

IN THE SUPREME COURT OF PENNSYLVANIA

No. 6 MAP 2017

EQT PRODUCTION COMPANY,

Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellant.

BRIEF FOR *AMICI CURIAE*
CERTAIN ELECTED OFFICIALS, ORGANIZATIONS, AND BUSINESSES
WITH AN INTEREST IN ENSURING THE CLEAN WATER SUPPLY IN
PENNSYLVANIA

Appeal from the Order dated January 11, 2017, issued by the
Commonwealth Court of Pennsylvania

Stephen G. Harvey
David V. Dzara
STEVE HARVEY LAW LLC
Attorney ID Nos. 58233 & 91274
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103

Counsel for Amici Curiae

Dated: May 10, 2017

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PRELIMINARY STATEMENT

The Court is asked to decide the critical question whether Section 301 of the Clean Streams Law (the “Law”) provides the Pennsylvania Department of Environmental Protection (“DEP”) with the authority to create an incentive for one who pollutes groundwater to clean the pollution up through the imposition of civil penalties for each day that the polluter allows the pollution to persist.¹ The decision of the Commonwealth Court under review would remove that incentive, contrary to the unambiguous words of the Law and the Commonwealth's duty as a trustee under Article I, § 27 of the Constitution. Section 301 clearly provides that “[n]o person . . . shall . . . permit to be discharged or permit to flow, *or continue to . . . permit to flow . . .* into any of the waters of the Commonwealth any industrial wastes except as hereinafter provided in this act.” 35 P.S. § 691.301(Emphasis added.) Section 1 of the Act defines the protected waters as including “any and all . . . bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.” *Id.* § 691.1. Contrary to the basic rules of statutory interpretation in the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1921, the Commonwealth Court held that civil penalties may be imposed only for the

¹ Act of June 22, 1937, P.L. 1987 (as amended 35 P.S. §§ 691.1-691.1001).

initial discharge of pollution and may not be imposed for the additional days that the pollution remains unremediated. This decision must be reversed.

DEP reads Section 301 to mean that a polluter violates it not just when the polluter permits waste to be discharged into virtually any type of water in Pennsylvania, but also when the polluter permits the waste to *flow or continue to flow* into virtually any type of water in Pennsylvania. The words chosen by the General Assembly are amply broad to support DEP's reading. Section 301 fits like a glove with the language used in Section 605, authorizing civil penalties, "which shall not exceed \$10,000 per day for any violation." 35 P.S. § 691.605. These words clearly authorize a separate penalty every day the Law is violated. There is no reasonable basis in the Law's words to support the Commonwealth Court's holding that a violation occurs *only* when the waste is initially discharged and that it is not a violation as well to permit the waste to flow or continue to flow into the waters of the Commonwealth.

Amici submit this brief in support of DEP position because of the harm that will result from the Commonwealth Court's decision, unless reversed by this Court. The General Assembly substantially revised the Clean Stream Law in 1970 for the very purpose of strengthening the Law's enforcement mechanism to protect the waters of the Commonwealth, with a particular concern for the Susquehanna River Basin, which is part of the Chesapeake Bay watershed and includes Duncan

Township, where the pollution at issue here took place. The Basin and the Bay, and all other major watersheds in the Commonwealth are now at great risk of increased water pollution from expanding oil and gas development of the Marcellus shale.

The risk of harm to water supplies and human health and activities from the explosive growth of the shale drilling industry is compounded by a marked decrease in resources for DEP regulatory oversight. There could not be a worse time to consider depriving the DEP of an enforcement tool that the General Assembly gave it to accomplish the goal of “not only [preventing] the further pollution of the waters of the Commonwealth, but also [reclaiming and reforming] to a clean, and unpolluted condition every stream in Pennsylvania that is presently polluted.” 35 P.S. § 691.4(3).

Amici ask the Court to uphold the plain language of the Clean Streams Law and recognize that permitting a pollutant to flow or continue to flow into the waters of the Commonwealth is itself a violation of the Law, separate and apart from the initial discharge. This reading of Section 301 comports well with the voluntary cleanup process available under the Land Recycling and Environmental Remediation Standards Act² (“Act 2”), particularly in light of DEP’s practice of terminating civil penalties under the Law upon attainment of Act 2 compliance.

² Act of May 19, 1995, P.L. 4, No. 2 (35 P.S. §§ 6026.101-6026.908).

Finally, there is no reason for concern about excessive penalties, because the statute directs that in assessing penalties "the department shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors," 35 P.S. § 691.605(a), and the assessment is subject to judicial review.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici Curiae are a diverse group of elected officials and organizations, as well as individual businesses, who take a great interest in ensuring the quality and quantity of the clean water supply in Pennsylvania. The Clean Streams Law recognizes that clean, unpolluted water is absolutely essential to the Commonwealth, its citizens, its economy, and its future. 35 P.S. § 691.4 ("Declaration of policy").

Without adequate supplies of clean water:

- people and families will not want to make their homes in Pennsylvania;
- businesses will not want to locate here;
- our lakes, rivers, streams, and ponds will degrade;
- tourists will not want to visit,
- recreational activities will diminish,

- the health of our citizens will be compromised;
- low income and minority communities will feel the adverse effects first and most greatly, and
- our social compact will, ultimately, weaken.

Amici are grateful for the historic, bipartisan agreement on this subject reflected in the Clean Streams Law as amended and want to make known to the Court their interest in ensuring that the Law be enforced as written, with its strong protection for the waters of the Commonwealth, through civil penalties imposed by the DEP as warranted under the circumstances.³

Here is a list of the *amici curie* on whose behalf this brief is submitted.

Pennsylvania State Representatives:

Hon. Mathew Bradford
Hon. Tim Briggs
Hon. Donna Bullock
Hon. Mike Carroll
Hon. Mary Jo Daley
Hon. Tina Davis
Hon. Madeline Dean
Hon. Pam DeLissio
Hon. Frank Dermody
Hon. Dan Frankel
Hon. Robert Freeman
Hon. Michael K. Hanna
Hon. Pat Harkins
Hon. Leanne Krueger-Braneky
Hon. Maureen Madden

³ No person paid in whole or in part for the preparation of this *amicus* brief.

Hon. Joseph Markosek
Hon. Steve McCarter
Hon. Tom Murt
Hon. Mike O'Brien
Hon. Eddie Day Pashinski
Hon. Chris Rabb
Hon. Mark Rozzi
Hon. Steve Samuelson
Hon. Mike Schlossberg
Hon. Jared Solomon
Hon. Michael Sturla
Hon. Greg Vitali
Hon. Perry Warren
Hon. Rosita C. Youngblood

Pennsylvania State Senators:

Senator Vincent Hughes

Other elected officials:

Hon. Howard Allen, Councilman, Bristol Township
Hon. Anita Barton, Councilwoman, Borough of Conshohocken
Hon. Jimmy DiPlacido, Commissioner, Abington Township
Hon. Derek Green, Councilman-at-large, City of Philadelphia
Hon. Bill Greenlee, Councilman-at-large, City of Philadelphia
Hon. Deborah L. Gross, Councilwoman, City of Pittsburgh
Hon. Darlene Harris, Councilwoman, City of Pittsburgh
Joseph Horowitz, Commissioner, South Fayette Township
Hon. Kenyatta Johnson, Councilman, City of Philadelphia
Hon. Tim Kearney, Mayor of Swarthmore
Hon. Cherelle Parker, Councilwomen, City of Philadelphia
Hon. Drew Rothman, Commissioner, Abington Township
Hon. Natalia Rudiak, Councilwomen, City of Pittsburgh
Hon. Ben Sanchez, Commissioner, Abington Township
Hon. John Spiegelman, Commissioner, Abington Township
Hon. Mark Squilla, Councilman, City of Philadelphia

Environmental organizations:

Aquashicola Pohopoco Watershed Conservancy
Audubon Pennsylvania
Beaver County Marcellus Awareness Coalition
Berks Gas Truth
Citizens Alliance Upholding a Safe Environment
Citizen Power
Clean Water Action
Damascus Citizens for Sustainability
Delaware Highlands Conservancy
Delaware Riverkeeper Network
Earthworks
Environmental Integrity Project
Friends of the Wissahickon
Group Against Smog and Pollution
Growth Through Energy and Community Health Strategies
Guardians of the Brandywine
Izaak Walton League of America, Pennsylvania Chapter
Keystone Trails Association
Local Authority Western PA
Mountain Watershed Association
Nine Mile Run Watershed Association
PennEnvironment
Pennsylvania Land Trust Association
Safety First East Goshen
Sawmill Run Watershed Association
South Hills Area Against Dangerous Drilling
Susquehanna Greenway Partnership
Sustainable Pittsburgh
10,000 Friends of Pennsylvania
The Foundation for Pennsylvania Watersheds
Three Rivers Water Keepers
Tincum Conservancy
Tobyhanna Creek/Tunkhannock Creek Watershed Association
Tookany/Tacony-Frankford Watershed Partnership, Inc.
United Sludge Free Alliance
Upper Burrell Citizens Against Marcellus Pollution
Westmoreland Marcellus Citizens' Group
Wissahickon Valley Watershed Association

Health Organizations:

Physicians for Social Responsibility-Philadelphia
Southwestern Pennsylvania Environmental Health Project

Civil Rights Organizations:

The Public Interest Law Center

Business Organizations:

The Sustainable Business Network of Greater Philadelphia

Pennsylvania Businesses:

Chester County Journal, LLC
Nodding Head Brewing
Philadelphia Brewing Company
River City Cannery
Rowhouse Spirits
Second District Brewery

ARGUMENT

A. The General Assembly Intended for the Clean Streams Law to Provide Maximum Protection for the Waters of the Commonwealth

1. Plain Language of the Key Provisions

This case presents a pure question of legislative intent: Did the General Assembly intend that permitting industrial waste to flow or continue to flow into the waters of the Commonwealth would represent a separate violation of the Clean Streams Law apart from any violation for initially discharging the waste into the waters of the Commonwealth?

The words of Section 301 of the Clean Stream Law are clear and unambiguous.

No person or municipality 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, except as hereinafter provided in this act.

35 P.S. § 691.301. These words mean that a polluter who permits waste to flow or continue to flow in virtually any bodies or channels of water or parts thereof in Pennsylvania violates the Law.⁴

⁴ “‘Waters of the Commonwealth’ shall be construed to include any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.” 35 P.S. 691.1.

The words of Section 605 are also clear and unambiguous. They provide for a civil penalty for a violation of the law “which should not exceed \$10,000 per day for any violation.” 35 P.S. § 691.605.

Read together, the Law says that every day a polluter permits waste to flow or continue to flow into the waters of the Commonwealth the polluter is liable for a separate violation of the Law, for which the penalty shall not exceed \$10,000 per day. *Amici* perceive no other reasonable reading of the words of the Law.

2. Legislative History of the Key Provisions

In the event that the Court determines that the words of the Law are not explicit, *Amici* offers the following explanation of the purpose of the Law as illustrated by the legislative history. Section 301 of the Law appeared in nearly its current form in the original enactment of 1937. *See* Act of June 22, 1937, P.L. 1987, No. 394. The 1970 amendment added the words “or municipality” after “no person,” and otherwise today Section 301 is as originally enacted.

The definition of “waters of the Commonwealth” was expanded in the 1970 amendment to the Law and is unchanged since then. *See* Report of the Committee of Confederate and House Bill No. 1353 (“H.B. 1353 Conference Report”). The Conference Report was adopted by the House (184-5) on July 15, 1970, and adopted by the Senate (40-0), and signed into law by Governor Shafer on July 31,

1970, as Act 222, P.L. 653. The definition of “waters of the Commonwealth” has not changed since 1970.

The 1970 amendment also added the statutory language on civil penalties in section 605. *See* H.B. 1353 Confederate Report, at 31-32. The 1970 addition included this language: “The civil penalty so assessed shall not exceed ten thousand dollars (\$10,000), plus five hundred dollars (\$500) for each day of continual violation.” *Id.* at 31.

Section 605 has been amended twice since 1970. It was amended on October 7, 1976 by Act 222 (H.B. 797), including the sentence quoted in the prior paragraph, which was amended to read, “the civil penalty so assessed shall not exceed ten thousand dollars (\$10,000) per day for each violation.”

Section 605 was amended again on October 10, 1980, by Act 157 (S.B. 922), with the addition of what now appears in the statute as subsections (b) and (c) of Section 605, with the preexisting language (including the sentence quoted in the prior paragraph) becoming subsection (a). There have been no changes to section 605 since 1980.

3. Historical Context of the Key Provisions

Franklin L. Kury of Northumberland County served in the Pennsylvania House of Representatives from 1966 to 1973 and in the Pennsylvania Senate from 1973 to 1980. He played a critical role in the 1970 amendment of the Clean Stream

Law and the 1970 ERA to the Pennsylvania Constitution, Article I, Section 27. He tells the story of both in his autobiography, *Clean Politics, Clean Streams: A Legislative Autobiography and Reflections* (Lehigh University Press 2011), at 60-63, 68-72 (hereinafter, “*Clean Streams*”). His recounting of the history of the 1970 amendment to the Clean Streams is corroborated by the legislative history available through the website of the Pennsylvania General Assembly. *See generally, Bills and Amendments, Pennsylvania General Assembly, www.legis.state.pa.us.*

Mr. Kury first introduced (with eight co-sponsors) an amendment to the Clean Streams Law in the 1968 legislative session, with a speech to the House introducing the bill on July 16, 1968. *See House Legislative Journal for 1968, at 1455-56.*

In that 1968 speech to the Pennsylvania House, Mr. Kury said:

- “[M]y bill is motivated by one basic factor, that is, that after three decades of having a Clean Streams statute on the books, there are still a great number of communities, municipalities, and industries in Pennsylvania which are not in compliance with the law.”
- “One of the major purposes of this bill is to give the Sanitary Water Board⁵ increased authority to compel compliance by municipalities and

⁵ The duties of the Sanitary Water Board were given to the Department of Environmental Resources (“DER”) upon its creation on January 1, 1971, by Act 225 (H.B. 2213). In 1995, those duties were given to DEP.

industries which have failed to comply even though the law has been on the books for over three decades.”

- “The fight against water pollution is a continuing one that will never really end. We can never be satisfied with our state’s machinery for eliminating pollution.”

The 1968 bill offered by Mr. Kury and the other co-sponsors had little chance of passage because it was introduced late in the legislative session. It was referred to the Conservation Committee and no action was taken. But it provided the seed for the 1970 amendment.

John Laudadio of Westmoreland County, Chair of the House Conservation Committee, introduced H.B. 1353 on June 24, 1969, with strong bi-partisan support of 68 co-sponsors (including Mr. Kury) for a comprehensive re-writing of the Clean Streams Law. H.B. 1353 passed the House (197-0) on January 27, 1970.

Mr. Laudadio made the following brief remarks to the House:

I think that this measure will go a long way in updating the act that is on the books today and *will certainly give the kind of muscle that the Sanitary Water Board and respective agencies need in order to carry out the extensive clean streams program that we are embarked on in Pennsylvania.*

House Legislative Journal for 1970, at 1728 (emphasis added).

At that same time, Mr. Kury inserted a statement for the record that included the following:

I urge the House of Representatives to pass House Bill No. 1353, the first comprehensive rewriting of the Clean Streams Act in 30 years, so that the Susquehanna River will be protected from pollution in the final third of the 20th Century.

The Clean Streams Act as presently written is inadequate to protect the Susquehanna in the face of heavy pressures that will be put upon it.

The pressures on the Susquehanna in the next three decades will be increasingly heavy. The completion of the Keystone Shortway and the arrival of new industries mean that the Susquehanna will have steadily greater uses for industrial, recreational and municipal purposes. A pollution-free Susquehanna is therefore essential to the future of Central Pennsylvania. The river is our area's greatest natural resource and it deserves full protection.

....

The present law has three basic defects. The law is restricted to regulating discharges of actual pollutants, *has weak enforcement procedures*, and has a narrow definition of pollution.

....

A civil fine of up to \$10,000, in addition to the present criminal penalties, is created.

....

I am particularly pleased to see the strengthening of the enforcement sections of the act. The average fisherman who takes fish over the limit pays \$10 per fish. Yet a large industry can kill thousands of fish and get off with a fine that amounts to a few cents per fish. This is unfair. The \$10,000 civil fine should redress this imbalance in the law.

House Legislative Journal for 1970, at 1728-29 (emphasis added).

4. Inescapable Conclusion About the Legislative Intent of the Key Provisions

As the foregoing discussion illustrates, a key purpose of the General Assembly in amending the law in 1970 was to strengthen the enforcement mechanism as a means of fighting water pollution. The legislative history reveals no specific attention to the questions whether a polluter violates Section 301 when it permits waste to flow or continue to flow into the waters of the Commonwealth after the initial discharge, apart from the plain words of the Law. But a strong legislative commitment to remediating pollution and providing incentive for a polluter to not pollute in the first place can be ascertained from the statement of legislative purpose to the Clean Streams Law, which was last amended in 1970. It says:

It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth but also to reclaim and restore to a clean, unpolluted condition even streams in Pennsylvania that are presently polluted.

35 P.S. § 691.4(3).

This statutory objective is entirely consistent with the command of Section 27 of the Declaration of Rights of the Pennsylvania Constitution:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the

environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In *Robinson Township v. Commonwealth*, 83 A.3d 901, 963 (Pa. 2013), this Court recognized "[t]hat Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life." This deliberate choice to protect the environment is reflected in both the ERA and the Clean Streams Law.

This conformity of purpose is not an accident. The ERA was drafted by Mr. Kury contemporaneously with the Clean Streams Law and approved by the voters in a 4-1 margin in May 1971, less than a year after the passage of the Clean Streams Law. *See Clean Streams*, at 69-72. The Court should therefore hold that the DEP's reading of the Law is required to effectuate the Commonwealth's deliberate choice to provide maximum protection for the waters of the Commonwealth.

B. The Position Urged by Appellee and Its Amici Would Defeat the Central Purpose of the Clean Streams Law

Appellee and its *amici*, representing the shale gas and oil drilling industry, ask the Court to hold that, under the Law, DEP can only impose at most one \$10,000 penalty per unlawful discharge per day that the unlawful discharge continues. So if a polluter discharged 10,000 (or ten million) gallons of highly toxic chemicals on a single day, and then stopped the discharge that same day, the polluter could be liable for at most \$10,000 in civil penalties, with no penalty for failing to remediate, even though the toxic chemicals remained in the soil and continued to leak into and foul the groundwater. After that, Appellee would have no liability for civil penalties, regardless of the amount of waste discharged, the toxicity, the proximity to water resources, or the extent of environmental harm.

Under this reading of Section 301, polluters have no incentive to commence or complete remediation, although they may do so voluntarily under Act 2. If remediation of the waters of the Commonwealth following a discharge of waste into any of the waters is voluntary, we can safely assume that some polluters will not commence and complete remediation. The waste will remain in the waters. The net effect will be that the waters get dirtier, not cleaner. The Clean Streams Law was intended to produce exactly the opposite effect. This proves that the position urged by the Appellee and adopted by the Commonwealth Court is contrary to the express intent of the Law and must be rejected.

In contrast, the position urged by the DEP makes perfect sense under the Law. Daily civil penalties for each day that a polluter permits the pollution to flow or continue to flow into any of the waters of the Commonwealth provide a powerful incentive to commence and complete remediation of the affected waters as soon as possible. Under the DEP's practice, it terminates civil penalties once Act 2 compliance is attained. Moreover, under Section 605 the number of days of violation and the maximum civil penalty represent only a starting point and the amount assessed must depend upon the other factors that DEP "shall" consider. This enforcement scheme both incentivizes remediation and provides a powerful incentive not to pollute in the first place.

As recognized under the federal Clean Water Act:

Treating the failure to take remedial measures as a continuing violation is eminently reasonable. This is because it is not the physical act of discharging dredge wastes itself that leads to the injury giving rise to citizen standing, but the consequences of the discharge in terms of lasting environmental degradation. This position finds support in Justice Scalia's concurrence in *Gwaltney [v. Chesapeake Bay Found.]*, 484 U.S. 49, 68 (1987) in which he was joined by Justices Stevens and O'Connor. According to the concurring Justices, the phrase in 33 U.S.C. section 1365(a) "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests "a state rather than an act--the opposite of state of compliance When a company has violated an effluent standard or limitation, it remains for purposes of [section 1365(a)] 'in violation' of that standard or limitation so long as it has not put in place

remedial measures that clearly eliminate the cause of the violation." *Gwaltney*, [484 U.S. at 69].

N.C. Wildlife Fed'n v. Woodbury, No. 87-584-CIV-5, 1989 U.S. Dist. LEXIS 13915, *6-*7 (E.D.N.C. Apr. 24, 1989).

C. The Position Adopted by the Commonwealth Court and Urged by Appellee Presents Far Too Great a Risk of Adverse Effects on Water Quality in Pennsylvania, With Attendant Consequences for Human Health and Well-Being in Pennsylvania

Water is essential for life. Humans, other animals, plants, and other forms of life need water to survive. It hardly needs to be said that the water needed for life must be clean. Dirty water causes sickness and death. It ruins the fishing.⁶ It is no good for brewing beer, making bread, or watering the lawn, not to mention quenching thirst or uncountable other human needs for clean water.

Water quality is a subject of great interest to the public. Just ask the residents of the City of Flint, Michigan. On May 2, 2017, the Natural Resources Defense Council issued a study that found that contaminants that can harm human health are found in tap water in all 50 states. Kristi Pullen Fedinick et al., *Threat on Tap: Widespread Violations Highlight Need for Investment in Water Infrastructure and*

⁶ It has happened. "A well blowout in Bradford County, Pennsylvania, spilled an estimated 10,000 gal (38,000 L) of produced water into a tributary of Towanda Creek, a state-designated trout fishery." EPA, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, Executive Summary, External Review Draft (June 2015), at 19, available at https://www.epa.gov/sites/production/files/2015-06/documents/hf_es_erd_jun2015.pdf. Studies show that many communities of color have some of the highest rates of fish consumption, supporting the point that adverse effects on water quality are felt first by low income and minority communities. See J. Christian-Smith, *A Twenty-First Century U.S. Water Policy*, 65 (2012).

Protections, NRDC, 17 (May, 2017),

<https://www.nrdc.org/sites/default/files/threats-on-tap-water-infrastructure-protections-report.pdf>.

Troublingly, we also found that systems serving very small communities—such as rural and more sparsely populated areas—had a significantly higher rate of violations of the health standards and a higher percentage of total violations compared with larger systems. Systems serving less than 500 people accounted for nearly 70 percent of all violations and a little over half of all health-based violations. This means that rural Americans could be at greatest risk from some drinking water contaminants.

Id. at 4.

The safety of drinking water is on the minds of people everywhere, as evidenced by the ubiquity of bottled drinking water, even in places (like Philadelphia, Pittsburgh, and other cities in Pennsylvania) where the tap water is considered perfectly safe to drink. Even so, according to a Gallup poll conducted from March 1-5, 2017, Americans are more concerned about water pollution than at any time since 2001 with 63% worrying a great deal about pollution of drinking water; 57% worrying a great deal about pollution of rivers, lakes and reservoirs; and low income and non-white Americans more concerned about water pollution. See Justin McCarthy, *In US, Water Pollution Worries Highest Since 2001*, Gallup (March 31, 2017), <http://www.gallup.com/poll/207536/water-pollution-worries-highest-2001.aspx>.

In Pennsylvania, concern about drinking water is directly tied to the DEP budget. On December 30, 2016, the EPA warned the DEP that it lacks the necessary staffing and resources to enforce safe drinking water standards, which could be grounds for taking that responsibility from the DEP, costing the Commonwealth millions of dollars. Marie Cusick, *Pennsylvania Lacks Resources to Enforce Safe Water Standards, Says EPA*, State Impact (Feb. 1, 2017), <https://stateimpact.npr.org/pennsylvania/2017/02/01/pennsylvania-lacks-resources-to-enforce-safe-water-standards-says-epa/>. That same letter said that the number of unaddressed Safe Drinking Water Act violations had nearly doubled in five years, from just over 4,000 to just under 8,000. *Id.*

The problem, according to David Hess, who served as DEP Secretary under Governor Tom Ridge, is that “DEP has seen a significant drop in its budget.” *Id.* He also said that DEP is down over 800 positions and that the “General Fund, which pays to keep the lights on and pays for people, has dropped 40 percent in the past 14 years. DEP is dangerously close to not being able to accomplish its mission.” *Id.*

More recently, on April 12, 2017, the EPA told the Commonwealth that its plan to hike fees on public water systems to raise \$7.5 million in order to pay for 33 new inspectors is inadequate. See Marie Cusick, *EPA Urges Pennsylvania to Move Faster on Water Safety Issues*, State Impact (May 5, 2017),

<https://stateimpact.npr.org/pennsylvania/2017/05/05/epa-urges-pennsylvania-to-move-faster-on-water-safety-issues/>. A “spokesman for Governor Tom Wolf, says the administration is examining ways to increase funding, but Pennsylvania’s grim financial picture makes that difficult right now.” *Id.*

Clean water is ultimately a drinking water issue, but ensuring clean water is a much bigger issue than inspecting drinking water. It includes regional watershed management strategies. The “Declaration of policy” for the Clean Streams Law, as amended in 1970, says that “[t]he achievement of the objective herein set forth requires a comprehensive program of watershed management and control.” 35 Pa.C.S. § 691.7(5).

Appellee’s shale gas drilling operation that is the subject of this appeal is in Tioga County, which is home to extensive shale gas and oil drilling operations and which feeds into the Susquehanna River Basin and the Chesapeake Bay.

The Susquehanna River is a 444-mile long waterway extending from the area around Cooperstown, NY, to the Chesapeake Bay. In Pennsylvania, the basin includes more than 37,000 miles of streams that feed into the river, which captures the precipitation of more than 20,000 square miles of land, and is home to over 3.3 million people. The region has been heavily impacted by oil and natural gas extraction in recent years; more than 5,500 unconventional wells and roughly 13,500 conventional wells have been drilled in the Pennsylvania segment of the basin since 2000. Unconventional wells, in particular, have brought industrial-scaled activity, pollution, and waste products to a wide area of the basin, with especially heavy development occurring in three

counties along Pennsylvania's northern tier, Bradford, Susquehanna and Tioga.

Matt Kelso, *Violations and Monitoring in Pennsylvania's Susquehanna River Basin*, FracTracker Alliance, (May 2, 2017),

<https://www.fractracker.org/2017/05/violations-susquehanna-river-basin/>.

As part of the ongoing Marcellus Shale oil and gas boom, nearly 5,500 unconventional wells on roughly 2,000 well pads have been drilled in the Susquehanna River Watershed since 2007. According to the Nature Conservancy, shale gas companies could drill 27,600 additional wells in the Susquehanna River basin by 2030, which would result in approximately 6,900 well pads (assuming four wells per pad, a relatively conservative number given recent trends where up to a dozen wells are being drilled on a single pad). These additional 4,900 well pads represent 31,850 acres of disturbed lands for the pads and access roads alone. Overall, the Nature Conservancy believes that up to 110,000 acres of forested land could be cleared in the Susquehanna River Watershed by 2030. In addition to well pads and access roads, one must also account for the impacts of associated pipelines. Estimates suggest that 12-15 acres of gathering line are installed per acre of well pad.

This explosive growth of the shale drilling industry, combined with declining resources for regulatory oversight, would complicate regional watershed management strategies. A growing body of evidence suggests that watersheds near hydraulic fracturing operations can be impacted by improper waste disposal, trucking accidents, migration of drilling fluids, as well as problems related to land disturbance such as pipeline and access road stream crossings, sedimentation and runoff (needs a reference). And while there are two major water monitoring programs operating in the Susquehanna River, one run by the Pennsylvania Department of

Environmental Protection (PA DEP) and the other operated by the SRBC, significant questions remain about their ability to assess the Susquehanna River's water quality. These concerns primarily stem from the infrequent and patchwork-like coverage of their sampling regimes, as well as inconsistencies in indicators measured at different sites.

Kirk Jalbert, *An Introduction to the Susquehanna River Basin Impacts Project*,
FracTracker Alliance (Feb. 1, 2017),

<https://www.fractracker.org/2017/02/susquehanna-river-basin-impacts-intro/>.

It does not take a Ph.D. in environmental science to understand that, if careful attention is not paid to the proliferation of shale gas drilling operations, with the possibility for water pollution, harm can result. According to a peer-reviewed study released by the EPA in December 2016, the use of water in hydraulic fracturing at oil and gas production wells “can impact drinking water resources under some circumstances.” EPA, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*, United States Environmental Protection Agency, 1 (Dec. 2016), www.epa.gov/hfstudy. “Cases of impacts were identified for all the stages of the hydraulic fracturing water cycle. Identified impacts generally occurred near hydraulically fractured oil and gas production wells and ranged in severity, from temporary changes in water quality to contamination that made drinking water wells unusable.” *Id.* at 2.

While the EPA report establishes that hydraulic fracturing operations can cause harm to water resources, including severe harm under certain circumstances, “data gaps and uncertainties prevented [it] from calculating or estimating the national frequency of impacts on drinking water resources” or “a full characterization of the severity of impacts.” *Id.* Overall, however, the report calls attention to hydraulic fracturing activities and the “factors that are more likely than others to result in more frequent or more severe impacts,” which “highlight, in particular, the vulnerability of groundwater resources to activities in the hydraulic fracturing water cycle.” *Id.* at 42.

The EPA’s conclusions that hydraulic fracturing, like the gas drilling operation at issue in this case, *can* cause harm to water resources, is corroborated by multiple sources. The Susquehanna River Basin Commission (“SRBC”), established in 1970 by a compact by the U.S. Congress and the legislatures of New York, Pennsylvania and Maryland to guide the conservation, development, and administration of the water resources of the basin, says that “[t]he concentration of drilling activities in Pennsylvania is cause for concern over how drilling will impact public water supplies and the integrity of surface water.” *See SRBC Information Sheet: Natural Gas Well Development in the Susquehanna River Basin*, <http://www.srbc.net/programs/docs/NaturalGasInfoSheetJan2013.PDF>.

The SRBC recognizes that “there are serious challenges that focus on the cumulative impact of gas drilling, both from a water quantity and water quality perspective.” *Id.*

Although the Susquehanna basin is relatively wet compared to other areas of the country experiencing natural gas development activities (e.g. Arkansas and Texas), there are serious challenges that focus on the cumulative impact of gas drilling, both from a water quantity and water quality perspective.

The key water-related issues include:

- impact of water withdrawals on small, remote forested streams, often home to wild trout and other sensitive species;
- impact on local public water supplies;
- potential for water contamination from poor casing of well bores or from flooded or leaking waste fluid holding pits;
- runoff from well pad sites, pipelines and unpaved roads;
- natural gas migration into streams and nearby water wells;
- the handling and disposal of fluids that return to the surface after hydraulic fracturing (flowback);
- disturbance of sensitive lands adjacent to water bodies; and
- spills.

Id. The SRBC further noted that “[i]n the Susquehanna basin, many of these issues fall under the authority of Pennsylvania’s Department of Environmental Protection.” *Id.*

Leading environmental organizations have raised their voices about the risks to water, air, and human health from hydraulic fracturing drilling operations in Pennsylvania and elsewhere. Penn Environment Research and Policy Center recently published a report entitled *Fracking Failures 2017: Oil and Gas Industry Environmental Violations in Pennsylvania*, written by Alana Miller and Adam Garber, available at <http://pennenvironmentcenter.org/sites/environment/files/reports/Fracking%20Failures%202017%20report%20vPRINT.pdf>. It makes the point, supported by extensive evidentiary support, that “[f]rom the very beginning of clearing a site for drilling, through the extraction, transport and delivery of natural gas, fracking poses significant risks to our air and water and to human health.” *Id.* at 4. Among other concerns, unconventional gas drilling has been noted to have a disproportionate impact on poor and vulnerable communities. *See, e.g.,* Yelena Ogneva-Himmelberger and Liyao Huang, *Spatial distribution of unconventional gas wells and human populations in the Marcellus Shale in the United States: Vulnerability analysis*, 60 *Applied Geography* 165 (June 2015) (“The results demonstrate that the environmental injustice occurs in areas with unconventional

wells in Pennsylvania with respect to the poor population. There are also localized clusters of vulnerable populations in exposed areas in all three states: Pennsylvania (for poverty and elderly population), West Virginia (for poverty, elderly population, and education level) and Ohio (for children).”).

As this discussion shows, unconventional gas and drilling operations, like the operations of the Appellee, can cause harm to water resources and threaten Pennsylvania, including the Susquehanna River Basin. While not all unconventional gas and oil drilling operations will violate Section 301, some will, and there needs to be incentives for good practices in the first place, and for thorough remediation in the event of discharges.

It is true that the DEP could seek an injunction or criminal penalties, if appropriate, under the Clean Streams Law, but the DEP is understaffed and underfunded. If the goal is to stop pollution and purify the waters of the Commonwealth, it makes far greater sense to rely on the authority expressly granted to the DEP and hold polluters liable for civil penalties for every day that they permit pollution to flow or continue to flow into our water. The scientific environmental reports summarized above strongly suggest that there is far too great of a risk of adverse effects on human health and well-being in the Commonwealth of Pennsylvania to do otherwise.

D. Concerns About the Potential Extent of Liability Under the Clean Streams Law Provide No Basis to Nullify the Legislative Purpose

The Commonwealth Court raised concern about the possibility of “potentially continuing violations” under the express words of the Law. Opinion at 20. That concern is misplaced. Although the record is admittedly unclear on this point, it appears that the DEP seeks to hold Appellee accountable for a single continuing violation for permitting waste to flow or continue to flow into any of the waters of the Commonwealth in violation of Section 301 for every discharge of waste in violation of Section 301 until Act 2 remediation is completed. That is not limitless.

Section 605 mandates that “[i]n determining the amount of the civil penalty the department *shall* consider the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.” (Emphasis added.) If Appellee believes that the civil penalty is unlawful, either because DEP miscalculated the number of initial discharges, DEP’s determination of the civil penalty was unlawful, arbitrary and capricious, or unsupported by substantial evidence, or DEP violated its own procedures, then Appellee can and should seek judicial review of the penalty. But that is no reason to jettison the enforcement mechanism clearly designed by the General Assembly to give the DEP strong enforcement power to fulfil its statutory and constitutional mandates.

This case is a particularly bad vehicle for the Court to consider curtailing the DEP's enforcement authority, coming to the Court on the grant of an application for summary relief, with scant information in the record about the circumstances giving rise to the dispute, the efforts at compliance and remediation, if any, and the calculation of the civil penalties. The Court should uphold Section 301 as written, or at least decline to rule broadly on such an important issue on such an undeveloped record.

CONCLUSION

For the foregoing reasons, the Court should hold that a polluter violates Section 301 of the Clean Streams Law not just when the polluter permits waste to be discharged into any of the waters of the Commonwealth but also when the polluter permits the waste to flow or continue to flow into any of the waters. This reading gives effect to all the words in Section 301, and both comports with the authorization of daily civil penalties per violation in Section 605, and with Act 2, given the DEP's practice of terminating civil penalties upon the attainment of Act 2 compliance. The reading adopted by the Commonwealth Court does violence not only to the language but also to the purpose of the Law, which is to ensure that the waters of the Commonwealth become progressively cleaner. As this purpose is absolutely essential to the Commonwealth, its citizens, economy, and future, *amici* urge the Court to enforce Section 301 of the Clean Streams Law as written.

Respectfully submitted,

STEVE HARVEY LAW LLC

Dated: May 10, 2017

/s/Stephen G. Harvey
Stephen G. Harvey (PA 58233)
David V. Dzara (PA 91274)
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19013
Tel.: (215) 438-6600
Fax: (215) 438-6600
steve@steveharveylaw.com
david@steveharveylaw.com

CERTIFICATE OF COMPLIANCE WITH WORD COUNT
FOR BRIEF OF AMICI CURIAE

I, Stephen G. Harvey, hereby certify that the foregoing Brief of Amicus Curiae, contains 6,567 words as prescribed by Pa.R.A.P. 531(b)(3).

/s/Stephen G. Harvey
Stephen G. Harvey
David V. Dzara
STEVE HARVEY LAW LLC
Attorney ID Nos. 58233 & 91274
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103

Counsel for Amici Curiae

Dated May 10, 2017

AFFIDAVIT OF SERVICE

DOCKET NO 6 MAP 2017

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EQT Production Company

v.

Commonwealth of Pennsylvania Department of Environmental Protection
-----X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on May 10, 2017

I served the **Brief for Amici Curiae** within in the above captioned matter upon:

<p>Geoffrey James Ayers PA Department of Environmental Protection 208 W. Third Street Williamsport, PA 17701</p> <p>Alexandra C. Chiaruttini PA Department of Environmental Protection Office of Chief Counsel 400 Market Street, 16th Floor Harrisburg, PA 17101</p> <p>Mary Martha Trushel PA Department of Environmental Protection Office of Chief Counsel 400 Waterfront Drive Pittsburgh, PA 15222-4745</p>	<p>Leonard Fornella Kevin J. Garber Jean M. Mosites Babst, Calland, Clements & Zomnir, P.C. Two Gateway Center, 603 Stanwix Street 6th Floor Pittsburgh, PA 15222</p> <p>Robert L. Byer Duane Morris LLP 600 Grant Street, Suite 5010 Pittsburgh, PA 15219-2802</p> <p><i>Counsel for Appellee</i></p>
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Jonathan S. Massey Massey & Gail, LLP 1325 G. Street NW Suite 500 Washington, D.C. 20005 <i>Counsel for Appellant</i>	
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via **electronic filing and electronic service**, as well as, **Express Mail** by depositing **2** copy of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on May 10, 2017

/s/ Robyn Cocho

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022

/s/ Elissa Diaz

Job # 273110