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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 485 MD 2014

EQT PRODUCTION COMPANY,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Robert C. Heim (PA #15758)
Steven G. Bradbury
Jennings F. Durand (PA #200779)
Ellen L. Mossman (PA #319149)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000

Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America

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PRELIMINARY STATEMENT

The Commonwealth of Pennsylvania's environmental laws include statutes aimed at two separate goals. On the one hand, the Clean Streams Law imposes civil penalties for active discharges of contaminants into the waters of the Commonwealth. On the other, the Land Recycling and Environmental Remediation Standards Act ("Act 2"), requires landowners to clean up when a contamination occurs.

Here, EQT Production Company ("EQT Production") does not contest the obligation to pay a penalty for each day when there was an actual discharge of contaminants—in this case, an unintentional leak from a pit used in the gas production process. Nor does EQT Production contest the obligation to clean up to the full extent necessary under Act 2. The contested issue before this Court is whether the Clean Streams Law authorizes the Department of Environmental Protection of the Commonwealth of Pennsylvania (the "Department") to impose ongoing civil penalties for each day when a contaminant merely "continues to be *present*" in the waters of the Commonwealth—even *after* the problem that caused the original discharge has been fixed and no further leaks or spills are occurring.

EQT Production argues that it did exactly what the government should have wanted: when it discovered an unintentional leak from a containment pit, EQT Production did not sweep the problem under the rug but rather self-reported the

leak to the Department. R.6a at ¶¶ 8-9. EQT Production has further explained that it did not resist its obligations to clean up the resulting contamination; it worked closely with the Department to create and swiftly execute a remediation plan that would fully satisfy the requirements established pursuant to Act 2. R.7a at ¶¶ 13-14.

EQT Production *agrees* that the Department has the authority to impose a civil penalty for the time when the impoundment was actively leaking. July 20, 2016 EQT Production Br. in Supp. of Appl. for Summ. Relief ("EQT Production Br.") at 12. And EQT Production *agrees* that it had to comply with the Act 2 remediation standards to clean up the problem to satisfactory standards. R.7a at ¶¶ 13-14. But EQT Production does *not* agree—and neither does the United States Chamber of Commerce (the "Chamber")—that the Clean Streams Law authorizes the Department to impose *ongoing penalties for any day after the time that EQT Production stopped the leak*. It is a leak that triggers civil penalties; once a leak is stopped, no further civil penalties are warranted or, moreover, authorized under the statute. Once a leak is stopped, the landowner or operator is still obligated to satisfy the Act 2 remediation standards—but not to pay ongoing penalties for a leak that has been completely contained.

Yet the power to impose further civil penalties is exactly what the Department is seeking. The Department is demanding penalties not just for the days when the leak was occurring, but also for every day there is any "continuous presence" of the contaminant that previously leaked from the impoundment. R.66a-67a at ¶¶ 60-61. Given that contaminants can persist at some levels for years, the Department's "continuous presence" interpretation of the Clean Streams Law would, if adopted by this Court, allow for ongoing penalties for years after an initial discharge has been stopped. That result is incompatible with Pennsylvania law and could subject landowners or operators to unpredictable, ongoing liability where contaminants were discharged only in the past but remain detectable in the waters of the Commonwealth. Such an interpretation would vastly expand the potential liability for businesses and landowners across the Commonwealth, increase risks associated with real estate transactions, and impair real estate values for existing owners.

The Chamber urges this Court to declare that the Clean Streams Law authorizes civil penalties only during an active discharge into the waters of the Commonwealth—and not after the discharge has been contained. That interpretation (rather than the Department's "continuous presence" view) would adhere to the plain language of the statute and comport with the policy

considerations underlying the Commonwealth's environmental penalty and remediation statutory structure by penalizing landowners *only* for the time during which their conduct introduces new or additional contaminants into the Commonwealth's waters.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1912, the Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. Many of the Chamber's members are based or do business in Pennsylvania, including companies that are subject to the oversight of the Department. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before state and federal courts, and the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the business community. This litigation is one such matter.

This case is especially important to the Chamber because if the Court adopts the Department's "continuous presence" interpretation of the Clean Streams Law, that result would vastly expand the potential liability faced by Pennsylvania

landowners. If the Department's interpretation of the law were adopted, it could be aimed at potentially every landowner in the Commonwealth. Any landowner could be subject to a continuously accruing penalty not just for the days when a leak occurs, but also for every day when a contaminant "continues to be present" in the waters of the Commonwealth, even years or decades after the initial discharge—and years or decades after the party responsible for the discharge fixed the leak and contained any ongoing spill. Taking the Department's interpretation to its logical conclusion, the Department might well attempt to impose penalties on a new landowner for damage caused by a discharge by a *prior* owner—so long as the contaminant "continues to be present" at the site.

That makes no sense. And it is not the law that the Pennsylvania legislature enacted. If the Department's "continuous presence" rule is adopted, it would vastly expand the potential liability for businesses and landowners across the Commonwealth, increase risks associated with real estate transactions, and impair real estate values for existing owners.

ARGUMENT

Under the plain language of the Clean Streams Law and for sensible policy reasons, businesses and other landowners are not liable for the mere continuous presence of a contaminant in the water of the Commonwealth, when the initial

discharge has been reported and contained. The Department contends that EQT Production is liable under sections 301, 307, and 401 of the Clean Streams Law, 35 P.S. §§ 691.301, 691.307, 691.401, for each day that a pollutant "*continues to be present*" in waters of the Commonwealth or the groundwater. R.66a-67a at ¶¶ 60-61 (emphasis added); *see also* EQT Production Br. at 10-11. But under this flawed interpretation of sections 301, 307, and 401 of the Clean Streams Law, a landowner could be liable for ongoing civil penalties long after the landowner contains a discharge by fixing a burst pipe, capping an overflowing barrel, or, as here, completely draining a leaking impoundment. *See* R.6a at ¶¶ 10-11. The Department's interpretation contradicts the statute's plain language and ignores the purpose and structure of the Pennsylvania environmental statutory scheme.

I. The Clean Streams Law Does Not Authorize Ongoing Civil Penalties Once a Leak Has Been Contained.

A. The Department's "Continuous Presence" Interpretation of the Clean Streams Law Is Contrary to the Statute's Plain Language.

Under Pennsylvania law, "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "The clearest indication of legislative intent is generally the plain language of a statute." *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004). Indeed, "[w]hen the words of a statute are clear and free from all ambiguity, the

letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b).

The Department's position that the Clean Streams Law allows it to impose civil penalties for the continuous presence of a pollutant in the waters of the Commonwealth strains the plain language of the statute beyond the breaking point. Sections 301, 307, and 401 all prohibit placing, discharging, or permitting the flow of a pollutant into the waters of the Commonwealth.[1] 35 P.S. §§ 691.301, 691.307, 691.401. The statute repeatedly uses the term "into," which connotes movement from one place to another. *See* Merriam-Webster Dictionary, *available at* www.merriam-webster.com/dictionary/into (stating that the word "into" is "used as a function word to indicate entry, introduction, insertion, superposition, or inclusion"). Moreover, the statute uses active, rather than passive, terms—"put," "place," "discharge," and "flow"—to define the actions that give rise to liability for a civil penalty based on a pollutant's entry into the waters of the

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[1] Specifically, Section 301 states: "No person . . . shall *place* or permit to be placed, or *discharged* or permit to *flow*, or continue to discharge or permit to flow, *into* any of the waters of the Commonwealth any industrial wastes . . . ." 35 P.S. § 691.301 (emphases added). Section 307 provides: "No person . . . shall *discharge* or permit the discharge of industrial wastes in any manner, directly or indirectly, *into* any of the waters of the Commonwealth . . . ." 35 P.S. § 691.307 (emphases added). Finally, Section 401 states: "It shall be unlawful for any person . . . to *put* or *place into* any of the waters of the Commonwealth, or allow or permit to be *discharged* from property owned or occupied by such person . . . *into* any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution . . . ." 35 P.S. § 691.401 (emphases added).

Commonwealth. *See* Merriam-Webster Dictionary, *available at* www.merriam-webster.com/dictionary/place (defining "place" as "to put in"); Oxford Dictionary, *available at* http://www.oxforddictionaries.com/us/definition/american_english/discharge (defining "discharge" as "[a]llow (a liquid, gas, or other substance) to flow out from where it has been confined"); Merriam-Webster Dictionary, *available at* www.merriam-webster.com/dictionary/flow (defining "flow" as "to move in a continuous and smooth way"). Liability for civil penalties based upon the continuous presence of a pollutant in the waters of the Commonwealth is inconsistent with the active, movement-based nature of the words used in the statute.

Moreover, the Department's interpretation of the Clean Streams law is wholly incompatible with the federal courts' interpretation of similar statutory language under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq*. Under CERCLA, a private party may institute a civil action to recover from "responsible parties"[2] the costs for cleaning up hazardous waste. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870-71 (9th Cir. 2001).

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[2] The clean-up costs are recoverable from, among others, a party "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were *disposed* of." 42 U.S.C. § 9607(a)(2) (emphasis added).

Several courts of appeals have considered whether the "disposal" of a hazardous substance for purposes of liability under CERCLA can occur when the contaminant is not actively discharged. Under the statute, "disposal" is defined by reference to the Solid Waste Disposal Act as "discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. § 6903(3); *see also* 42 U.S.C. § 9601(29). Although reaching different outcomes based upon the facts of each case, the courts agree that based upon the plain language of CERCLA, a former landowner is not liable for clean-up costs where there was no active, ongoing discharge of the hazardous substance during the party's ownership of the site.[3] One court ruling noted that "because 'disposal' is defined primarily in terms of *active words* such as

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[3] *See Carson Harbor*, 270 F.3d at 879-880 (holding that because the words defining disposal "generally connote active conduct," the gradual spread of contaminants during defendants' ownership did not constitute a "disposal" under § 9607(a)(2))); *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000) (concluding that because disposal "is defined primarily in terms of active words," the defendants could not be liable under CERCLA because there was no evidence of any "human activity involved in whatever movement of hazardous substances occurred on the property" during defendants' ownership)); *ABB Indus. Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 357-59 (2d Cir. 1997) (concluding that although one prior owner could be liable because there was evidence that it had spilled contaminants on the property, subsequent owners could not be liable because they did not spill any contaminants and, rather, the previously spilled chemicals merely "continued to gradually spread underground" while the subsequent owners controlled the site); *United States v. CDMG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996) (holding that disposal under CERCLA did not include the spreading of waste at issue, because defendant did not "deposit[] waste at the site during [his] term of ownership").

injection, deposit, and placing" the statute should be interpreted to require active conduct by the landowner. *150 Acres of Land*, 204 F.3d at 706 (emphasis added).

Just as the federal courts—when construing CERCLA's active terms, including "discharge[ing]" "placing," or "leaking . . . into"—have determined that a prior landowner cannot be held liable if it did not cause or allow a leak, spill, or discharge, this Court should reach the same conclusion that the Clean Streams Law authorizes a civil penalty only when the party is actively "plac[ing]," "discharg[ing]," or "permit[ting] [the] flow" of a contaminant "into" the waters of the Commonwealth. The Clean Streams Law should not be interpreted to authorize civil penalties for the mere "continuous presence" of a pollutant long after the initial discharge has been contained.

B. Interpreting the Clean Streams Law as Allowing Civil Penalties for "Continuous Presence" Would Undermine the Policy Interests Behind Pennsylvania's Environmental Remediation Statutes.

The Department's interpretation of the Clean Streams Law would not align with the basic goals of Pennsylvania's Act 2 environmental remediation statute, 35 P.S. § 6026.101, *et seq*. The fundamental logic of the interaction between these two environmental statutes is, first, that under the Clean Streams Law, a landowner that is actively discharging a contaminant can (and should) be penalized for that harm, and, second, that once the landowner stops the contamination, it must

remediate the problem according to Act 2 standards. *See* EQT Production Br. at 19-26 (explaining that Act 2 seeks to implement uniform cleanup standards without requiring the remediator to remove all constituents of the contaminant and to relieve individuals from further clean-up liability if they have voluntarily remediated the soil and groundwater to the Act 2 standard).

But under the Department's view of the Clean Streams Law, as long as some small amount of a contaminant remains, the Department may continue to assess penalties, even on a landowner who had already fulfilled the Act 2 remediation standards (or a landowner who purchased land that was fully remediated by a prior owner). The General Assembly cannot have intended such ongoing penalties for a landowner that has not only *stopped* the leak but has *complied* with the Act 2 remediation requirements.[4] Indeed, the General Assembly adopted Act 2, in part "to provide a uniform framework for cleanup decisions" and "to avoid potentially conflicting and confusing environmental standards." 35 P.S. § 6026.102(4).

Act 2 seeks to encourage proactive monitoring, reporting, and clean-up by landowners. 35 P.S. § 6026.102. The threat of civil penalties for the ongoing

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[4] While Act 2 does not preempt the Clean Streams Law, the scope and purpose of Act 2 can be used as a tool of interpretation. *See* 1 Pa. C.S. § 1921(c)(6) ("[T]he intention of the General Assembly may be ascertained by considering . . . [t]he consequences of a particular interpretation.").

presence of a contaminant would disincentivize a landowner from self-reporting an unintentional discharge and working with the Department to remediate the site.

Neither EQT Production nor the Chamber contends that a landowner should be excused from its clean-up obligations under Act 2. To the extent remediation is required for a landowner's discharge of contaminants, the landowner should work with the Department to meet the remediation standards—just as EQT Production has done here. R.7a at ¶¶ 13-14.[5] But liability for clean-up is governed by Act 2—not by the Clean Streams Law's civil penalty provisions. EQT Production and the Chamber urge the Court to interpret the Clean Streams Law such that the Department has the authority to impose penalties for an actual discharge—but not to impose ongoing penalties for an ongoing "presence" of a contaminant once a leak has been fixed.

II. The Department's "Continuous Presence" Interpretation Would Expose Current and Future Landowners to Potentially Limitless Liability—Chilling Land Sales and Depressing Property Values.

The Department's interpretation would expose both current and potential future landowners to ever-increasing liability for years after an initial discharge has ended. In addition to contradicting the language and purposes of the Clean

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[5] EQT Production has already attained the required Act 2 remediation standards with respect to the soil beneath the impoundment that leaked, and it is working closely with the Department to finalize the remediation of the groundwater at the site. R.7a at ¶ 14.

Streams Law, such a rule would unfairly increase potential liability for all landowners in Pennsylvania and would threaten to depress real estate values across the Commonwealth.

The rationale for imposing a civil penalty is to punish and deter bad conduct. *Mastrangelo v. Buckley*, 250 A.2d 447, 464 (Pa. 1969) ("[T]he primary purpose of a fine or penalty is twofold: to *punish* violators and *to deter future or continued violations*.") (emphasis added). Even if the Department arguably had authority to consider such a rule under the Clean Streams Law, this application of the law would make no sense. It makes no sense to punish a landowner after it has identified, self-reported, and stopped the leak; once the problem is stopped, there is no active "discharge" worthy of punishment—especially while the landowner is taking extensive efforts to fully remediate the site under Act 2. A landowner is already incentivized to fix the leaking pipe, because for each day that the pipe is leaking, the landowner is subject to daily, ever-increasing penalties, and the longer the pipe is left to leak, the bigger the mess the landowner will eventually have to clean up during the Act 2 remediation process.

Moreover, exposure to "continuous presence" penalties would apply not only to a landowner whose conduct actively caused the discharge but also to future landowners who had nothing to do with the leak. Again, it makes no sense for the

Clean Streams Law to be interpreted to allow for penalties to punish or deter future landowners who are not responsible for the "presence" of contaminants.

The potential liability for continuous presence under the Clean Streams Law reaches far beyond just EQT Production and far beyond businesses in the natural gas industry. Under the Department's interpretation, *any* Pennsylvania landowner could face daily civil penalties for continuous presence of a contaminant, even if the original discharge occurred before the landowner purchased the property or flowed from another owner's property onto the landowner's property. Therefore, any prospective land purchaser would face the risk of daily penalties if an existing contaminant were deemed "present," even if the property had been fully remediated under Act 2 and the remediation statute permitted the level of the still-existing contaminant. The risks of such penalties would have a chilling effect on a wide swath of Pennsylvania real estate transactions. That unintended effect is just one more reason for the Court to reject the Department's impermissible reading of the Clean Streams Law.

CONCLUSION

For the foregoing reasons, the Chamber urges this Court to declare that the Clean Streams Law authorizes civil penalties only for days on which there is an active discharge into the waters of the Commonwealth—and not for any day after

the discharge has been contained. That interpretation, and not the Department's "continuous presence" view, would adhere to the plain language of the statute, comport with the policy considerations underlying the Commonwealth's environmental remediation statute, and penalize landowners only for the time in which their conduct is adding new contaminants to the Commonwealth's waters—not for a time when they have stopped the leak and begun to clean up.

Dated: July 20, 2016

Respectfully submitted,

/s/ *Robert C. Heim*

Robert C. Heim (PA #15758)
Steven G. Bradbury
Jennings F. Durand (PA #200779)
Ellen L. Mossman (PA #319149)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-2439

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States of America

CERTIFICATE OF COMPLIANCE WITH PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2135(A)(1)

This brief complies with the word count limits under Pa. R.A.P. 2135(a)(1) because, according to the word processing software used to prepare this brief, it contains less than 14,000 words.

Dated: July 20, 2016

/s/ *Jennings F. Durand*
Jennings F. Durand (PA #200779)
DECHERT LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this, the 20th day of July 2016, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America to be served upon the following counsel in a manner that satisfies the requirements of Pa. R. App. P. 121:

Service via electronic filing and first class mail:

Robert L. Byer
Duane Morris LLP
600 Grant Street, Suite 5010
Pittsburgh, PA 15219

Kevin J. Garber
Leonard Fornella
Babst, Calland, Clements and Zomnir, P.C.
Two Gateway Center, Sixth Floor
Pittsburgh, PA 15222

Attorneys for Petitioner EQT Production Company

Geoffrey J. Ayers
Office of Chief Counsel
208 W. Third Street, Suite 101
Williamsport, PA 17701

Mary Martha Truschel
Office of Chief Counsel
400 Waterfront Drive
Pittsburgh, PA 15222

Attorneys for Respondent the Department of Environmental Protection of the Commonwealth of Pennsylvania

Dated: July 20, 2016

/s/ *Jennings F. Durand*
Jennings F. Durand (PA #200779)
DECHERT LLP