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IN THE SUPREME COURT OF PENNSYLVANIA

No. 6 MAP 2017

EQT PRODUCTION COMPANY,
Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellant.

BRIEF OF *AMICI CURIAE*, CITIZENS FOR PENNSYLVANIA'S FUTURE AND SIERRA CLUB, IN SUPPORT OF THE APPELLANT

Appeal from the Order of the Commonwealth Court
of Pennsylvania entered January 11, 2017 at No. 485 M.D. 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE ISSUES ADDRESSED BY *AMICI CURIAE* 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE COMMONWEALTH COURT ERRONEOUSLY APPLIED A "UNITARY WATERS" CONCEPT THAT IS INCONSISTENT WITH THE CLEAN STREAMS LAW'S PROTECTION OF EACH AND EVERY WATER OF THE COMMONWEALTH. 6

A. The Commonwealth Court Adopted EQT's Unitary Waters Conception of the Waters of the Commonwealth. 6

B. At the Federal Level, the Unitary Waters Theory Has Gained Traction Only Through *Chevron* Deference to Agency Rulemaking. 9

C. Pennsylvania Has Not Adopted the NPDES Permit Exclusion Created by the Federal Water Transfers Rule. 13

D. The Clean Streams Law Takes a Non-Unitary Approach that Protects Each and Every Water of the Commonwealth. 13

II. SECTION 307 OF THE CLEAN STREAMS LAW APPLIES TO DISCHARGES OF INDUSTRIAL WASTE INTO GROUNDWATER. 20

III. SECTION 401 OF THE CLEAN STREAMS LAW APPLIES TO POLLUTION RESULTING FROM DISCHARGES OF INDUSTRIAL WASTE. 23

CONCLUSION 27

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Adams Sanitation Co., Inc. v. Department of Envtl. Prot.,
715 A. 2d 390 (Pa. 1998) 15

*Catskill Mountains Chapter of Trout Unlimited, Inc. v.
City of New York*, 273 F.3d 481 (2d Cir. 2001) 10, 12

*Catskill Mountains Chapter of Trout Unlimited, Inc. v.
City of New York*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*,
549 U.S. 1252 (2007) 10, 12

*Catskill Mountains Chapter of Trout Unlimited, Inc. v.
EPA,* 846 F.3d 492 (2d Cir. 2017) 12, 13, 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 12

Commonwealth v. Harmar Coal, 306 A.2d 308 (Pa. 1973), *appeal
dismissed,* 415 U.S. 903 (1974) 14

Commonwealth v. Hansley, 47 A.3d 1180 (Pa. 2012) 14

Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991) 10

Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996),
cert. denied, 521 U.S. 1119 (1997)..10

EQT Prod. Co. v. Department of Envtl. Prot., 153 A.3d 424
(Pa. Cmwlth. 2017) .... 6, *passim*

Friends of the Everglades v. South Fla. Water Management Dist.,
570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 562 U.S. 1082 (2010) 9, 10, 11, 13

Northern Plains Res. Council v. Fidelity Expl. & Dev. Co.,
325 F.3d 1155 (9th Cir.), *cert. denied*, 540 U.S. 967 (2003) 10

Novicki v. O'Mara, 124 A. 672 (Pa. 1924) 25

Sierra Club v. Virginia Elec. & Power Co., 2017 U.S. Dist. LEXIS 42635 (E.D. Va., Mar. 23, 2017) 21

SEPTA v. City of Philadelphia, 101 A.3d 79 (Pa. 2014) 14

South Fla. Water Management Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004) 10, 11, 17, 19

Tri-Realty Co. v. Ursinus Coll., 124 F. Supp. 3d 418 (E.D. Pa. 2015) 21

Westinghouse Elec. Corp. v. Pennsylvania Dep't of Envtl. Prot., 705 A.2d 1349 (Pa. Cmwlth.), *allocatur denied*, 729 A.2d 1133 (Pa. 1998), *appeal after remand,* 745 A. 2d 1277 (Pa. Cmwlth. 2000) 26

Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, 141 F. Supp. 3d 428 (M.D.N.C. 2015) 21

CONSTITUTIONAL PROVISIONS

Pa. Const. art. I, § 27 ....15, 16

STATUTES

Federal

Clean Water Act, 33 U.S.C. §§ 1251-1387

Section 301, 33 U.S.C. § 1311 9
Section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) 11
Section 303(d), 33 U.S.C. § 1313(d) 11
Section 402(a), 33 U.S.C. § 1342(a) 9
Section 402(b), 33 U.S.C. § 1342(b) 20
Section 502(7), 33 U.S.C. § 1362(7) 9
Section 502(12), 33 U.S.C. § 1362(12) 9, 17, 21

Administrative Procedure Act, 5 U.S.C. §§ 551-706

Section 706(2), 5 U.S.C. § 706(2) 12

State

The Clean Streams Law, Act of June 22, 1937, No. 394, P.L. 1987, *as amended*, 35 P.S. § 691.1-691.1001 1

Article III, §§ 301-316, 35 P.S. §§ 691.301-691.316 ....23, 25
Article IV, §§ 401-402, 35 P.S. §§ 691.401-691.402 ....23, 25
Section 1, 35 P.S. § 691.1 .... 7, *passim*
Section 2.B, 35 P.S. § 691.2.B 23, 25
Section 4(3), 35 P.S. § 691.4(3) 16, 18
Section 201, 35 P.S. § 691.201 6
Section 301, 35 P.S. § 691.301 .... 6, *passim*
Section 304, 35 P.S. § 691.304 ....16, 18
Section 307, 35 P.S. § 691.307 .... 6, *passim*
Section 307(a), 35 P.S. § 691.307(a) 6, 17, 21, 23
Section 315(a), 35 P.S. § 691.315(a) 6
Section 316, 35 P.S. § 691.316 ....15, 23, 24
Section 401, 35 P.S. § 691.401 .... 6, *passim*
Section 401(a), 35 P.S. § 691.401(a) 20
Section 402(a), 35 P.S. § 691.402(a) 25
Section 901, 35 P.S. § 691.901 1

Statutory Construction Act of 1972, Act of Dec. 6, 1972, P.L. 1339, No. 290, *as amended*, 1 Pa. C.S. §§ 1501-1991 14

Section 1921(a), 1 Pa. C.S. § 1921(a) 14, 18, 25
Section 1921(b), 1 Pa. C.S. § 1921(b) 15, 25, 26
Section 1921(c), 1 Pa. C.S. § 1921(c) 15, 18, 25, 26
Section 1924, 1 Pa. C.S. § 1924 ....23, 25

RULES AND REGULATIONS

Federal

Code of Federal Regulations

40 C.F.R. § 122.3(i) 11, 13
40 C.F.R. § 122.3(a)-(g) 13

Federal Register

43 Fed. Reg. 18017 (April 27, 1978) 20
73 Fed. Reg. 33,697 (June 13, 2008) 11, 13

State

Pennsylvania Code

25 Pa. Code Ch. 92a 13, 22
25 Pa. Code § 92a.2 ....20, 21, 22
25 Pa. Code § 92a.4 13
25 Pa. Code § 1021.122(b)(1) 19

PA Bulletin

40 Pa. Bull. 5767 (Oct. 10, 2010) 13

COURT RULES

Pa. R.A.P. 531(b)(2)(ii) 2

OTHER

John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II – Environmental Rights and Public Trust*, 104 Dick. L. Rev. 97 (1999) 15

Webster's Ninth New Collegiate Dictionary (1991) 17

STATEMENT OF THE INTERESTS OF *AMICI CURIAE*

Citizens for Pennsylvania's Future (PennFuture) is a Pennsylvania nonprofit organization whose mission includes protecting our air, water and land, and empowering citizens to build sustainable communities for future generations. Since PennFuture's founding in 1998, protection of water resources across Pennsylvania, and specifically ensuring proper implementation of The Clean Streams Law[1] and the regulations adopted thereunder, have been a focus of the organization's advocacy work. Members of PennFuture regularly use and enjoy the natural, scenic, and esthetic attributes of Pennsylvania's waters.

Sierra Club is a national nonprofit organization with 67 chapters and over 774,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out those objectives. Sierra Club's Pennsylvania Chapter has approximately 30,000 members, including members who live, work, and recreate in Tioga County.

[1] Act of June 22, 1937, No. 394, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001. *See id.* § 691.901 ("This act shall be known and may be cited as 'The Clean Streams Law.'").

PennFuture, Sierra Club, and their members have interests recognized by Article I, Section 27 of the Pennsylvania Constitution in pure water and the preservation of the natural, scenic, historic, and esthetic values of the environment. Protection of those interests depends, in significant measure, on effective implementation and enforcement of The Clean Streams Law.

Amici Curiae PennFuture and Sierra Club offer the analysis presented below in support of the Appellant, the Pennsylvania Department of Environmental Protection (Department). We do so out of concern that the Commonwealth Court's decision will impede effective enforcement of The Clean Streams Law by improperly restricting the scope of three central prohibitions in the statute, and thereby limiting the Department's ability to seek civil penalties that reflect the full impacts of pollution on all affected waters of the Commonwealth.

Counsel for PennFuture and Sierra Club authored this brief. While they do not believe that disclosure is necessary under Pa. R.A.P. 531(b)(2)(ii), they state that they conferred with attorneys for the Clean Air Council in drafting portions of Section I of the Argument.

STATEMENT OF THE ISSUES ADDRESSED BY *AMICI CURIAE*

1. Does the prohibition in Section 301 of The Clean Streams Law against permitting or continuing to permit any industrial wastes to flow into any of the waters of the Commonwealth apply exclusively to the initial entry of waste into the waters from an outside source, and therefore not to the movement of industrial wastes from one distinct body or channel of water to another?

Answered in the negative.

2. Does the definition of the term "discharge" in Pennsylvania's National Pollutant Discharge Elimination System regulations limit the scope of the word "discharge" as used in Section 307 of The Clean Streams Law, such that Section 307 does not prohibit releases of industrial wastes into groundwater?

Answered in the negative.

3. Does Section 401 of The Clean Streams Law apply to discharges of industrial waste resulting in pollution?

Answered in the affirmative.

SUMMARY OF ARGUMENT

In granting Appellee EQT Production Company's (EQT) Application for Summary Relief, the Commonwealth Court improperly adopted EQT's variation of the unitary waters theory, under which the "waters of the Commonwealth" are considered a single, collective unit into which a given quantity of industrial waste may enter only once. When industrial waste flows from one channel or body of water into another, the theory posits, the waste is simply moving within the collective waters of the Commonwealth. By adopting this theory, the Commonwealth Court incorrectly decided as a matter of law that there can be no violation of Section 301 of The Clean Streams Law when industrial waste is permitted to flow from one distinct water of the Commonwealth into another.

Even in the context in which it arose – as a conception of the nation's "navigable waters" under the federal Clean Water Act – courts repeatedly rejected the unitary waters theory as a matter of statutory interpretation. The theory gained a measure of acceptance only through deference to the U.S. Environmental Protection Agency's (EPA) Water Transfers Rule. That rule, which recognized that the states retain primary responsibility to regulate water transfers, created a permitting exclusion that has not been incorporated into Pennsylvania's National Pollution Discharge Elimination System (NPDES) regulations.

No matter what effect the unitary waters theory has at the federal level, it is inapplicable to the distinctive approach to water quality protection under Pennsylvania's Clean Streams Law. Repeatedly throughout the statute – from the definition of "waters of the Commonwealth," to the declaration of policy, to the language of Section 301's prohibition against discharges of industrial wastes, the General Assembly makes clear its intention to protect and restore each and every distinct water of the Commonwealth. The collective, unitary conception of the waters of the Commonwealth adopted by the Commonwealth Court below does not square with the individualized, non-unitary conception adopted by the General Assembly in The Clean Streams Law.

The Commonwealth Court clearly erred in summarily rejecting Sections 307 and 401 of The Clean Streams Law as potential bases of liability. In holding that Section 307 does not prohibit unpermitted discharges of industrial wastes to groundwater, the Commonwealth Court improperly relied on an inapplicable, limited-purpose regulatory definition to narrow the scope of the statute as reflected in its plain text. Similarly, the Court improperly relied on statutory headings in holding that Section 401's expansive prohibition against pollution resulting from discharges of "any substance of any kind or character" does not apply to polluting discharges of industrial wastes.

ARGUMENT

I. THE COMMONWEALTH COURT ERRONEOUSLY APPLIED A "UNITARY WATERS" CONCEPT THAT IS INCONSISTENT WITH THE CLEAN STREAMS LAW'S PROTECTION OF EACH AND EVERY WATER OF THE COMMONWEALTH.

A. The Commonwealth Court Adopted EQT's Unitary Waters Conception of the Waters of the Commonwealth.

In the decision under appeal, the Commonwealth Court "confined [its analysis] to proper application of Section 301 of The Clean Streams Law for purposes of imposing civil penalties."[2] *EQT Prod. Co. v. Department of Envtl. Prot.*, 153 A.3d 424, 434 (Pa. Cmwlth. 2017). That section prohibits, except as otherwise authorized,[3] "any industrial wastes" from being allowed to reach "any of the waters of the Commonwealth:"

> No person or municipality shall place or permit to be placed, or discharged [sic[4]] 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. The "Waters of the Commonwealth" protected by The Clean Streams Law are broadly defined as including:

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[2] It did so because, as explained in Sections II and III of this brief, it incorrectly concluded that Sections 307 and 401 of The Clean Streams Law were inapplicable to this case.

[3] *See* 35 P.S. §§ 691.307(a), 315(a).

[4] *See* 35 P.S. § 691.201 (using the correct "discharge" in parallel provision governing sewage).

> 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.

Before the Commonwealth Court, Appellee EQT

> t[ook] the position that industrial waste enters "into" the waters of the Commonwealth when it first enters one of the types of waters enumerated in the definition of "waters of the Commonwealth." EQT contend[ed] that after that initial entry, however, movement of the industrial waste from one water to another water is not prohibited, because the various enumerated waters all make up "the *waters* of the Commonwealth." In other words, once the industrial waste enters into one water of the Commonwealth, it has entered "the *waters* of the Commonwealth," such that Section 301's prohibition does not encompass the movement of the industrial waste after its initial entry.

EQT Prod., 153 A.3d at 435 (emphasis in original). The Commonwealth Court adopted EQT's position, declaring that Section 301 "prohibits acts or omissions resulting in the *initial active discharge or entry* of industrial waste into waters of the Commonwealth," and does not "authoriz[e] 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.*, 153 A.3d at 437 (emphasis added).[5]

This notion that the waters of the Commonwealth make up a single unit, that a given quantity of industrial waste can enter into the waters of the Commonwealth only once, and that any further movement of the waste within the single unit formed by those waters can never constitute a separate violation of The Clean Streams Law, is a permutation of what has been termed the "unitary waters theory." We discuss below the development of that theory at the federal level, highlighting its dependence on deference to agency rulemaking, and ultimately demonstrating that whatever effect the unitary waters theory has under the federal Clean Water Act, it is inapplicable to the distinctive approach to water quality protection under Pennsylvania's Clean Streams Law.

[5] *Amici Curiae* do not read the Department as having taken the position below that the continued presence of the industrial waste in a particular water of the Commonwealth, *by itself,* is an ongoing violation of Section 301 of The Clean Streams Law. Rather, the continued presence of the industrial waste is relevant as evidence of the continued flow of industrial waste into the initial receiving water, or between distinct waters of the Commonwealth, in violation of Section 301. As explained in the text below, the Commonwealth Court incorrectly ruled as a matter of law that the movement of industrial waste between distinct waters is not a possible basis for liability under Section 301.

B. At the Federal Level, the Unitary Waters Theory Has Gained Traction Only Through *Chevron* Deference to Agency Rulemaking.

The federal Clean Water Act protects the "navigable waters," a term it defines as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The "unitary waters theory" arose as a way of conceptualizing those waters for the purpose of determining whether "any addition of any pollutant to navigable waters from any point source" is occurring, *id*. § 1362(12), and therefore whether a National Pollutant Discharge Elimination System (NPDES) permit is required. *See id*. §§ 1311, 1342(a). Under the unitary waters theory, the "navigable waters" are considered to form a single unit, so a given amount of a pollutant can be added to the navigable waters only once. Any further movement of the pollutant is simply a movement *within* the single unit. *See Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (*Friends I*) (under unitary waters theory, "addition" of pollutants occurs "only when pollutants first enter navigable waters"), *cert. denied*, 562 U.S. 1082 (2010). Because the movement adds no new pollutants to the single unit, even where polluted river water is conveyed to a pristine stream, an NPDES permit is not required. Thus, under the unitary waters theory, the distinctions between two bodies of navigable waters are ignored as a matter of law in determining whether an "addition" of a pollutant to navigable waters has occurred.

Prior to 2008, the unitary waters theory had never prevailed in a federal appellate court as the preferred reading of the Clean Water Act. As described by the Eleventh Circuit, "[t]he unitary waters theory ha[d] a low batting average. In fact, it ha[d] struck out in every court of appeals where it ha[d] come up to the plate" in a series of citizen suits finding that movements of contaminated water from one distinct water body to another without the authorization of an NPDES permit added pollutants to the receiving waters in violation of the Clean Water Act. *Friends I*, 570 F.3d at 1217-18 (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (*Catskill I*); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 83 (2d Cir. 2006) (*Catskill II*), *cert. denied*, 549 U.S. 1252 (2007); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996), *cert. denied,* 521 U.S. 1119 (1997); *Northern Plains Res. Council v. Fidelity Expl. & Dev. Co.,* 325 F.3d 1155, 1163 (9th Cir.), *cert. denied*, 540 U.S.967 (2003)).

Further, the United States Supreme Court questioned whether the unitary waters theory was a proper interpretation of the Clean Water Act in *South Florida Water Management District v. Miccosukee Tribe,* 541 U.S. 95 (2004), which involved the pumping of contaminated water from a canal to a water conservation area (a wetland). In *Miccosukee*, the Court stated that several provisions of the

Clean Water Act "might be read to suggest a view contrary to the unitary waters approach." *Id*. at 107 (discussing 33 U.S.C. § 1313(c)(2)(A), (d)). Ultimately the Court declined to decide the issue, allowing the parties to pursue their unitary waters arguments on remand, in addition to the question of whether the canal and the water conservation area at issue were "meaningfully distinct water bodies." *Id.* at 109, 112.

In 2008, EPA gave effect to the unitary waters theory in promulgating its "Water Transfers Rule," 73 Fed. Reg. 33,697 (June 13, 2008), which created an exclusion from the requirement to obtain an NPDES permit when transferring water from one distinct body to another. *See id*. at 33,701 (col. 1) (quoting Brief for the United States in *Friends I* case); *Friends I*, 570 F.3d at 1228 (describing Water Transfers Rule as "EPA's regulation adopting the unitary waters theory"). That exclusion, codified at 40 C.F.R. § 122.3(i), defines a "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id*. Provided the transfer activity itself introduces no new pollutants to the waters being transferred, the transfer is excluded from the requirement to obtain an NPDES permit, *id*., on the grounds that there is no "addition" of pollutants to the waters of the United States. *See* 73 Fed. Reg. at 33,700-703 (explaining rationale for rule). *See also Friends I*, 570 F.3d at 1227-28 (granting Water Transfers Rule

deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and reversing judgment that pumping contaminated water from canals to adjacent lake without NPDES permit violated Clean Water Act).

Despite having twice rejected the unitary waters theory in finding a particular unpermitted water transfer to violate the Clean Water Act in *Catskill I and II*, the Second Circuit recently upheld the Water Transfers Rule against challenges to its validity under the Administrative Procedure Act, 5 U.S.C. § 706(2). *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III),* 846 F.3d 492 (2d Cir. 2017).[6] The critical difference in this third case was that EPA had adopted the Water Transfers Rule through formal notice-and-comment rulemaking, making it eligible for *Chevron* deference. Although not finding it the *best* interpretation, the Second Circuit found that EPA's interpretation of the Clean Water Act as reflected in the Water Transfers Rule was permissible, and therefore, accorded it deference under *Chevron. See Catskill III*, 846 F.3d at 508-33. *See also id.* at 504, 508-09 (noting that court had not applied *Chevron* deference in *Catskill I and II*). Thus, at the federal level, the unitary waters theory was repeatedly rejected by the courts and gained traction only when

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[6] The Second Circuit denied petitions for rehearing on April 18, 2017. The deadline for seeking review by the United States Supreme Court is July 17, 2017.

supported by *Chevron* deference to the Water Transfers Rule. *See Catskill III*, 846 F.3d at 508-33; *Friends I*, 570 F.3d at 1227-28.

C. Pennsylvania Has Not Adopted the NPDES Permit Exclusion Created by the Federal Water Transfers Rule.

The Water Transfers Rule makes clear that states have full authority to regulate water transfers under state law, declaring that "Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities." 73 Fed. Reg. at 33,703 (col. 1). Significantly, Pennsylvania's current NPDES regulations, 25 Pa. Code Ch. 92a, which were adopted two years *after* the federal Water Transfers Rule, *see* 40 Pa. Bull. 5767 (Oct. 10, 2010), do not incorporate the federal water transfers permit exclusion (40 C.F.R. § 122.3(i)). *See* 25 Pa. Code § 92a.4 (incorporating by reference 40 C.F.R. § 122.3(a)-(g)). Thus, Pennsylvania has declined to embrace this specific manifestation of the unitary waters theory. More generally, regardless of its applicability to "the waters of the United States" under the Clean Water Act, the unitary waters theory clearly does not fit the "waters of the Commonwealth" under The Clean Streams Law, which seeks to protect and restore each and every body or channel of water.

D. The Clean Streams Law Takes a Non-Unitary Approach that Protects Each and Every Water of the Commonwealth.

The Commonwealth Court's conclusion that Section 301 of The Clean Streams Law addresses only the "initial active discharge or entry of industrial

waste into the waters of the Commonwealth," *EQT Prod.*, 153 A.3d at 437, is inconsistent with this Court's decision in *Commonwealth v. Harmar Coal*, 306 A.2d 308, 315 (Pa. 1973), *appeal dismissed,* 415 U.S. 903 (1974). There, this Court held that "[n]othing in The Clean Streams Law justifies the [Commonwealth] Court's holding that pollution occurs *only* when polluting substances are "*first* discharged into *any* 'waters of the Commonwealth,'" in this case the underground pool." *Id*. at 315. The *Harmar Coal* decision properly gave effect to the "non-unitary" conception of the waters of the Commonwealth built into The Clean Streams Law. In contrast, the Commonwealth Court's decision in this case was based on a misconception of the waters of the Commonwealth exclusively as a single unit.

"In interpreting statutes, [this Court is] guided by the Statutory Construction Act, 1 Pa. C. S. §§ 1501-1991, as well as [this Court's] decisional law." *Commonwealth v. Hansley*, 47 A.3d 1180, 1185 (Pa. 2012). *See also SEPTA v. City of Philadelphia*, 101 A.3d 79, 85 (Pa. 2014) (in all matters involving statutory interpretation, this Court "follow[s] the dictates of the Statutory Construction Act"). The Statutory Construction Act dictates that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "The plain language of the statute is generally the best indicator of legislative intent." *Hansley*, 47 A.3d at

1186. *See also* 1 Pa. C.S. § 1921(b). When the words of a statute are not free from ambiguity, the object remains to determine the General Assembly's intention by considering additional indicators. *See* 1 Pa. C.S. § 1921(c) (presenting non-exhaustive list of matters that may be considered).

This Court's interpretation of The Clean Streams Law must be guided by the environmental rights and natural resource trustee obligations under Article I, Section 27 of the Pennsylvania Constitution. Pa. Const. art. I, § 27. *See Adams Sanitation Co., Inc. v. Department of Envtl. Prot.*, 715 A. 2d 390, 394 (Pa. 1998) (rejecting interpretation of Section 316 of The Clean Streams Law as "run[ning] counter to the legislative mandate contained in Article I, Section 27 of the Pennsylvania Constitution"). "[W]hen there is any doubt about the meaning of a legislative provision, the doubt should be resolved on behalf of the interpretation that protects the environmental rights or public natural resources identified in Article I, Section 27." John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II – Environmental Rights and Public Trust*, 104 Dick. L. Rev. 97, 156 (1999). *See generally id.* at 156-58.

The main point of contention in this case is the interpretation of the phrase "into any of the waters of the Commonwealth" in Section 301 of The Clean Streams Law. 35 P.S. § 691.301. That phrase appears in a statute that repeatedly evidences the General Assembly's intention to protect each and every water of the

Commonwealth. Such comprehensive protection is necessary to fulfill the Commonwealth's constitutional obligations as a trustee to "conserve and maintain" "Pennsylvania's public natural resources." Pa. Const. art. I, § 27.

Initially, the words "any and all" and "or parts thereof" in The Clean Streams Law's definition of the term "Waters of the Commonwealth," together with the definition's extensive list of different varieties of such waters, make clear that every component of the hydrologic regime is considered significant. *See* 35 P.S. § 691.1. The clearest expression of the General Assembly's intention to protect individual waters comes in its "Declaration of Policy" in Section 4: "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 *every stream* in Pennsylvania that is presently polluted[.]" *Id.* § 691.4(3) (emphasis added). Further, Section 304 directs the Department to "make a complete survey of the waters of the Commonwealth in order to ascertain the extent of pollution *in each of said waters*, and the remedies to be employed to purify said waters." *Id.* § 691.304.

The language of Section 301 is consistent with the statute's overarching intention to protect each and every water of the Commonwealth. If the General Assembly had intended Section 301 to prohibit only the initial entry of industrial waste into the waters of the Commonwealth collectively, it would have used the

collective formulation: “into the waters of the Commonwealth.” Instead, it included the words “any of” after “into,” *id.* § 691.301, thereby confirming its intention to protect each and every distinct water. *Cf. Miccosukee,* 541 U.S. at 106 (noting that United States contended that *absence* of word “any” before “navigable waters” in Section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12), supported unitary waters approach); *Catskill III*, 846 F.3d at 514 (observing that if Congress had used “*any navigable water*” in Section 502(12), it would have revealed an intention to refer to individual water bodies) (emphasis in original).

The use of the word “flow” in Section 301 further supports interpreting that section’s prohibition to extend beyond the “initial active entry” of industrial waste into the first affected water of the Commonwealth. *EQT Prod.*, 153 A.3d at 437. The word “flow” connotes the movement of water and the conveyance of material by or through water,[7] and it is clear that one way industrial waste may “flow into any of the waters of the Commonwealth” is from another body or channel of water.[8] 35 P.S. § 691.301. Thus, for example, where a ditch (specifically listed as

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[7] *E.g.,* Webster’s Ninth New Collegiate Dictionary, 475 (1991) (defining verb form of “flow” as including “to issue or move in a stream”).

[8] Similarly, one of the ways industrial waste may be discharged “indirectly” into the waters of the Commonwealth within the meaning of Section 307(a) of The Clean Streams Law is through one or more intermediary waters of the Commonwealth. 35 P.S. § 691.307(a). As shown in Section II, below, the Commonwealth Court erroneously dismissed Section 307 as a potential basis for liability.

a variety of water of the Commonwealth, *see* 35 P.S. § 691.1) outlets to a creek (also listed as a variety of water of the Commonwealth, *see id.*), placing industrial waste in the ditch also permits the waste to flow into the creek with the inevitable stormwater runoff. By using the word "flow," the General Assembly clearly signaled an intention to prohibit industrial waste from entering "into any of the waters of the Commonwealth" not only from a container, the land surface, or subsurface soil and rock, but also from another water of the Commonwealth.

Taken together, these provisions of The Clean Streams Law manifest an intention to protect and restore each of the waters of the Commonwealth individually. *See* 35 P.S. § 691.1, 691.4(3), 691.301, 691.304. *See also* 1 Pa. C.S. § 1921(a), (c). The Commonwealth Court's unitary-waters approach subverts that intention by failing to extend Section 301's prohibition to all of the waters that may be affected by a release of industrial waste and all of the ways such wastes may reach specific waters. To effectuate the General Assembly's intention, this Court must interpret Section 301 to prohibit a person or municipality from

permitting industrial waste to flow from one water of the Commonwealth into another.[9]

Consistent with its decision in *Harmar Coal,* this Court should overturn the Commonwealth Court's restrictive reading of Section 301 of The Clean Streams Law. It should be left to the Environmental Hearing Board to determine in this case how many distinct waters of the Commonwealth have been affected by the release of industrial waste from EQT's Phoenix Pad S impoundment and how many separate violations of Section 301 (and Sections 307 and 401) of The Clean Streams Law have occurred.

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[9] Where the Department asserts, in a civil penalty proceeding, that industrial waste was permitted to flow from one water of the Commonwealth into another (or others), it bears the burden of proving that the waters are meaningfully distinct. *See* 25 Pa. Code § 1021.122(b)(1). In some instances, such as the hypothetical ditch and creek discussed in the text, the detailed definition of "Waters of the Commonwealth" in The Clean Streams Law, *see* 35 P.S. § 691.1, draws a clear distinction between different varieties of such waters. In other instances, however, whether two waters that are claimed to be separate are in fact meaningfully distinct may present a triable issue. *See Miccosukee*, 541 U.S. at 112 (remanding for determination whether canal and wetland at issue were "meaningfully distinct water bodies").

II. SECTION 307 OF THE CLEAN STREAMS LAW APPLIES TO DISCHARGES OF INDUSTRIAL WASTE INTO GROUNDWATER.

The Commonwealth Court inappropriately relied on a regulation to narrow the scope of Section 307 of The Clean Streams Law,[10] and thus to hold that Section 307 does not apply to the releases of industrial waste at issue in this case. *EQT Prod.*, 153 A.3d at 434. Specifically, without any analysis, the Commonwealth Court used the definition of "discharge" in Pennsylvania's regulations implementing the federal Clean Water Act's NPDES program[11] to define the term in Section 307 of The Clean Streams Law. *Id.* at 433. This ruling, which ignores an express restriction on the applicability of the regulatory definition, undermines The Clean Stream's Law's intended comprehensive protection of *all* water resources – both groundwater and surface waters – from *all* varieties of pollutant sources – both point and nonpoint.

As defined in The Clean Streams Law, the "waters of the Commonwealth" include "bodies or channels of conveyance of . . . underground water," commonly known as groundwater. 35 P.S. § 691.1. As a result, the prohibition in Section

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[10] 35 P.S. § 691.307. Although the court relied on the regulatory definition of "discharge" in 25 Pa. Code § 92a.2 only in ruling that Section 307 is inapplicable to this case, the same term appears in two other sections of The Clean Streams Law at issue here, Sections 301 and 401. *See* 35 P.S. §§ 691.301, 691.401(a).

[11] The Department implements the NPDES program in Pennsylvania pursuant to a delegation of authority under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). *See* 43 Fed. Reg. 18017 (April 27, 1978).

307 of The Clean Streams Law against the "discharge" of industrial waste "into *any* of the waters of the Commonwealth," 35 P.S. § 691.307(a) (emphasis added), indisputably includes the discharge of such waste into groundwater.

By failing to engage in this straightforward statutory analysis, the Commonwealth Court incorrectly ruled below that Section 307 of The Clean Streams Law does *not* apply to discharges of industrial waste into groundwater, and that because the gas well waste at issue "initially infiltrated groundwater, not surface water," Section 307 is inapplicable to this case. *EQT Prod.*, 153 A.3d at 433-34. The Court erred in assuming that the definition of "discharge" in the Department's NPDES program regulations – "[a]n addition of any pollutant *to surface waters* of this Commonwealth from a point source," 25 Pa. Code § 92a.2 (emphasis added) – governs the interpretation of that term as used in The Clean Streams Law.[12] The regulation itself, however, makes clear that its definitions

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[12] The Court further erred in narrowly construing the term "discharge" in Chapter 92a to cover only releases of pollutants *directly* into surface waters. The word "directly" does not appear in the Pennsylvania NPDES regulation's definition of "discharge," 25 Pa. Code § 92a.2, or in the definition of "discharge of a pollutant" under the Clean Water Act, 33 U.S.C. § 1362(12). The elements of these definitions may be satisfied, and an NPDES permit therefore may be required, where pollutants discharged directly into groundwater are carried via hydrologic connection into surface waters. *See, e.g., Sierra Club v. Virginia Elec. & Power Co.*, 2017 U.S. Dist. LEXIS 42635, at *16-*18 (E.D. Va., Mar. 23, 2017); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 443-46 (M.D.N.C. 2015). *Cf. Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 459-61 (E.D. Pa. 2015).

apply solely to the NPDES program codified at 25 Pa. Code Chapter 92a: "The following words and terms, *when used in this chapter*, have the following meanings, unless the context clearly indicates otherwise[.]" *Id*. § 92a.2 (emphasis added). By expressly confining the application of that special-purpose regulatory definition to the NPDES program, Pennsylvania's Environmental Quality Board made clear that it was not purporting to define the scope of the term "discharge" as used elsewhere.

The Commonwealth Court nevertheless treated the definition of "discharge" in Section 92a.2 as controlling the meaning of "discharge" as used in Section 307 of The Clean Streams Law. By restricting Section 307's prohibition to point source discharges of industrial waste directly to surface waters, that ruling contravenes the General Assembly's clear intention to protect all waters of the Commonwealth, including groundwater, from all varieties of pollution sources. This Court therefore should reverse that portion of the Commonwealth Court's decision and remand this matter for appropriate consideration of Section 307 of The Clean Streams Law.

III. SECTION 401 OF THE CLEAN STREAMS LAW APPLIES TO POLLUTION RESULTING FROM DISCHARGES OF INDUSTRIAL WASTE.

The Commonwealth Court also erred when it summarily held that Section 401 of The Clean Streams Law, 35 P.S. § 691.401, is wholly inapplicable to the current dispute because industrial waste is regulated exclusively under Article III of The Clean Streams Law, *id*. §§ 691.301-691.316, and not at all under the statute's Article IV, *id*. §§ 691.401-691.402. *EQT Prod.*, 153 A.3d at 433. This ruling improperly relies on titles used in The Clean Streams Law to limit the expansive scope of Section 401 as set forth in its plain language.

Under the Statutory Construction Act, while headings affixed to articles or sections of a statute may be used as an aid in the construction of the statute, they "shall not be considered to control." 1 Pa. C.S. § 1924. The Clean Streams Law itself provides that "[s]ection headings shall not be taken to govern *or limit the scope of* the sections of this Act." 35 P.S. § 691.2.B (emphasis added).

Article III of The Clean Streams Law, titled "Industrial Wastes," includes prohibitions against discharging such wastes set forth in Sections 301 and 307(a), *id*. §§ 691.301, 691.307(a). Article III also includes provisions that are *not* limited to "industrial waste" as defined in the statute. *See id.* § 691.1. Most prominent is Section 316 ("Responsibilities of landowners and land occupiers"), which authorizes the Department to order an owner or occupier of land to correct, or to

grant access for others to correct, "a condition which exists on land in the Commonwealth" that creates "a danger of pollution." 35 P.S. § 691.316. *See also id*. § 691.1 (defining "pollution"). Section 316 also includes a penalty exclusion for certain events causing sediment runoff from agricultural lands. *See id*. § 691.316. Thus, notwithstanding its heading, Article III of The Clean Streams Law goes beyond the regulation of industrial waste.

Article IV of The Clean Streams Law, titled "Other Pollutions and Potential Pollution," contains just two sections, Section 401 ("Prohibition against other pollutions") and Section 402 ("Potential pollution"). Section 401 does not refer to any specific variety of waste or polluting substance. Instead, using extraordinarily broad language – "any substance of any kind or character resulting in pollution" – Section 401 comprehensively prohibits pollution of the Waters of the Commonwealth:

> It shall be unlawful for any person or municipality 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 or municipality into any of the waters of the Commonwealth, *any* substance of *any* kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

35 P.S. § 691.401 (emphasis added throughout).

In contrast to Section 401, Section 402 contains an express exception for activities regulated elsewhere in the statute. Specifically, Section 402 provides that

the permitting and regulation it authorizes apply only to activities "not otherwise requiring a permit under this act." *Id.* § 691.402(a). The absence of similar language from Section 401 confirms that the General Assembly intended Section 401's expansive prohibition against polluting the waters of the Commonwealth to include actions or conditions regulated under other sections of the statute. *See Novicki v. O'Mara*, 124 A. 672, 673 (Pa. 1924) ("A change of language in separate provisions of a statute is prima facie evidence of a change of intent.").

Here, the Commonwealth Court abruptly dismissed the Department's reliance on Section 401 of The Clean Streams Law as a basis for liability. Without examining the language of Section 401, the Commonwealth Court summarily declared:

> Because the release emanated from an industrial site, the waste at issue is considered industrial waste, regulated under Article III of The Clean Stream Law, and not Article IV (relating to other forms of pollutants). Our analysis, therefore will focus on interpreting [Article III] of The Clean Streams Law.

EQT Prod., 153 A.3d at 433.

This cursory analysis improperly gives controlling weight to the titles of Articles III and IV and Section 401 of The Clean Streams Law, contrary to both the Statutory Construction Act, *see* 1 Pa. C.S. § 1924, and The Clean Streams Law, *see* 35 P.S. § 691.2.B. It also ignores the paramount indicator of the General Assembly's intent – the language of the statute. *See* 1 Pa. C.S. § 1921(a)-(c).

While it is true that the gas well wastes at issue constitute "industrial wastes" as defined in The Clean Streams Law, *see* 35 P.S. § 691.1, they also constitute "any substance of any kind or character" within the meaning of Section 401's comprehensive prohibition against causing pollution of the waters of the Commonwealth, *id*. § 691.401. An unauthorized discharge of industrial waste in violation of Sections 301 and 307 may also violate Section 401 provided Section 401's additional element of "resulting in pollution" is satisfied. *See Westinghouse Elec. Corp. v. Pennsylvania Dep't of Envtl. Prot.*, 705 A.2d 1349, 1352, 1357 (Pa. Cmwlth.) (upholding Environmental Hearing Board's findings that each of two different groundwater-contaminating waste handling practices in different areas of manufacturing plant constituted violations of Sections 301, 307, and 401 of The Clean Streams Law), *allocatur denied*, 729 A.2d 1133 (Pa. 1998), *appeal after remand,* 745 A. 2d 1277 (Pa. Cmwlth. 2000). The reference to "other" pollution in the titles of Article IV and Section 401 may not be read to limit the unambiguous and unlimited language of Section 401, which is controlling. *See* 1 Pa. C.S. § 1921(b), (c). Under that controlling language, Section 401 of The Clean Streams Law indisputably applies to the documented pollution of the waters of the Commonwealth at issue in this case. This Court therefore must reverse the Commonwealth Court's decision that Section 401 is wholly inapplicable and remand for proper analysis of the effect of Section 401.

CONCLUSION

For the reasons set forth above, *Amici Curiae* PennFuture and Sierra Club request that this Court reverse the decision of the Commonwealth Court.

Respectfully submitted,

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DATED: May 10, 2017

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATION

In accordance with Pa. R.A. P. 2135(d), I, Alice R. Baker, hereby certify that this brief complies with length limitation in Pa. R.A.P. 531(b)(3) in that it contains fewer than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word.

Dated: May 10, 2017

*/s/ Alice R. Baker*__________________
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae*, Citizens for Pennsylvania's Future and Sierra Club, was filed electronically using the PACFile system. Service will be made on the persons and in the manner set forth on the Proof of Service generated by the PACFile system, which service satisfies the requirements of Pa. R.A.P. 121. The Proof of Service generated by the PACFile system will follow this Certificate of Service in the paper copy of this brief filed with the Court.

Dated: May 10, 2017

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