PA Supreme Court Rejects DEP's "Continuing Violation" Theory under the Clean Streams Law for Assessing Civil Penalties

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On March 28, 2018, in a much-anticipated ruling involving the Department of Environmental Protection's (DEP's) enforcement authority under the Pennsylvania Clean Streams Law (CSL), the State Supreme Court in a 5-2 decision rejected DEP's assessment of ongoing civil penalties for the continued migration of pollutants in Commonwealth waters following an unpermitted release. *EQT Production Co. v. Commonwealth*, No. 6 MAP 2017, 2018 WL 1516385. The *EQT* case involved an unpermitted release from a flowback impoundment of an oil and gas operator, EQT, but the decision impacts any entity that experiences a sudden or accidental, unpermitted release to Commonwealth waters.

DEP argued that the CSL allows assessment of civil penalties for each day that pollutants from an unpermitted release continue to migrate, potentially polluting other Commonwealth waters, even if the initial release is quickly ceased upon discovery. DEP asserted that language in the CSL referring to a "continuing" action creates a new violation for each day that pollutants continue to migrate, thereby supporting its penalty assessment of $4.53 million against EQT. (DEP previously suggested the penalty could exceed *$81 million* under this theory).

On the other hand, EQT argued that (1) the CSL only prohibits pollutants from entering *into* Commonwealth waters, and does not create a separate violation for the downstream migration of contaminants from one waterbody to the next, (2) its civil penalty should be a fraction of the penalty ultimately assessed, and (3) the continued presence of pollutants in downstream waters following a release only triggered DEP's remediation authority, not assessment of additional civil penalties. Due to the significance of the dispute, numerous *amicus* briefs from federal, state, and local chambers of commerce and environmental groups were filed on both sides of

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the issue.

Pollutants from a sudden or accidental release may linger in downstream waters for many days, even months, regardless of whether the release is immediately ceased, and can settle and contaminate sediments, leading to a potential order for remediation. EQT asserted that DEP's interpretation of the statute creates significant uncertainty and almost unending civil liability for any alleged release, even when the release is immediately ceased upon discovery. Thus, the potential obligation to remediate the impact of a release should be independent of the prohibition against the initial release, and civil penalties for an unpermitted release should not continue to accrue until the entity proves that the last contaminant molecules have been removed.

The Supreme Court rejected DEP's position and affirmed the Commonwealth Court's earlier ruling, stating "…[I]f the General Assembly wished to create the sort of massive civil penalty exposure administered by the [DEP] on a strict-liability basis…it would have said so more expressly. In the absence of such clarity, we find the agency's expansive construction…to be too unreasonable to support an affordance of deference." The Court's ruling clarified the scope of DEP's enforcement authority as follows:

- The mere presence of contaminants in surface or groundwater does not, in and of itself, constitute a violation of the CSL.
- Migration of contaminants from one waterbody to another does not create a separate violation of the CSL.

Procedurally, EQT sought summary relief on DEP's interpretation of the CSL, and the Supreme Court decided only the above-referenced issues and did not address on grounds of ripeness DEP's separate theory of liability. The Court remanded the matter to the Commonwealth Court, leaving the following issues unresolved for now:

- The interpretation of CSL civil penalty provisions applied to the alleged migration of contaminants through soil and into water (DEP's soil-to-water theory).

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- The ultimate civil penalty to be paid by EQT, which was initially adjudicated in a separate proceeding in the Environmental Hearing Board, is currently on appeal to the Commonwealth Court.

The decision in *EQT* provides important protection to entities that experience a sudden or accidental release to Commonwealth waters. Prompt response and cessation of the release is paramount to cut off the potential for accrual of daily civil penalties. The decision does not, however, protect against a potential order to remediate environmental impacts caused by a release, nor does it insulate against a potential assessment of penalties for violating such order or failure to timely report a release. For questions regarding the *EQT* decision or Pennsylvania's Clean Streams Law, please contact Kevin Barley or another member of Frost Brown Todd's Environmental Practice Group.

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