IN THE SUPREME COURT OF PENNSYLVANIA

No. 6 MAP 2017

EQT PRODUCTION COMPANY,

Appellee,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellant.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, AND THE GREATER PITTSBURGH CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Founded in 1912, the United States Chamber of Commerce ("U.S. Chamber") is the world's largest business federation. The U.S. 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 U.S. Chamber's members are based or do business in Pennsylvania, including companies that are subject to the oversight of the Department of Environmental Protection of the Commonwealth of Pennsylvania (the "Department").

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ greater than 50 percent of Pennsylvania's private workforce. The PA Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

The Greater Pittsburgh Chamber of Commerce ("Pittsburgh Chamber," and together with the U.S. Chamber and PA Chamber, the "Chambers") serves as the 10-county Pittsburgh region's chief advocate at all levels of government to secure public sector investment and legislative and regulatory improvements to improve the economy and quality of life. The enduring contribution of the Pittsburgh Chamber is its ability to bring people and organizations together around issues

critical to the region's competitiveness and effectively convey the needs and priorities of the region to local, state, and federal decisionmakers.

Amici Chambers represent the interests of their members in matters before state and federal courts, and regularly file *amicus curiae* briefs in cases that raise issues of concern to the business community. This litigation is one such matter. The Commonwealth of Pennsylvania's environmental laws include statutes aimed at two separate but complementary goals. On the one hand, the Clean Streams Law imposes civil penalties for 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.

The contested issue before this Court is whether the Clean Streams Law authorizes the Department to impose ongoing civil penalties for each day when a contaminant remains present or moves within the waters of the Commonwealth—even *after* the conduct that caused the original discharge has been fixed and the contaminant is no longer entering into water. This issue is of significant concern to the Chambers because if the Clean Streams Law permits the Department to impose such ongoing, potentially limitless civil penalties even after the discharge has

ceased, it would vastly expand the potential liability faced by all Pennsylvania businesses and landowners.

The Department's interpretation of the Clean Streams Law would, if adopted by this Court, allow for ongoing penalties indefinitely after an initial discharge has been stopped. The only limit the Department proposes is its own "practice" of ending the accrual of civil penalties when Act 2 remediation standards have been met. But that practice is cold comfort to businesses seeking predictability and assurance, as the Department could change its practice at any moment. Further, the imposition of ongoing penalties after the initial discharge has been stopped is incompatible with Pennsylvania law and would 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.

Amici urge 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 stopped. That interpretation adheres to the plain language of the statute and comports with the policy considerations underlying the Commonwealth's environmental penalty and remediation statutory structure by penalizing businesses and landowners *only* for the time during which their conduct introduces new or additional contaminants into the Commonwealth's waters.

ARGUMENT

Under the plain language of the Clean Streams Law and for sensible policy reasons, businesses and other landowners are not liable for penalties for the mere continuous presence of a contaminant in the waters of the Commonwealth, when the initial discharge has been reported and stopped. The Department contends that EQT Production Company ("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 passively migrates through water, continues to be present in water, or migrates from one part of water to or through another water. *See* EQT Production Br. at 22 (explaining the evolution of the Department's theory of continuing liability). 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 ends a discharge by fixing a burst pipe, capping an overflowing barrel, or, as here, completely draining a leaking impoundment. *See* R.21a 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 Department's Interpretation of the Clean Streams Law Is Contrary to the Statute's Plain Language.

The Department's position that the Clean Streams Law allows it to impose civil penalties for the presence or passive movement 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. 35 P.S. §§ 691.301, 691.307, 691.401. 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. Section 307 likewise 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(a). And 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.

There are two salient points about the text of all three of these provisions that demonstrate that they are incompatible with imposing civil monetary penalties

for the mere continued presence or passive movement of a pollutant in the waters of the Commonwealth. First, these laws prohibit only certain conduct by a regulated entity: to discharge, to put, to place, or to permit a pollutant to be introduced into waters of the Commonwealth. The specific verbs the statute employs—"put," "place," "discharge," and "flow"—all focus on the action of a person introducing a pollutant into waters in Pennsylvania and thus delimit the actions that give rise to liability for a civil penalty. *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").

Second, the statute repeatedly uses the preposition "into," which connotes movement from one place (out of water) to another (the body of water). *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").

Again, this focuses the statute on the initial introduction of a pollutant to the water. Nothing in the law suggests the continued presence of a pollutant flowing *through* the water gives rise to daily civil monetary penalties.

Moreover, the Department's interpretation of the Clean Streams Law is 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"[1] the costs for cleaning up hazardous waste. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870-71 (9th Cir. 2001).

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

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[1] The cleanup 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).

have agreed that based upon the plain language of CERCLA, a former landowner is not liable for cleanup costs where there was no active, ongoing discharge of the hazardous substance during the party's ownership of the site.[2] One court ruling noted that "because 'disposal' is defined primarily in terms of *active words* such as injection, deposit, and placing" the statute should be interpreted to require active conduct by the landowner. *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000) (emphasis added).

Just as the federal courts—when construing CERCLA's active terms, including "discharge[ing]" "leaking," or "placing . . . 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],"

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[2] *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. Sys., Inc. v. Prime Tech., 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").

"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 presence or passive movement of a pollutant within the waters of the Commonwealth, after the initial discharge has been contained and the contaminant is no longer entering "*into*" the waters of the Commonwealth.

II. Pennsylvania Businesses and Landowners Should Not Be Forced to Rely Upon the Department's Asserted "Practice" of Capping Penalties Permitted to Continue Under the Department's Interpretation of the Clean Streams Law.

Under the Department's interpretation of the Clean Streams Law, as long as some small amount of a contaminant remains in the waters of the Commonwealth, the Department could continue to seek penalties even if the landowner already fulfilled the Act 2 remediation standards. But the Department suggests that a business or landowner would never actually be exposed to civil penalties for violations after Act 2 remediation has been attained, because its "practice" is to cease assessing penalties at the time Act 2 standards have been met. Department Br. at 59.

Businesses and landowners in Pennsylvania should not be forced to put their faith and the certainty of the penalties they will face in the Department's asserted practice. The Department could change its practice at any moment, subjecting

businesses to the threat of limitless liabilities as civil penalties mount even when Act 2 remediation standards have been met. Businesses and landowners, in making risk-based assessments regarding business and development decisions, need certainty in understanding when (and how much) potential civil penalty liability could accrue. They cannot rely on the Department's discretion and alleged practice in, for example, making decisions about whether to develop a formerly contaminated site that has been fully remediated under Act 2. As discussed below, the Department's interpretation would chill the purchase and development of such brownfields sites, because businesses would be unwilling to rely on the Department's supposed practice of not seeking civil penalties after Act 2 standards have been met. Properly construed, the statute itself provides businesses and landowners with the certainty they need to understand the risk of civil penalty liability. Under the Commonwealth Court's interpretation of Section 301, a business or landowner can have assurance that once it has ceased allowing industrial waste to enter into the waters of the Commonwealth, its violation of Section 301 and the accompanying civil penalties will end.

Further, the Department's interpretation, even with its asserted practice, would still give it substantial power to threaten limitless liability. This would allow the Department to coerce settlements under the threat of substantial, ever-

increasing civil penalties, as it did in this case, giving rise to the declaratory judgment action filed in the Commonwealth Court. Pennsylvania businesses and landowners should not be forced to rely on an agency's asserted internal practice, where the practice could end at any time, creating coercive civil penalty liability.

III. Interpreting the Clean Streams Law as Allowing Civil Penalties for Continuous Presence or Passive Flow of Pollutants Would Undermine the Policy Interests Behind Pennsylvania's Environmental Remediation Statutes.

The Department's interpretation of the Clean Streams Law does 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 discharge, it must remediate the problem according to Act 2 standards. *See* EQT Production Br. at 53-54.

But under the Department's view of the Clean Streams Law, as long as some small amount of a contaminant remains in the waters of the Commonwealth, 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 remediated by a prior owner). As discussed above, the only check on this continued assessment after remediation is the Department's "practice" of

capping its claims for civil penalties after completing Act 2 remediation. But allowing the Department's interpretation to reign would not require such a cap, and the Department's asserted practice could change.

The General Assembly cannot have intended to permit such ongoing penalties for a landowner that has not only *stopped* the leak but has *complied* with the Act 2 remediation requirements.[3] 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 cleanup by landowners. The threat of civil penalties for the ongoing presence of a contaminant would disincentivize a landowner from reporting, for example, historic groundwater contamination and voluntarily entering into the Act 2 program to remediate the site.

The Chambers do not contend that a landowner should be excused from its cleanup obligations under the Clean Streams Law or Act 2. But the threat of civil

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[3] Although 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.").

penalties for the presence or movement of substances within waters of the Commonwealth should not be used to compel cleanups beyond Act 2 standards. The General Assembly could have provided for penalties based upon delays in reaching Act 2 remediation standards after a discharge has been stopped. It did not. And the Department should not be permitted to use civil penalties aimed at incentivizing quick containment of *discharges* to incentivize quick (and potentially slipshod) *remediation*.

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. But liability for cleanup is governed by Act 2—not by the Clean Streams Law's civil penalty provisions. The Chambers 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 or passive movement of a contaminant once a leak has been stopped.

IV. The Department's Interpretation Would Chill Land Sales and Depress 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

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 stop the entry of contaminants into waters of the Commonwealth, because for each day that contaminants enter into the waters, the landowner is subject to daily, ever-increasing penalties, and the longer that contaminants enter into waters of the Commonwealth, the bigger the mess the landowner will eventually have to clean up during the Act 2 remediation process.

Moreover, exposure to penalties for the continued presence or passive flow of a contaminant 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 were not responsible for the presence of contaminants in the first place, simply because contaminants are present or move within groundwater beneath or from the landowner's property.

The potential liability 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 the presence or passive flow 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 purchaser would face the risk of daily penalties even if the property had been fully remediated to meet Act 2 standards, which permit constituents to remain in waters of the Commonwealth at concentrations below Act 2 standards. The risk 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 Chambers urge this Court to affirm the judgment of the Commonwealth Court and 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.

Dated: July 17, 2017

Respectfully submitted,

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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 17, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this, the 17th day of July 2017, I caused a true and correct copy of the foregoing Brief of *Amici Curiae* The Chamber of Commerce of the United States of America, The Pennsylvania Chamber of Business and Industry, and the Greater Pittsburgh Chamber of Commerce to be served upon the following counsel in a manner that satisfies the requirements of Pa. R. App. P. 121:

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