IN THE SUPREME COURT OF PENNSYLVANIA

CASE NO. 15 MAP 2015

EQT PRODUCTION COMPANY,

Appellant,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

EQT Production Company ("EQT Production") and the Department of Environmental Protection of the Commonwealth of Pennsylvania ("Department") have a dispute over the proper interpretation of the Clean Streams Law, 35 Pa. C.S.A. §§ 691.1, *et seq.* But this appeal is not about whose interpretation of the law is correct. It is about when, under the circumstances presented here, EQT Production is entitled to an answer.

Like any of the countless businesses—large and small—that are active in Pennsylvania, EQT Production has a right to understand what Pennsylvania statutes do and do not allow. 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. In such circumstances, as this Court has held in a similar context, where a government entity "has adopted an interpretation of the statute in question and stated its intention to apply that interpretation prospectively to the apparent detriment of" an entity (as well as other similarly situated entities), the adversely

affected party has the right to seek declaratory judgment in the Commonwealth Court. *Commonwealth v. Donahue*, 98 A.3d 1223, 1235 (Pa. 2014).

It is no answer that, after EQT Production sought declaratory judgment, the Department initiated proceedings with an adjudicatory agency, the Pennsylvania Environmental Hearing Board ("Hearing Board"), that might (but might not) result in the Hearing Board's determination of disputed legal issue. The reason is that EQT Production had no right, on its own, to seek the Hearing Board's review. Only the Department has the right to initiate a Hearing Board proceeding. Despite its sharp disagreement with EQT Production over the meaning of the statute, the Department chose *not* to initiate Hearing Board proceedings and instead threatened EQT Production with substantial, ever-increasing civil penalties—now claimed to be over $4.5 million (and counting)—based on EQT Production's supposedly ongoing violation, as interpreted by the Department, of the Clean Streams Law. Without the opportunity for judicial review, EQT Production faced a choice between two unacceptable alternatives: Either (1) surrender its legal position and agree to pay the Department the millions it sought in a "consent" decree, or (2) maintain its legal position and wait for the Department to file an enforcement action at some uncertain point in the future, of the Department's own choosing, while the company's exposure to civil penalties would continue to grow over time

under the Department's legal theory, casting an ever-enlarging shadow over the company's business. Thus, in an effort to promptly determine its obligations under the Clean Streams Law, EQT Production filed its declaratory judgment complaint, and only then did the Department feel motivated to initiate Hearing Board proceedings.

At the time that EQT Production filed its declaratory judgment complaint, it had a genuine "controversy" with the Department, which gave the Commonwealth Court jurisdiction to decide the issue. *See* 42 Pa. C.S.A. § 7541(a) (purpose of Declaratory Judgments Act is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered"). That "controversy" (and thus the court's jurisdiction) should not be deemed to have disappeared merely because the Department later saw fit to initiate Hearing Board proceedings.

The Chamber of Commerce of the United States of America ("Chamber") does not advocate that its members, or any other business, should flout the applicable laws in Pennsylvania (or any other state). Rather, the Chamber stresses only that businesses need to know the rules they must follow. For that reason, the Chamber respectfully requests that the Court reverse the Commonwealth Court and hold that the dispute between EQT Production and the Department created a

justiciable controversy under the Declaratory Judgments Act. Pennsylvania businesses, including EQT Production, deserve to know the rules that the Commonwealth wants them to play by.

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 in or do business in Pennsylvania, including companies that are subject to the oversight of the Department and other Pennsylvania state agencies. More than 96% 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 appeal is one such matter.

This case is especially important to the Chamber because businesses have a right to the prompt adjudication of their rights and obligations under Pennsylvania law. If a business knows what the law does and does not mandate, it can better plan and implement its business activities in a lawful manner—without an undue fear of accruing liability until a court finally determines the applicable law, perhaps

years after declaratory judgment could have issued. Pennsylvania's traditionally liberal allowance for declaratory judgments rightly gives businesses the prompt adjudication that they deserve, and that policy should continue in this case.

ARGUMENT:

THE COMMONWEALTH COURT ERRED BY CREATING AN OVERLY RESTRICTIVE STANDARD FOR WHEN A "CONTROVERSY" EXISTS SUFFICIENT TO ALLOW FOR DECLARATORY JUDGMENT.

A. When EQT Production Filed Its Complaint for Declaratory Judgment, the Parties Had a Sharp Dispute Over Whether EQT Production Was Violating the Department's Interpretation of the "Discharge" Provisions of the Clean Streams Law.

The backdrop to EQT Production's request for declaratory judgment is this: EQT Production appropriately followed the applicable environmental protection laws in monitoring, reporting, and remediating an unintentional discharge from a pit used in the gas production process, but it disagreed with the Department that it should pay millions for a violation of the Department's interpretation of the "discharge" provisions of the Clean Streams Law. In fact, EQT Production did, in large part, exactly what the government would have wanted. It did not intentionally cause any environmental damage; an impoundment leaked. (R. 6a.) EQT Production did not sweep the leak under the bushes; it self-reported the leak to the Department. (R. 6a.) EQT Production 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 of the Land Recycling and Environmental Remediation Standards Act, 35 Pa. C.S.A. §§ 6026.101-6026.908. (R. 7a.)

EQT Production's dispute on the merits includes one purely legal issue: whether the Clean Streams Law's provisions concerning "discharges" of contaminants make businesses liable (as the Department insists) for the mere presence of previously leaked contaminants as an independent discharge. As explained in EQT Production's Complaint, in its Proposed Consent Assessment of Civil Penalty May 9, 2012, the Department demanded a substantial monetary penalty for every day that any contaminants from the remediated property remained in the groundwater or surface water. (R. 7a-9a.) The Department's interpretation is at odds with Act 2 of the Land Recycling and Environmental Remediation Standards Act, which lays out the remediation mandates with which EQT Production has been complying. (R. 9a.) EQT Production filed a complaint seeking declaratory judgment by the Commonwealth Court so that it could settle the dispute on the merits. (R. 1a-45a.)

Only subsequently, on October 7, 2014, did the Department file its Complaint for Civil Penalties with the Hearing Board. In that complaint, the Department escalated even further the size of the penalties it was seeking. The

Department now seeks $4,532,296—which represents a daily assessment for each day of alleged discharge from May 30, 2012 (when EQT Production detected and self-reported the leak) up to the date of its October 7, 2014 Hearing Board complaint. (R. 73a.) On top of that, the Department has demanded an *additional* penalty of up to $10,000 a day for each day from October 8, 2014 until the resolution of the parties' dispute over whether EQT Production can be held liable under the Department's theory. *Id.* Thus, by rejecting the Department's proposed consent decree and by refusing to accede to what it believed to be an erroneous view of the Clean Streams Law, EQT Production has risked ever-increasing financial liability—potential liability that grows another $10,000 every day (potentially adding well over $1.5 million to date).

B. Under Basic Principles of Due Process, a Business Should Be Able to Seek Declaratory Judgment When a State Agency Announces Its View of the Law, Intends to Apply Its View to the Business, Controls When It Will Initiate Proceedings That Would Allow for Judicial Review, and Puts the Business at Risk of Ever-Increasing Monetary Penalties.

Pennsylvania has a long tradition of liberally allowing declaratory judgment actions and a policy in favor of prompt adjudication of businesses' and individuals' legal rights and obligations. The fundamental purpose of a declaratory judgment action is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and

administered." 42 Pa. C.S.A. § 7541(a). This Court has long embraced that liberal approach to declaratory judgment. *See, e.g.*, *Harrison v. Cabot Oil & Gas Corp.*, 110 A.3d 178, 186 (Pa. 2015); *Donahue*, 98 A.3d at 1229; *Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm'n*, 447 A.2d 675, 680 (Pa. Commw. Ct. 1982), *aff'd*, 459 A.2d 1218 (Pa. 1983).

In this case, deviating from the traditionally permissive allowance for declaratory judgment actions, the Commonwealth Court concluded that there was no "controversy" ripe for review under the Declaratory Judgments Act. The Commonwealth Court's fundamental rationale was that EQT Production can (eventually) have its dispute resolved by the Hearing Board and that when "an adequate administrative remedy exists," there is no jurisdiction. (R. 160a (quoting *Grand Central Sanitary Landfill, Inc. v. Dep't of Envir. Resources*, 554 A.2d 182, 184 (Pa. Commw. Ct. 1989).) But the Commonwealth Court's premise was wrong: in this case, the Department did not provide EQT Production with an "adequate" administrative remedy due to its failure to initiate Hearing Board proceedings until EQT Production filed its declaratory judgment action. *See Marinari v. Commonwealth*, 566 A.2d 385, 387-88 (Pa. Commw. Ct. 1990) (finding it proper to consider declaratory judgment action where Department of Environmental Resources had announced a policy adverse to petitioner's interests

and where petitioner's theoretical right to administrative process review was inadequate because the agency had delayed taking any affirmatively appealable action). *Marinari* distinguished *Grand Central* as refusing to review a challenge to a regulation where there was no allegation of any specific immediate negative implication upon the petitioner. *Id.* at 388. Indeed, *Grand Central* itself recognized that a petitioner may seek declaratory judgment if it can show that it is currently in violation of the agency's interpretation of the law (which was not the case there). *Grand Central*, 554 A.2d at 184-84. Here, unlike the petitioner in *Grand Central*, who had "fail[ed] to allege any specific instance where it [wa]s currently in violation of the contested regulations," *id.* at 184, there is no doubt that EQT Production is (in the Department's view) currently in violation of its interpretation of the Clean Streams Law. And, as in *Marinari*, although there was a theoretical possibility of eventual review of the Department's interpretation of the statute, EQT Production had no adequate administrative remedy because the Department chose not to initiate the proceedings necessary to make the Hearing Board's review possible.

Departing from the traditionally liberal regime for allowing declaratory judgment actions, the Commonwealth Court created a new, narrow rule that effectively allows agencies to coerce settlements under threat of substantial civil

penalties that can continue to grow without compliance. Under the Commonwealth Court's new rule, if (1) the Department (or any other agency) informs a business or individual that its actions violate the agency's interpretation of a statute, (2) the agency threatens substantial monetary penalties for ongoing "noncompliance" with the agency's interpretation, (3) the business believes that its conduct is lawful, yet (4) the business has no avenue on its own to seek judicial review of the agency's interpretation, then the business is left only with two poor choices: either pay the substantial penalty to appease the agency (here, for EQT Production, to the tune of approximately $1.3 million) or stick to its guns on the legal argument—risking potentially many millions more as its ongoing conduct continues to accrue penalties (should the agency's view ultimately prevail).

There is no reason to interpret narrowly the Pennsylvania declaratory judgment statute so as to put businesses into such an untenable position. The denial of pre-enforcement judicial review in circumstances such as those presented in this case would raise serious due process issues. Without such review, private parties facing the prospect of mounting liability encumbering their business or property interests may be forced to accede to the coercive demands of a government agency, such as the DEP's demand for a "consent" order here, thereby surrendering any right to effective judicial review post enforcement. Indeed, this

Court has long disfavored government agencies' use of such coercive, intimidating penalties. *See Bell Tel. Co. of Pa. v. Driscoll*, 21 A.2d 912, 914 (Pa. 1941) ("[i]t would be grossly unfair to require the corporation and its officers to risk such penalties in order to test" an agency's authority, or the validity or constitutionality of the agency's order); *Fid. Philadelphia Trust Co. v. Hines*, 10 A.2d 553, 558 (Pa. 1940) ("[H]arsh penalties . . . cannot be imposed, pending litigation intended to test the construction or validity of an act, so as to deter or intimidate parties affected thereby from resorting to the courts for that purpose.") (citing *Ex Parte Young*, 209 U.S. 123, 147 (1908) (due process concerns arise if the cost of challenging a government order is "so enormous . . . as to intimidate" recipients from "resorting to the courts to test [an order's] validity" before complying with it)).[1]

Declaratory judgment should be available to EQT Production because once a state agency has announced its interpretation of a statute, and once it has made clear its intention to apply that interpretation to a business, then that business

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[1] In EQT Production's case, the Department has *already* sought to increase substantially the penalties upon EQT Production based on the company's refusal to accede to the Department's aggressive interpretation of the Clean Streams Law. Originally, the Department demanded to settle the matter for $1.3 million—itself a substantial sum. (R. 17a.) But when EQT Production persisted in its view that the statute did not authorize this level of penalty, and after EQT Production filed its complaint for declaratory judgment to have the issue decided, the Department responded by filing its own complaint with EHB—seeking a super-charged *$4.5* million in penalties *plus* up to $10,000 a day for every day after the filing of the Hearing Board complaint. (R. 72a-73a.) That sort of enforcement by intimidation is not befitting of the government of the Commonwealth.

should be able to seek adjudication of the applicable law—rather than being forced to wait until the agency decides to bring an adjudicative action and only then, perhaps years later, to have a court articulate its interpretation of the law in dispute. Indeed, even if a state agency initiates a proceeding that would allow for judicial review of its dispute with the alleged violator, there is no guarantee that the adjudicating entity will ever reach the merits of the dispute as to which the business has sought declaratory judgment.[2]

All EQT Production seeks is the court's clear guidance on what it must do to comply with the Clean Streams Law—whatever that guidance may be. EQT Production's declaratory judgment was filed *before* the Department filed its complaint, not as some sort of end run around a previously filed EHB action. EQT

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[2] Indeed, this is not the first time that the Department has informed a business that it believes that the mere presence of previously discharged constituents violates the Clean Streams Law, and it is not the first time that the EHB has had the opportunity to decide the question. In 2014, the Department filed a complaint with the EHB claiming that another business (Sunoco) had violated, among other things, the "mere presence" rule that the Department perceives is prohibited by the Clean Streams Law. *See Commonwealth v. Sunoco Logistics Partners, L.P.*, EHB Docket No. 2014-020-CP-R. In summary judgment briefs to the EHB, Sunoco argued that the Clean Streams Law prohibits and penalizes the accidental discharge of gasoline from a pipeline—a "discharge violation" under the terms of the Clean Streams Law—but that the statute does not impose any additional, ongoing penalties if any constituent parts of the very same leaked gasoline continues to be detectable (despite lawful remediation efforts). But the EHB denied summary judgment without passing on the merits of that purely legal issue. *See Sunoco Logistics*, October 24, 2014, EHB Docket No. 2014-020-CP-R (Oct. 24, 2014 Op. and Order on Mot. For Partial Summ. J.). Fact discovery is still ongoing in the *Sunoco Logistics* case. *Sunoco Logistics*, EHB Docket No. 2014-020-CP-R. Neither EQT Production, Sunoco, nor any other Pennsylvania business or landowner has any clear guidance (other than that from the Department itself) on whether the Department's "mere presence" theory is a proper interpretation of the Clean Streams Law.

Production filed that declaratory judgment only when it was faced with the Department's aggressive and clearly articulated interpretation of the Clean Streams Law and with its threat of over a million dollars in penalties for an allegedly ongoing violation. EQT Production filed the declaratory judgment action at a time when it had no other ability to seek judicial review because the Department had chosen (whether to preserve its ability to intimidate without oversight or for another reason) not to file a complaint with EHB.[3] Clearly, EQT Production had a significant "controversy" with regard to the Department's view of the statute and its intent to impose substantial penalties, and there was no reason—under the terms or the policy behind the Declaratory Judgments Act—for the Commonwealth Court to find a controversy lacking.

In a similar case, the United States Supreme Court has recognized that it is not fair for a government agency to impose substantial fines or restrictive orders when the targeted business or landowner does not have, within its own control, the right to challenge the agency's interpretation of the law. For example, in *Sackett v. Environmental Protection Agency*, the Supreme Court unanimously held that the

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[3] Not only was the Department choosing not to initiate proceedings with the Hearing Board, but also it was not facing any urgency due to a statute of limitations. The Clean Streams Law has a relatively generous five-year statute of limitations to impose a civil penalty for a past violation. 35 Pa. C.S.A. § 691.605. But if there is an ongoing violation (as is the case under the Department's theory), the Department could leave the threat of civil penalties on the table year after year for the supposed ongoing violation. (R. 110a.)

federal courts had jurisdiction to declare the rights of landowners who were informed by the United States Environmental Protection Agency ("EPA") that they were violating the EPA's interpretation of a provision of the Clean Water Act and where the petitioners had no way to initiate judicial review. 132 S. Ct. 1367, 1371, 1374 (U.S. 2012). Justice Alito's concurrence described the impossible situation faced by the petitioning landowners:

> If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable. . . . [T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.

Id. at 1375 (Alito, J., concurring).

Here, just as in *Sackett*, a business or individual that is in conflict with a government agency's interpretation of a statute can only challenge that interpretation if the agency itself chooses to initiate the process. *See id.* at 1372. In such circumstances, the waiting process (a wait that can go on as long as the agency sees fit before deciding to "drop the hammer," *id.*) causes the business to

accrue the risk that, if the government's view is ultimately upheld, it will be forced to pay thousands, if not millions, in additional penalties. No business or citizen should be forced to take on such risk when it has a good faith belief that the government's interpretation of the law is wrong.

The solution is to allow businesses and landowners to bring a declaratory judgment action. A business that has a genuine "controversy" with a government agency, that is subject to the agency's enforcement orders and the threat of substantial penalties for both past and ongoing violations, and that has no ability to initiate, on its own, a challenge to the government agency's interpretation of a statute should be able to ask the courts to rule on its rights and obligations. *See Donahue,* 98 A.3d at 1235. Without that recourse, most small businesses or landowners would have "little practical alternative but to dance to the [the Department's] tune." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

CONCLUSION

The Chamber respectfully requests that the Court reverse the Commonwealth Court and hold that declaratory judgment is available when a state agency announces its view of the law, makes clear its intent to apply its view to a business or landowner, maintains exclusive control over when (if ever) it will initiate proceedings that would allow for judicial review, and declines to initiate such adjudicatory proceedings until after the business or landowner seeks

declaratory judgment to settle the rights and obligations under the law with which it must comply. Pennsylvania businesses deserve to know the rules by which they must conduct themselves. They should not be forced to wait years for the resolution of disputes over those rules—all the while bearing the risk of ever-increasing monetary penalties for non-compliance with a state agency's interpretation.

Dated: May 11, 2015

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: May 11, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this, the 11th day of May 2015, 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:

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