[J-67-2015] [MO: Saylor, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

EQT PRODUCTION COMPANY, Appellant v. DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 15 MAP 2015 Appeal from the Order of the Commonwealth Court at No. 485 MD 2014 dated 2/20/15 ARGUED: November 17, 2015

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: December 29, 2015**

In May 2012 Appellant, EQT Production Company (EPC), informed Appellee, the Department of Environmental Protection (DEP), of its discovery of water contaminated during hydraulic fracturing operations leaking from one of EPC's subsurface impoundments. Two years later, premised on its interpretation of the Clean Streams Law as imposing penalties for every day that contamination remained in the subsurface soil and passively entered ground or surface water, DEP offered EPC a proposed monetary settlement. EPC disputed DEP's interpretation of the Clean Streams Law as imposing daily penalties, resulting in what it viewed as excessive fines, and on September 19, 2014, filed a complaint for declaratory judgment in the original jurisdiction of the Commonwealth Court to test DEP's legal theory. Two and a half

weeks later, DEP filed a complaint with the Environmental Hearing Board (EHB) against EPC for civil penalties based on the violations outlined in the proposed settlement.

The Majority holds that this case provides a sufficient, actual controversy entitling EPC to pre-enforcement judicial review of an agency's interpretation of a statutory regime via a declaratory judgment proceeding, without the need to exhaust administrative remedies and despite the matter being in the exclusive jurisdiction of an administrative tribunal. The Majority's rationale for establishing this exception to the well-established requirements that courts should yield to administrative tribunals and litigants should exhaust administrative remedies is threefold: the agency's threat of multi-million dollar penalties, the lack of material facts in dispute, and the inability of EPC to initiate administrative review. I do not find this exception to be narrowly tailored, and perceive that the Majority has generally eroded the requirements for declaratory relief in a departure from established law. My reasoning follows.

First, I do not believe EPC has standing to petition the Commonwealth Court for declaratory relief because it is not aggrieved under the facts of this case. See Office of the Governor v. Donahue, 98 A.3d 1223, 1229 (Pa. 2014) ("For standing to exist, the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been 'aggrieved.'"). Although DEP took the position that it could impose mounting daily penalties against EPC for its alleged violation of the Clean Streams Law, it has no authority to levy these penalties absent a hearing before the EHB, 35 P.S. § 691.605, and EHB's determination of the proper sanction, 35 P.S. § 7514. When such a hearing occurs, EPC will challenge DEP's statutory interpretation and the EHB will decide the issue. Until then, EPC's harm is speculative and has not matured into an actual case or controversy. EPC therefore does not have an interest sufficiently substantial, direct, or immediate to confer standing. See Donahue. 98 A.3d

at 1229 (explaining that a party is aggrieved for purposes of establishing standing when the party has a "substantial, direct and immediate interest" in the outcome of litigation).

The Majority apparently believes that because it is DEP's position that EPC is in continuing violation of the Clean Streams Law, and that it can therefore impose penalties for every day the violation continues, the harm is not speculative. I disagree. DEP's belief that the penalties are appropriate presents EPC with the sort of choice industry participants routinely assess when confronted with allegations that they have violated the law: whether to settle with the agency to mitigate their losses, or to wait for DEP to file a complaint before the EHB and challenge DEP's statutory interpretation before that tribunal. If the EHB finds there is statutory support for DEP's continuing violation theory, then EPC is liable for every day that its contaminants remain in the subsurface soil. See 35 P.S. § 691.602(d) ("Each day of continued violation of any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to this act shall constitute a separate offense."). If, on the other hand, there is no statutory support for DEP's interpretation, there is no direct, immediate, or substantial hardship. DEP's untested belief that it can assess penalties against EPC for continuing violations of the Clean Streams Law is no more than one party's theory of the case, and is therefore insufficient to confer standing on EPC to seek declaratory relief at this juncture.

Second, "[t]he doctrine of exhaustion of administrative remedies requires a party to exhaust all adequate and available administrative remedies before the right of judicial review arises." Empire Sanitary Landfill, Inc. v. Com., Dep't of Envtl. Res., 684 A.2d 1047, 1053 (Pa. 1996). Courts should defer judicial review when presented with a question within an agency's specialization and where there is an administrative remedy

to produce the desired result. Id. (citing National Solid Wastes Mgmt. v. Casey, 580 A.2d 893, 897 (Pa.Cmwlth. 1990), aff'd, 619 A.2d 1063 (1993)).

As an executive agency, it is DEP's responsibility to administer and enforce environmental laws. See Tire Jockey Service, Inc. v. Dept. of Environmental Protection, 915 A.2d 1165, 1185 (Pa. 2007) (noting that DEP is the executive branch, and is assigned various duties to implement and enforce environmental statutes and regulations). However, this enforcement obligation includes the authority to assess civil penalties for violations of the Clean Streams Law only after a hearing before the EHB. 35 P.S. § 691.605. Absent such a hearing, DEP has no such authority.

The Majority concludes there is no available administrative remedy, a factor which it opines favors original jurisdiction judicial review. In this case, DEP has now filed a complaint with the EHB, bringing before that tribunal DEP's statutory interpretation of its authority to asses daily penalties against EPC. Divesting the EHB of its statutory jurisdiction to issue adjudications on DEP's orders and decisions, see 35 P.S. § 7514(a), simply because EPC filed its original jurisdiction declaratory judgment action first will "foster races to the respective judicial and quasi-judicial tribunals" as the Majority fears. Maj. Slip Op. at 11-12, n. 8. Moreover, although the Majority is correct that until DEP filed its complaint with EHB, EPC had no venue within which to challenge DEP's asserted entitlement to penalties, it is equally accurate that until DEP sought administrative review it could never assess a fine against EPC. Similarly, the Majority is correct that if DEP's continuing violation theory is supported by the Clean Streams Law, then by delaying administrative review it could increase the fine. There is no reason to believe, however, that EHB will not understand this and reject a nonmeritorious result if appropriate. Under all established law, it should be afforded the opportunity to do so. I see no justification to bypass this administrative review.

Third and relatedly, the Declaratory Judgments Act expressly provides that declaratory relief is not available with respect to any proceeding within the exclusive jurisdiction of a tribunal other than a court. 42 Pa.C.S. § 7541(c)(2). Because the EHB is an administrative tribunal with exclusive jurisdiction to issue adjudications on orders and decisions of DEP, declaratory relief should not be available to assess EPC's liability for violating the Clean Streams Law. See Tire Jockey, 915 A.2d at 1185 (describing the EHB as having the power and duty to hold hearings and issue adjudications on DEP's decisions); Burnham Coal Co. v. PBS Coals, Inc., 442 A.2d 3, 5 (Pa.Cmwlth. 1982) aff'd, 451 A.2d 443 (1982) (". . . to the extent that the present declaratory judgment action by Burnham seeks a judicial declaration that 'Burnham has no liability for any violations of the Clean Streams Law being assessed against Burnham and PBS by [DEP],' the action clearly is placed outside the original declaratory judgment jurisdiction of this court by 42 Pa.C.S. § 7541(c)); 35 P.S. § 7514(a) (providing that the EHB's jurisdiction includes "the power and duty to hold hearings and issue adjudications . . . on orders, permits, licenses, or decision of [DEP].").

Because EPC lacks standing, has not exhausted administrative remedies, and the matter is in the exclusive jurisdiction of the EHB, I do not believe EPC is entitled to declaratory relief. As noted above, the Majority's disagreement appears to be tied to the agency's threat of multi-million dollar penalties, the lack of material facts in dispute, and the inability of EPC to initiate administrative review. I do not find, however, that the facts of this case are unique or unusual sufficient to justify departure from the general requirements of declaratory relief described above.

Rather than representing an aberration, EPC's disagreement with the agency tasked with ensuring its compliance with relevant statutory obligations is the type of dispute for which administrative review is well suited. Agencies across the

Commonwealth levy fines and penalties against those they are tasked to regulate, and the relevant administrative tribunal determines the legal validity of such assessments. By focusing on the mounting penalties for which EPC may or may not be responsible, I am concerned that the Majority has created an exception to the requirement of exhaustion of administrative remedies that will swallow the rule. Respectfully, in doing so, the Majority demonstrates an implicit lack of confidence in the administrative tribunals of the Commonwealth. I do not share this lack of confidence. Rather, I trust that these administrative tribunals, which cultivate an expertise in their relative fields, will resolve the case before it correctly, rejecting fanciful or absurd theories that aggrieved parties may appeal to our courts in due course, ensuring a second (or third) review of any alleged error by the administrative tribunal. This is the undeniable logic of the administrative appeal process. Indeed, the administrative process is presently unfolding before the EHB against EPC, and in another case on the same legal issue, DEP v. Sunoco Logistics Partners, LP and Sunoco Pipeline, LP, EHB Dkt. No. 2014-020-CP-R. We should permit these proceedings to continue without judicial interference, and we should allow the EHB to apply its expertise on this question.

Moreover, our notions of case or controversy and justiciability restrain the judiciary from wading into matters that have not yet ripened into concrete disputes. See Rendell v. Pennsylvania State Ethics Comm'n, 983 A.2d 708, 717 (Pa. 2009) ("Several discrete doctrines—including standing, ripeness, and mootness-have evolved to give body to the general notions of case or controversy and justiciability."). By establishing an entitlement to declaratory relief for EPC in the present circumstances premised on DEP's legal interpretation of a statute, mounting daily penalties, and EPC's inability to initiate the administrative proceeding, the Majority has degraded our justiciability restraints in matters not confined to the present scenario. Numerous examples spring

to mind. Consider the district attorney who announces an intent to seek the death penalty against a criminal defendant premised on a legal interpretation of a statute, or a negligence plaintiff in a minor impact soft tissue case who indicates an intent to seek punitive damages. Declaratory relief would not be available to the defendants threatened with prosecution or the lawsuit. Rather, we trust that a trial court will resolve any legal disputes that arise in the context of the criminal or negligence action initiated by the prosecutor or plaintiff. Following resolution, the issues would be reviewed on appeal.

In this case, DEP's legal interpretation of the Clean Streams Law is not independent of its allegations that EPC failed to abate the contamination caused by its water leakage. In this respect, there are factual matters for the EHB to resolve regarding EPC's continued contamination. Without the interference of a declaratory judgment action, the EHB will resolve, in due course, DEP's legal interpretation and apply it to the factual circumstances of EPC's contamination. The aggrieved party may, or may not appeal. Without an appeal, there will be nothing for the courts to decide.

Finally, I am not persuaded that the Majority's conclusion flows from Donahue. As the Commonwealth Court explained, the declaratory judgment action in Donahue challenged the Office of Open Records (OOR)'s declaration in litigation that it would interpret a provision of the Right to Know Law (RTKL), 65 P.S. § 67.901, in a manner detrimental to, *inter alia*, the Office of the Governor (OG). OOR, as the tribunal tasked with adjudicating requests under the RTKL, had the authority to impose its interpretation on OG. In contrast, DEP has no authority to impose its interpretation of the Clean Streams Law on EPC. Rather, it may interpret the statute and make a legal argument to the EHB, while the EHB has the authority to impose penalties.

Because I see nothing in the factual or legal circumstances of this case to warrant departure from our well-established rules of jurisprudence limiting a party's right to seek declaratory relief in the courts, I respectfully dissent.