[J-67-2015]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., EAKIN, BAER, TODD, STEVENS, JJ.

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

OPINION

MR. CHIEF JUSTICE SAYLOR **DECIDED: December 29, 2015**

In this direct appeal, we consider whether a company threatened by an administrative agency with ongoing, multi-million-dollar penalties per such agency's interpretation of a statutory regime has the right, immediately, to seek a judicial declaration that the agency's interpretation is erroneous.

Via Pennsylvania's Land Recycling and Environmental Remediation Standards Act,[1] otherwise known as Act 2, the General Assembly has created a scheme for establishing "cleanup standards" applicable to voluntary efforts to remediate environmental contamination for which a person or entity may bear legal responsibility. 35 P.S. §6026.102(4). Act 2, however, specifies that it does not obviate penalties

[1] Act of May 19, 1995, P.L. 4, No. 2 (35 P.S. §§6026.101-6026.908).

otherwise authorized by law for pollution of the land, air, or water in the Commonwealth. *See id.* §§6026.102(5), 6026.106(b), 6026.905(b).

Various penalties associated with pollution pertain under the Clean Streams Law.[2] Substantively, the enactment requires, among other things, that 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 waters of the Commonwealth any industrial wastes," except as otherwise provided in the enactment. 35 P.S. §691.301; *see also id.* §§691.307 (also regulating industrial waste relative to Commonwealth waters), 691.401 (pertaining to "other pollutions"), 691.611 (specifying that it is unlawful, *inter alia*, to cause water pollution and subjecting offending persons and municipalities to the law's penalty provisions). The penalties include civil assessments of up to $10,000 per day for each separate violation. *See* 35 P.S. §691.605(a).

Appellant EQT Production Company ("EPC"), owns and operates natural gas wells in the Commonwealth. In May 2012, the company notified Appellee, the Department of Environmental Protection (the "Department" or "DEP"), that it had discovered leaks in one of its subsurface impoundments containing water that had been contaminated during hydraulic fracturing operations. Subsequently, EPC cleared the site of impaired water and sludge and commenced a formal cleanup process pursuant to Act 2.

The Department took the position that the discharge of contaminated water implicated civil penalties under the Clean Streams Law. In May 2014, the agency tendered to EPC a proposed "Consent Assessment of Civil Penalty," seeking to settle the penalty question via a payment demand of $1,270,871, subsuming approximately $900,000 attending asserted ongoing violations. The claim of continuing violations was

[2] Act of June 22, 1937, P.L. 1987 (as amended 35 P.S. §§691.1-691.1001).

based on DEP's position that each day in which contaminants remain in the subsurface soil and passively enter groundwater and/or surface water constitutes a violation, thus implicating serial, aggregating penalties. *See, e.g.*, Complaint for Civil Penalties in *DEP v. EQT Prod. Co.*, No. 2014-140-CP-L, at ¶60 ("To the extent that flowback water from Marcellus drilling operations, and/or its constituents, continues to be present in any water of the Commonwealth after the date that this Complaint is filed with the [EHB], the pollution continues, and [EPC] continues to incur liability for additional penalties.").

EPC disputed the Department's approach to the Clean Streams Law, maintaining that: penalties cannot exceed those accruing during the time period in which contaminants actually were discharged from the company's impoundment; all such actual discharges ended in June 2012; and the Act 2 regime controlled the extent of the essential remediation efforts. In an effort to vindicate this position, EPC commenced an original-jurisdiction proceeding in the Commonwealth Court,[3] per the Declaratory Judgments Act.[4] The company asserted that it lacked any viable administrative remedy, while observing that the Department recently also had advanced its continuing-violation interpretation in *DEP v. Sunoco Logistics Partners, LP*, EHB Dkt. No. 2014-020-CP-R. Additionally, EPC averred that the legal question that it posed was adequately developed and ripe for judicial review; it would suffer direct, immediate, and substantial hardship if review was delayed; and the action would settle controversies otherwise indicative of immediate and inevitable litigation. *See generally Commonwealth, Office of the Governor v. Donahue*, 626 Pa. 437, 448, 98 A.3d 1223,

[3] The Commonwealth Court's original jurisdiction over actions against a Commonwealth agency is undisputed. *See* 42 Pa.C.S. §761.

[4] Act of July 9, 1976, P.L. 586, No. 142, §2 (as amended 42 Pa.C.S. §§7531-7541).

1229 (2014) (discussing such prerequisites to judicial redress under the Declaratory Judgments Act).

A few weeks later, the Department lodged a "Complaint for Civil Penalties" in the Environmental Hearing Board (the "Hearing Board" or the "EHB"), seeking more than $4,500,000 from EPC, supplemented by continuing levies of up to $10,000 per day. *See* Complaint for Civil Penalties in *DEP v. EQT Prod. Co.*, No. 2014-140-CP-L, at 18. DEP also interposed preliminary objections in the declaratory judgment proceeding initiated by EPC, asserting that the Commonwealth Court lacked jurisdiction to entertain the action.

In its preliminary objections, the Department asserted that an adequate administrative remedy was available to EPC before the Hearing Board; indeed, the agency stressed that the subject matter of the company's declaratory judgment action had been put squarely before the EHB both in the proceedings commenced by DEP against EPC and in the *Sunoco* litigation. In this regard, the Department highlighted that the Declaratory Judgments Act specifically prescribes that declaratory relief is unavailable with respect to proceedings within the exclusive jurisdiction of administrative tribunals. *See* 42 Pa.C.S. §7541(c)(2). Furthermore, the agency contended, at the time EPC commenced the declaratory judgment proceedings, no issue had yet matured to the point of an actual controversy. *See, e.g.*, Preliminary Objections in *EQT Prod. Co. v. DEP*, No. 485 M.D. 2014, at 7 ("As alleged in the Complaint, with respect to [EPC], the status of events between [EPC] and the Department is a rejected settlement offer."). More generally, DEP characterized the declaratory judgment action as an inappropriate "pre-emptive strike." *Id.* Indeed, according to the Department, any controversy would cease if the EHB decided to reject the agency's continuing-violation interpretation.

In a single-judge opinion and order, the Commonwealth Court sustained DEP's preliminary objections on the basis that exclusive authority to determine the appropriate penalty was reposited in the Hearing Board. *See EQT Prod. Co. v. DEP*, 114 A.3d 438 (Pa. Cmwlth. 2015) (Friedman, S.J.). Initially, the court recognized that the express purpose of the Declaratory Judgments Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Id.* at 441 (quoting 42 Pa.C.S. §7541(a)). Nevertheless, the court explained that the judiciary has interposed prudential prerequisites, including the need to demonstrate an interest that is direct, immediate, and substantial, as well as to establish the existence of an actual controversy related to invasion or threatened invasion of the petitioner's legal rights. *See id.* (quoting *Waslow v. DOE*, 984 A.2d 575, 580 (Pa. Cmwlth. 2009)); *accord Donahue*, 626 Pa. at 448, 98 A.3d at 1229. The court found this controversy threshold to be lacking, given that DEP merely expresses legal opinions when it makes penalty recommendations; whereas, it is the Hearing Board that ultimately determines and imposes the appropriate penalties. *See EQT Prod. Co.*, 114 A.3d at 441 (citing *Westinghouse Elec. Corp. v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998)).

The Commonwealth Court also distinguished *Donahue*, in which this Court found a declaratory judgment action to have been proper, as an instance in which an agency had *actually imposed* its interpretation of a statute upon other government agencies. *See id.* In this regard, the court again stressed that DEP is powerless to impose its interpretation of the Clean Streams Law upon EPC. *See id.* As such, the court deemed EPC's allegation of harm to be "merely speculative." *Id.*

In its present direct appeal, EPC characterizes the Department's reading of the Clean Streams Law as "unlawful and unprecedented," Brief for Appellant at 10, and

maintains that it has direct, substantial, and immediate consequences for the company. In this regard, EPC asserts that the continuing-violation interpretation:

> (i) imposes ongoing, indefinite civil penalty liability for the mere presence of constituents in waters of the Commonwealth, and (ii) forces EPC to continue to spend significant additional money to clean up the site, well beyond what is legally required under Act 2, or face massive civil penalties for an indefinite period of time as long as any detectable amount of a substance remains present in waters of the Commonwealth.

Brief for Appellant at 9; *see also id.* ("Regardless of any remediation efforts, the Department's interpretation places EPC in a world of constantly accumulating penalties with no legal or administrative remedy."). As such, EPC strongly differs with the Commonwealth Court's characterization of the harm that it faces as speculative. The company also explains that its complaint is centered on discrete legal questions, primarily, whether the mere presence of contaminants in the environment represents a "discharge" under the Clean Streams Law, and does not entail a fact-based inquiry subject to essential vetting through the administrative hearing process.

EPC regards its position concerning justiciability, as well as the recent vindication of an instance of declaratory judgment review in *Donahue*, as consistent with the requirements of the Pennsylvania Constitution that courts are to be open and remedies are not to be denied.[5] Along these lines, the company's *amicus*, the Chamber of Commerce of the United States of America, advocates as follows:

> Like any of the countless businesses -- large and small -- that are active in Pennsylvania, [EPC] has a right to understand what Pennsylvania statutes do and do not allow.

[5] *See* PA. CONST. art I, §11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have a remedy by due course of law, and right and justice administered without sale, denial or delay.").

> This case is not about trying to avoid doing what the law requires. It is about *knowing what* the law requires -- and having a reasonably prompt determination of its requirements, consistent with principles of due process, so that a business can arrange its affairs accordingly. Having such certainty is especially important where, as here, a business not only disagrees with a government agency's interpretation of the law but also is subject to ever-increasing penalties each day that it does not comply with the government agency's interpretation.

Brief for *Amicus* Chamber of Commerce of the U.S. at 1 (emphasis in original).

Both EPC and its *amicus* consider the present case to be analogous to the circumstances before the Supreme Court of the United States in *Sackett v. EPA*, ___ U.S. ___, 132 S. Ct. 1367 (2012). There, the Supreme Court held that the federal judiciary was invested with jurisdiction to declare the rights of landowners after the Environmental Protection Agency interpreted the federal Clean Water Act as prohibiting the filling of a segment of their property with dirt and rock and as justifying mounting, daily penalties pending abatement. *See id.* at ___, 132 S. Ct. at 1370. Recognizing that the main issue before the Supreme Court in *Sackett* concerned whether a compliance order represented "final agency action" under the federal Administrative Procedure Act, 5 U.S.C. §704, EPC and its *amicus* observe that the Supreme Court's opinion nevertheless touches on the sorts of prudential considerations pertinent to declaratory judgment review in Pennsylvania. *See, e.g.*, *id.* at ___, 132 S. Ct. at 1374 (indicating that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review"). They also draw particular attention to Justice Alito's concurrence, in which he opined that denying judicial review to individuals potentially subject to mounting penalties of up to $75,000 per day pending enforcement

measures within the exclusive purview of a government agency was "unthinkable." *Id.* at ___, 132 S. Ct. at 1375 (Alito, J., concurring).

Finally, EPC notes that courts routinely entertain declaratory judgment requests in insurance-coverage disputes rather than forcing parties bearing risks of loss to breach insurance contracts or await commencement of suit by others. *See, e.g.*, *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 588 Pa. 205, 208, 903 A.2d 1170, 1172 (2006). The company urges this Court to treat its own circumstances as no less compelling.

The Department's present arguments are consistent with the position developed in its preliminary objections and in the Commonwealth Court's opinion sustaining them. DEP maintains that the proceedings before the Hearing Board serve as the appropriate and exclusive vehicle available to resolve challenges to its interpretation of the Clean Streams Law's penalty provisions, *see, e.g.*, Brief for Appellee at 11 (citing 35 P.S. §§691.605, 7514(a)), and that the requirement of exhaustion of administrative remedies squarely pertains.[6] The Department continues to stress that it lacks the ability to unilaterally impose penalties, thus rendering any harm prior to imposition by the Hearing Board as indirect, remote, and speculative. DEP also highlights a concern expressed by Madame Justice Todd, in *Donahue*, that too broad an approach to justiciability in the

[6] *See, e.g.*, Brief for Appellee at 12 (citing *Burnham Coal Co. v. PBS Coals, Inc.*, 65 Pa. Cmwlth. 86, 89, 442 A.2d 3, 5 (1982) ("[T]o the extent that the present declaratory judgment action . . . seeks a judicial declaration that '[a company] has no liability for any violations of the Clean Streams Law being assessed against [it] by [DEP],' the action clearly is placed outside the original declaratory judgment jurisdiction of this court by 42 Pa.C.S. § 7541(c)."), *aff'd per curiam*, 499 Pa. 59, 451 A.2d 443 (1982), and *Faldowski v. Eighty Four Mining Co.*, 725 A.2d 843, 846 (Pa. Cmwlth. 1998) (indicating that a declaratory judgment action should not be employed "to short-circuit the administrative process and have the law determined without the benefit of the administrative agency first reviewing the matter")).

declaratory judgments context will "embroil[] [courts] in poorly-developed, ill-considered, and largely academic debates examining other governmental entities' legal judgments." *Donahue*, 626 Pa. at 486, 98 A.3d at 1252 (Todd, J., concurring).

The general framework governing the availability of declaratory relief is amply developed within our case law, as most recently reflected in *Donahue*, including the acknowledgement of the remedial nature of the Declaratory Judgments Act and the policy of applying it liberally; the prudential requirement of a real or actual controversy; the general prescription for exhaustion of administrative remedies; and the longstanding exception pertaining to substantial pre-enforcement challenges to agency regulations. *See Donahue*, 626 Pa. at 448, 98 A.3d at 1229; *accord Bayada Nurses, Inc. v. DLI*, 607 Pa. 527, 541-44, 8 A.3d 866, 874-76 (2010).

Upon consideration, we deem this case to present a sufficient, actual controversy and to fall within the class of disputes that are a proper subject of pre-enforcement judicial review. We recognize that the seminal decision in the pre-enforcement line involved a challenge to published administrative regulations, *see Arsenal Coal Co. v. Commonwealth*, 505 Pa. 198, 200-01, 477 A.2d 1333, 1335 (1984); whereas the present scenario concerns an agency's less formal interpretation of a statute. Nevertheless, the governing rationale of *Arsenal Coal* did not focus on the formality of the administrative action, but rather, centered upon burdensome impact upon those subject to regulation. *See id.* at 209, 477 A.2d at 1339 ("Where the effect of the challenged regulations upon the industry regulated is direct and immediate, the hardship thus presented suffices to establish the justiciability of the challenge in advance of enforcement."). Consistent with this approach, a majority of this Court in *Donahue* deemed the distinction between formal and less formal agency policies to be

one "without a difference," where either would have adverse, direct, and immediate effects upon salient rights or interests. *Donahue*, 626 Pa. at 450, 98 A.3d at 1231.

Thus, in *Arsenal Coal*, a group of coal mine operators and producers were permitted to proceed with a pre-enforcement challenge to comprehensive regulatory requirements promulgated by the Environmental Quality Board, so as to clarify the operators' and producers' obligations under the law and avoid unnecessarily protracted proceedings. *See Arsenal Coal*, 505 Pa. at 210-11, 477 A.2d at 1339-40. In *Bayada Nurses*, a pre-enforcement challenge advanced by a home health care provider was found to be justiciable, since judicial review would eliminate substantial expense and uncertainty in the day-to-day operations of such providers and alleviate costly and inefficient piecemeal enforcement measures. *See Bayada Nurses*, 607 Pa. at 544-45, 8 A.3d at 876. In *Donahue*, the Office of the Governor appropriately pursued declaratory relief in challenging the Office of Open Records' interpretation of statutory provisions governing the submission of open-records requests, in light of the adverse, direct, and immediate impact of that interpretation on Commonwealth agencies. *See Donahue*, 626 Pa. at 450, 98 A.3d at 1230-31. And, in the present case, EPC will be permitted to pursue its substantial challenge to the Department's continuing-violation interpretation in the Commonwealth Court, given the company's potential exposure to potent, ongoing civil penalties for which DEP maintains the company is liable.[7]

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[7] Responsive to the Commonwealth Court's attempt to distinguish *Donahue* as involving an instance in which an administrative agency actually had imposed its interpretation of a statute upon others, we neither read *Donahue* as relying on this factor nor believe that that the consideration carries dispositive weight. Rather, the uncertainties facing EPC while under the threat of ballooning penalties under DEP's ongoing-violation interpretation is sufficient, in our view, to confirm the entitlement to judicial review.

Along these lines, we observe that the assessment of all of the relevant factors in determining justiciability (including immediacy and substantiality) -- individually and (continued…)

Our decision might be different had the Department advanced a persuasive case that there are material factual dynamics involved in evaluating the validity of its continuing-violation interpretation, or that the application of the specialized expertise of the Hearing Board is essential to a full and fair understanding of it. Here, however, DEP has limited its argument along these lines to regurgitation of the landscape of potentially relevant environmental statutes and a conclusory pronouncement of a need to develop a full factual record before the EHB. *See* Brief for Appellee at 16-18. This presentation offers little to contradict EPC's assertion that its challenge to the agency's continuing-violation interpretation presents only questions of law presently amenable to judicial review. *Accord LeClerc v. Webb*, 419 F.3d 405, 413-14 (5th Cir. 2005) (observing that a pre-enforcement challenge "is generally ripe if any remaining questions are purely legal . . . [and] further factual development" is not required for effective judicial review).

Consistent with the concerns expressed in *Sackett*, we also treat EPC's inability in its own right to implicate the sole avenue available for quasi-judicial administrative review as a factor favoring original-jurisdiction judicial review. *See Sackett*, at ___, 132 S. Ct. at 1372; *accord Bayada Nursing*, 607 Pa. at 544, 8 A.3d at 876. This consideration may be offset to some degree by the Department's somewhat proximate, but subsequent, initiation of a proceeding before the EHB. We conclude, however, that such commencement did not sufficiently alleviate the hardships facing EPC so as to divest the Commonwealth Court of jurisdiction that already was secure.[8] Rather, EPC is

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(…continued)
collectively – entails discerning judgments. *Accord* 22A AM. JUR. 2D *Declaratory Judgments* §34 (2015) ("The difference between an abstract question and a controversy is necessarily one of degree[.]").

[8] A different dynamic would pertain had the Department commenced the administrative penalty proceedings before EPC initiated the declaratory judgment action in the Commonwealth Court. We do not resolve the question of justiciability presented in such (continued…)

entitled to clarification by that court concerning the statutes establishing the parameters of the company's penalty exposure, so that it may have the opportunity to organize its affairs accordingly.

We hold that the impact of the Department's threat of multi-million dollar assessments against EPC was sufficiently direct, immediate, and substantial to create a case or controversy justifying pre-enforcement judicial review via a declaratory judgment proceeding, and that exhaustion of administrative remedies relative to the issues of statutory interpretation that the company has presented was unnecessary.[9]

The order of the Commonwealth Court is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Mr. Justice Eakin did not participate in the decision of this case.

Madame Justice Todd and Mr. Justice Stevens join the opinion.

Mr. Justice Baer files a dissenting opinion.

(…continued)
a scenario but note only that we would be hesitant to foster races to the respective judicial and quasi-judicial tribunals.

[9] To the extent that the previous decisions of the Commonwealth Court relied upon by the Department are inconsistent with our present ruling, *see supra* note 6, they are disapproved.