IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EQT Production Company,	:	
	:	No. 485 M.D. 2014
Petitioner	:	Argued: January 21, 2015
	:	
v.	:	
	:	
Department of Environmental Protection of the Commonwealth of Pennsylvania,	:	
	:	
Respondent	:	

MEMORANDUM AND ORDER

Before this court are the preliminary objections (POs) filed by the Department of Environmental Protection of the Commonwealth of Pennsylvania (DEP) to the Complaint in Action for Declaratory Judgment (Complaint) filed by EQT Production Company (EQT). We sustain the POs and dismiss EQT's Complaint.

In its Complaint,[1] EQT states that it owns and operates natural gas wells. EQT constructed a subgrade impoundment (Pad S Impoundment) near a gas well pad in Duncan Township, Tioga County, fitted with an impervious synthetic membrane liner to contain impaired water generated from hydraulic fracturing.

[1] This court notes that throughout its brief, EQT references its petition for review. Presumably, EQT is actually referencing its Complaint.

On May 30, 2012, EQT concluded that the Pad S Impoundment was leaking into the subsurface and notified DEP. Twelve days later, on June 11, 2012, the Pad S Impoundment was completely emptied of impaired sludge. Upon removal of the water and sludge, EQT entered into a formal cleanup process under the Land Recycling and Environmental Remediation Standards Act[2] and continues to remediate affected soil and groundwater.

On May 9, 2014, DEP sent a proposed Consent Assessment of Civil Penalty (Consent Assessment) to EQT. DEP alleged that discharge of the impaired water from the Pad S Impoundment violated The Clean Streams Law (Law)[3] and sought a penalty of $1,270,871. DEP's proposed penalty included $900,000 for ongoing discharge in violation of sections 301, 307(a), and 401 of the Law, 35 P.S. §§691.301, 691.307(a), and 691.401.[4] According to DEP, civil penalties may be assessed for the passive migration of material in the environment after the initial discharge into the environment has ended.

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[2] Act of May 19, 1995, P.L. 4, 35 P.S. §§6026.101-6026.908.

[3] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1 – 691.1001.

[4] Section 301 of the Law provides that "[n]o person . . . 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."

Section 307(a) of the Law provides that "[n]o person shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly" into the Commonwealth's waters.

Section 401 of the Law states that it is "unlawful for any person . . . to put or place . . . or allow or permit to be discharged from property . . . any substance . . . resulting in pollution" into the Commonwealth's waters.

On September 19, 2014, EQT filed the Complaint. EQT claims that DEP may assess civil penalties for only those days that pollutants were actually discharged from the Pad S Impoundment. EQT argues that DEP's interpretation of the Law, that it may assess penalties for ongoing discharge, is overly broad. EQT asks this court to enter judgment declaring that DEP's interpretation of sections 301, 307(a), and 401 of the Law is unlawful.

On October 7, 2014, DEP filed with the Environmental Hearing Board (EHB), and served on EQT, a Complaint for Civil Penalties (Complaint for Penalties) for the violations outlined in the Consent Assessment. That matter is presently before the EHB.

On October 20, 2014, DEP filed POs to EQT's Complaint, which are presently before this court. In its POs, DEP maintains that EQT has an adequate administrative remedy that it failed to exhaust and failed to plead or establish critical elements necessary to obtain relief.

In ruling on POs, this court must accept as true all well-pled material allegations in the petition and all inferences reasonably deducible therefrom. *Wagaman v. Attorney General of the Commonwealth of Pennsylvania*, 872 A.2d 244, 246 (Pa. Cmwlth. 2005). "Preliminary objections shall be sustained only when they are clear and free from doubt." *Grand Central Sanitary Landfill, Inc. v. Department of Environmental Resources*, 554 A.2d 182, 184 (Pa. Cmwlth. 1989).

Section 7541(c)(2) of the Declaratory Judgments Act, 42 Pa. C.S. §7541(c)(2), provides that declaratory relief is not available with respect to any "[p]roceeding within the exclusive jurisdiction of a tribunal other than a court." "[W]hen an adequate administrative remedy exists, this [c]ourt lacks jurisdiction . . . ." *Grand Central*, 554 A.2d at 184.

EQT acknowledges that the EHB's authority to assess penalties under the Law is exclusive;[5] however, EQT argues that it does not logically flow that every legal question requiring statutory interpretation of the Law rests solely within the EHB's discretion. (EQT's Br. at 27-28.)

EQT maintains that declaratory judgment is proper because it provides this court the authority "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Section 7541(a) of the Declaratory Judgments Act, 42 Pa. C.S. §7541(a). "However, a party seeking a declaratory judgment must allege an interest which is direct, substantial and present, and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of its legal rights." *Waslow v. Pennsylvania Department of Education*, 984 A.2d 575, 580 (Pa. Cmwlth. 2009).

Here, there is no actual controversy because it is the EHB, not DEP, that imposes civil penalties. In accordance with the Law, where a complaint for civil

[5] EQT acknowledges that *Department of Environmental Protection v. Sunoco Logistics Partners, L.P.*, EHB Docket No. 2014-020-CP-R, which is presently before the EHB, involves the same issue EQT presents here, i.e., DEP's theory that the Law permits penalties for ongoing discharge.

penalties has been filed, the EHB makes an independent determination of the appropriate penalty amount. *Westinghouse Electric Corporation v. Pennsylvania Department of Environmental Protection*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998). However, "DEP may make a recommendation." *Id.*

DEP has merely expressed its legal opinion as to what constitutes a violation of the Law and how penalties for such a violation should be calculated. This case is distinguishable from *Office of the Governor v. Donahue*, 98 A.3d 1223 (Pa. 2014), upon which EQT relies. In *Donahue*, in determining the timeliness of an agency's response to a request for records, the Office of Open Records (OOR) announced its intent to interpret section 901 of the Right-to-Know Law (RTKL),[6] 65 P.S. §67.901, as providing all agencies five days to respond to a RTKL request, starting from the date the agency receives the request by any agency employee, rather than upon receipt of the request by the open records officer. The Office of the Governor (OG) filed an action for declaratory judgment challenging the OOR's interpretation of the RTKL. *Donahue*, 98 A.3d at 1225. This court granted declaratory relief, and the Pennsylvania Supreme Court affirmed. The Supreme Court stated:

> Of consequence is that OOR has adopted an interpretation of the statute in question and stated its intention to apply that interpretation prospectively to the apparent detriment of OG (as well as other Commonwealth agencies). Under these circumstances, we conclude that the Commonwealth Court properly exercised its original jurisdiction over OOR in this matter.

[6] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

Id. at 1235.

EQT maintains that this case is similar to *Donahue* because DEP "has indicated that it fully intends to *impose* its interpretation of civil penalty liability under the . . . Law." (EQT Br. at 19) (emphasis added). Although DEP may interpret the Law, it has no authority to impose its interpretation of the Law on EQT. DEP, like EQT, is merely making a legal argument. Because only the EHB has the authority to impose penalties, and it may or may not agree with DEP's legal interpretation of the Law, EQT's allegation of harm here is merely speculative. "Declaratory relief is not available unless an actual controversy exists, is imminent or inevitable." *Pennsylvania Turnpike Commission v. Hafer*, 597 A.2d 754, 756 (Pa. Cmwlth. 1991) (*en banc*).

Accordingly, this court enters the following order:

And now this 20th day of February, 2015, we hereby sustain the preliminary objections filed by the Department of Environmental Protection and dismiss the complaint filed by EQT Production Company.

ROCHELLE S. FRIEDMAN, Senior Judge