The PIOGA press

The monthly newsletter of the Pennsylvania Independent Oil & Gas Association May 2018

Pennsylvania Supreme Court rejects DEP's 'water-to-water' theory of violations under the Clean Streams Law

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In a case of first impression, the Pennsylvania Supreme Court rejected the Department of Environmental Protection's untested legal theory that penalty liability under the Clean Streams Law continues as long as any constituents of a release remain in waters of the Commonwealth—days, months and years after the release has been stopped.

On March 28, the Supreme Court held "[t]he mere presence of a contaminant in a water of the Common - wealth or a part thereof does not establish a violation of Section 301, 307, or 401 of the Clean Streams Law, since movement of a contaminant into water is a predicate to violations." EQT Prod. Co. v. Com., Dep't of Envtl. Prot., 6 MAP 2017, slip op. at *37 (Pa. Mar. 28, 2018) (emphasis in original). In other words, a violation of these sections of the Clean Streams Law is based on the initial entry of pollutants into waters of the Commonwealth, not the presence or movement of constituents within such waters.

The Supreme Court's opinion provides necessary clarification concerning the scope of liability for penal - ties under the Clean Streams Law for all persons, entities, businesses and industries that are responsible for remediation, those who would redevelop brownfield properties for reuse under Act 2, as well as any property owner with an historic contamination in groundwater that it did not cause. The decision reaffirms that penalty liability is distinct from cleanup liability and recognizes that penalties are neither appropriate nor effective in altering the time that may be necessary for full remediation.

The parallel proceedings between EQT and the department

The court's statutory construction stemmed from a controversy between EQT Production Company and DEP regarding the liability and penalties that could be imposed for a release from an onsite pit at a Marcellus Shale well pad in Tioga County in 2012.

After the department presented EQT with a penalty demand of $1.2 million for the release, EQT filed a declaratory judgment action in the Pennsylvania Commonwealth Court in September 2014 to challenge the department's use of a "continuing violation" theory to support its penalty calculation. EQT asked the court to rule on two issues: first, that a violation of the Clean Streams Law occurs only on a day in which a person allows an industrial waste to actually enter into waters of the Commonwealth, and second, that the mere presence of an industrial waste in waters of the Commonwealth does not, in and of itself, constitute a violation.

The department opposed EQT's application for relief and argued that a violation of the Clean Streams Law occurs when industrial waste or a substance resulting in pollution flows from one water of the Commonwealth into another. The Supreme Court would later call this the department's "water-to-water" theory. In earlier pleadings, the department also alleged that industrial waste from the pit remained in bedrock and soil beneath the impoundment's liner for a period of time longer than the "actual discharge;" industrial waste can bind to the soil or perch above an aquifer, "continually polluting new ground water;" and this would continue for months or years at the site. EQT Prod. Co., 6 MAP 2017, slip op. at *5. The Supreme Court called this the department's "soil-to-water" theory.

After EQT filed its declaratory judgment action, the department filed a civil penalty complaint with the Pennsylvania Environmental Hearing Board (EHB), seeking a penalty of $4.5 million for the release. EQT stopped the source of the release within 12 days of reporting it on May 30, 2012, and then entered the Act 2 program to clean up soil and groundwater. The post-hearing memo the department filed following a two-week hearing before the EHB in July 2016 asserted that a penalty of nearly $470 million could be assessed under DEP's interpretation of the Clean Streams Law. On May 26, 2017, the board assessed a civil penalty of $1.1 million, including the department's costs. The EHB found that "active releases" from the impoundment continued to the date of the hearing in July 2016, violating the Clean Streams Law daily, but assessed a penalty only through September 27, 2012 (i.e., the date of the

excavation of the soils beneath the impoundment's liner). Both parties appealed the adjudication for the Commonwealth Court to review. That appeal has been briefed and oral argument is scheduled for May 9.

Earlier, in the declaratory judgment case, on January 11, 2017, the Commonwealth Court held that Section 301 of the Clean Streams Law "prohibits acts or omissions resulting in the initial active discharge or entry of industrial waste into waters of the Commonwealth and is not a provision that authorizes the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway of the Commonwealth following its initial entry into the waterways of the Commonwealth." EQT Prod. Co. v. Com., Dep't of Envtl. Prot., 153 A.3d 424, 437 (Pa. Cmwlth. 2017), aff'd in part, vacated in part sub nom. EQT Prod. Co. v. Com., Dep't of Envtl. Prot., 6 MAP 2017 (Pa. Mar. 28, 2018). The Commonwealth Court did not delineate the contours of the department's multiple theories of continuous liability. The department appealed the January 11, 2017, decision.

The Supreme Court's resolution of the dispute

The Supreme Court rejected the department's expansive and novel theory of civil penalty liability and held that the mere presence of a contaminant in a water of the Commonwealth or a part thereof does not establish a violation of Section 301, 307 or 401 of the Clean Streams Law, because "movement of a contaminant into water is a predicate to violations." EQT Prod. Co., 6 MAP 2017, slip op. at *37. The court expressly rejected the department's water-to-water theory of serial violations. Id. The Supreme Court largely upheld the Commonwealth Court's January 11, 2017, decision, noting that "discharging or permitting to flow or continuing to do so, directly or indirectly, into waters of the Common - wealth, can reasonably be viewed from the point of the initial release and entry into water. It is less natural, in our view, to view discharges and other forms of release as also entailing serial entries into different waters of the Commonwealth as contaminants migrate through parts of those waters." Id. at *29.

The Supreme Court expressed no opinion on the department's soil-to-water theory, namely, whether and to what extent the migration of contaminants through soil into water constitutes a violation of the Clean Streams Law. Id. at *37. The court concluded that issue was "not sharply in focus" before it, and that the soil-to-water question "appears to be at issue in the Common - wealth Court pending review of the EHB's penalty determination." Id.

The Supreme Court concluded that the General Assembly did not intend to impose penalty liability under the Clean Stream Law that "persist[s] even after all relevant cleanup requirements were met, as long as some microscopic amount of contaminants might remain present to move among waters and parts of waters." Id. at *33. The court determined that "if the General Assembly wished to create [this] sort of massive civil penalty exposure . . . , it would have said so more expressly." Id. at *33. And "[i]n the absence of such clarity," the department's "expansive construction of a statute that is inexplicit in such regards [is] unreason able." Id. at *34.

By clarifying that civil penalties may only be assessed under the Clean Streams Law for the days of actual movement of a pollutant into waters of the Commonwealth, this precedential decision prevents the imposition of indefinite penalty liability for spills after the discharge into groundwater or surface water ends.