth, its industrial waste, resulting in “pollution” as that term is defined in the Clean Streams Law.

64. It is the Department’s position under Section 401 of the Clean Stream Law, 35 P.S. § 691.401, that EQT’s ongoing violation of Section 401 of the Clean Streams Law will end when it no longer unlawfully puts or places into waters of the Commonwealth, or allows or permits to be discharged from property owned or occupied by EQT into waters of the Commonwealth, its industrial waste, resulting in “pollution” as that term is defined in the Clean Streams Law.

65. It is the Department’s position that EQT is subject to a civil penalty to be assessed by the Environmental Hearing Board pursuant to the Clean Streams Law for each day that the evidence introduced before the Environmental Hearing Board proves that EQT unlawfully put or placed into waters of the Commonwealth, or

allowed or permitted to be discharged from property owned or occupied by EQT into waters of the Commonwealth, its industrial waste.

66. The Department's theory of EQT's Clean Streams Law civil penalty liability is entirely consistent with Pennsylvania's rules of statutory construction. 1 Pa.C.S.A. §§ 1901, *et seq.*

Anti-degradation Surface Water Requirements Governing EQT's Ongoing Act 2 Remediation of Groundwater Polluted by its Industrial Waste

67. The physical location of EQT's Pad S Impoundment is within the watershed containing a stream designated by regulation as High Quality in 25 Pa. Code § 93.91.

68. One of the surface waters within that watershed is Rock Run. A segment of Rock Run is itself designated a High Quality Cold Water Fishery and Migratory Fishery.

69. The Department's anti-degradation surface water requirements apply to EQT's remediation of its pollution in the Rock Run watershed.

70. Those anti-degradation requirements, as well as Act 2, require EQT to remediate its industrial waste groundwater pollution until EQT can discharge groundwater which does not degrade the water quality of Rock Run.

71. Each day that EQT's impact upon a water of the Commonwealth constitutes "pollution," as that term is defined and used in Section 401 the Clean

Streams Law, is a day on which EQT both: 1) fails to meet the applicable Act 2 groundwater remediation standard; and 2) violates the Clean Streams Law.

72. EQT's impact upon groundwater constitutes a separate instance of "pollution," as that term is defined and used in The Clean Streams Law, on each day that the industrial waste which was to have been contained within the Pad S Impoundment creates or is likely to create a nuisance or to render a water of the Commonwealth harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters.

General Assembly's Clean Streams Law Declarations of Policy

73. "The General Assembly specifically set forth the important purposes for which it exercised the Commonwealth's police powers by enacting the Clean Streams Law" in Section 4 of that Act, entitled "Declaration of Policy." 35 P.S. §691.4.

74. The first "Declaration of Policy" to be considered in interpreting and applying the Clean Streams Law is that "[c]lean, unpolluted streams are absolutely

essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry." 35 P.S. § 691.4(1).

75. EQT's interpretation of the Clean Streams Law is inconsistent with the declaration of policy set forth in the preceding paragraph.

76. The second "Declaration of Policy" to be considered in interpreting and applying the Clean Streams Law is that "[c]lean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead." 35 P.S. § 691.4(2).

77. EQT's interpretation of the Clean Streams Law is inconsistent with that declaration of policy set forth in the preceding paragraph.

78. The third "Declaration of Policy" to be considered in interpreting and applying the Clean Streams Law is that "[i]t is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." 35 P.S. § 691.4(3).

79. EQT's interpretation of the Clean Streams Law is inconsistent with that declaration of policy set forth in the preceding paragraph.

80. The fourth "Declaration of Policy" to be considered in interpreting and applying the Clean Streams Law is that "[t]he prevention and elimination of water

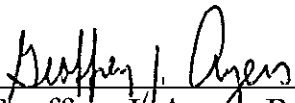
pollution is recognized as being directly related to the economic future of the Commonwealth.” 35 P.S. § 691.4(4).

81. EQT’s interpretation of the Clean Streams Law is inconsistent with that declaration of policy set forth in the preceding paragraph.

WHEREFORE, for the reasons set forth above, the Court should conclude that is not entitled to any relief pursuant to its “Complaint in Action for Declaratory Judgment.”

Respectfully submitted,

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION



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Date: March 8, 2016

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EQT PRODUCTION COMPANY,

Petitioner,

v.

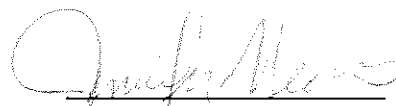
DEPARTMENT OF ENVIRONMENTAL
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NO. 485 M.D. 2014

VERIFICATION

I, Jennifer Means, Program Manager for the Department of Environmental Protection's Oil and Gas Program in the Eastern Oil and Gas District, do hereby state that I am authorized to execute this Verification on behalf of the Department of Environmental Protection, and that the averments of fact contained in the foregoing DEPARTMENT OF ENVIRONMENTAL PROTECTION'S ANSWER AND NEW MATTER IN RESPONSE TO EQT PRODUCTION COMPANY'S COMPLAINT FOR DECLARATORY JUDGMENT in the case assigned the above-captioned docket number, as those facts have been made known to me, are true and correct to the best of my information, knowledge and belief. This Verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.


Jennifer Means

Date: March 8, 2016