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VIOLATIONS ABOUND: THE CONTROL OF WATER
POLLUTION LIABILITY IN *EQT PRODUCTION COMPANY V.*
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OF THE COMMONWEALTH

I. INTRODUCTION

“I do not know much about gods; but I think that the river
Is a strong brown god—sullen, untamed and intractable,
Patient to some degree, at first recognised as a frontier;
Useful, untrustworthy, as a conveyor of commerce;
Then only a problem confronting the builder of bridges.”¹

When T. S. Eliot composed these verses, it is unlikely he contemplated statutory stream pollution control.² Eliot did manage to identify a problem lying at the epicenter of stream pollution control, however, by recognizing the difficulty in taming the turbulent nature of streams and rivers.³ In the context of environmental law, remediating stream pollution can be formidable once contaminants enter into the water.⁴ To find a long-term solution, courts must balance the public’s interest in restoring polluted waterways back to their pristine states, while also levying consistent, predictable, and fair sanctions against polluting entities.⁵

1. T.S. ELIOT, *The Dry Salvages*, in *THE COMPLETE POEMS AND PLAYS* 130, 130 (1971) (stating opening lines to “The Dry Salvages,” third poem in “The Four Quartets”).

2. See Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 738-39 (2011) (noting powerful environmental statutes were “virtually non[-]existent” before 1970); PETER ACKROYD, T. S. ELIOT 262 (1984) (implying “The Dry Salvages” was written before 1970 by stating Eliot sent draft of poem in January 1941).

3. See *EQT Prod. Co. v. Dep’t of Env’t. Prot.*, 181 A.3d 1128, 1143 (Pa. 2018) (noting EQT rejected theory of liability for contamination based on “passive movement of substances in the environment and the complexity of affected water systems.”).

4. See *id.* (noting EQT emphasized difficulty of remediating passive migration of contaminants in complex water systems); *United States v. Alcoa, Inc.*, 98 F. Supp. 2d 1031, 1038 (N.D. Ind. 2000) (discussing difficulty and expense of removing contaminants from river sediment).

5. See PA. CONST. art. I, § 27 (discussing people’s right to clean environment and Commonwealth’s duty to preserve such environment); 35 PA. CONS. STAT. § 6026.102(3) (1989) (stating predictable and uniform cleanup standards are necessary in eliminating environmental hazards); *EQT*, 181 A.3d at 1147 (recognizing need to protect environment from pollution and concluding General Assembly did not intend clean water legislation to foster massive strict liability system).

In *EQT Production Company v. Department of Environmental Protection*,⁶ the challenge in taming Eliot's "strong brown god" came before the Pennsylvania Supreme Court.⁷ Previously, using Section 301 of the Clean Streams Law, Pennsylvania's Department of Environmental Protection (DEP) held polluters liable for the passive migration of contaminants, in addition to their initial discharge, into the environment.⁸ This authorized the DEP to charge additional "continuing violation[s]" when contaminants passively migrated from the soil into a waterway or entered a new discrete waterway from an old one.⁹ In theory, this practice would encourage entities to remediate their own pollution quickly before the contaminants travelled downstream.¹⁰ Despite the DEP's encouragement, polluters encountered challenges in the technical aspects of pollution remediation, particularly when contaminants entered turbulent waterways.¹¹ EQT Production Company (EQT) filed for declaratory judgment regarding the DEP's reading of the Pennsylvania Clean Streams Law, fearing the current reading would subject the company to countless pollution violations.¹² The Pennsylvania Supreme Court, in a 5-2 decision, held an entity does not violate Section 301 when streams or rivers passively carry contaminants into new waterways.¹³

The ruling in *EQT* demonstrates the importance of providing potential polluters with predictable sanctions regarding their con-

6. *EQT*, 181 A.3d at 1147 (discussing need for clean environment while stressing need to limit liability for contamination).

7. *Id.* at 1130 (discussing basic factual background of case concerning pollution into Pennsylvania waterway); T.S. ELIOT, *The Dry Salvages*, in *THE COMPLETE POEMS AND PLAYS* 130, 130 (1971) (describing river as "strong brown god").

8. *EQT*, 181 A.3d at 1131-32 (explaining DEP's soil-to-water and water-to-water theories of violations of Clean Streams Law).

9. *See id.* at 1132 (explaining DEP's continuing violation theory which permits charging of additional violations once contaminants enter new discrete water).

10. *See id.* at 1151 (Donohue, J., dissenting) (suggesting Clean Streams Law encourages polluters to limit flow of contaminants once contaminants enter water); Commonwealth of Pennsylvania, Department of Environmental Protection's Reply Brief at 4, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (arguing Clean Streams Law was intended to punish entity's failure to take remedial steps).

11. *See* Brief for Appellee Eq't Production Company at 33, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (discussing difficulty in stopping passive flow of contaminants once polluters release them into turbulent waters).

12. *EQT*, 181 A.3d at 1130-31 (stating litigation was result of EQT's declaratory judgment proceeding and EQT's concern for "unending civil liability").

13. *Id.* at 1149 (stating majority's holding in case).

duct.¹⁴ This decision will provide manufacturing and drilling entities more predictability in their potential pollution liability and will leave the DEP sufficient room to maneuver when drawing funds for remediation.¹⁵ This Note discusses the Pennsylvania Supreme Court's ruling in *EQT* in the context of the DEP's prior enforcement of the Clean Streams Law, as well as previous judicial review of the DEP's interpretation of that law.¹⁶ Additionally, this Note will argue Section 301 of the Clean Streams Law, when contextualized with other statutes that explicitly remediate pollution, only contemplates initial contaminant releases and not subsequent contaminant movements.¹⁷ Part II provides detailed factual background of *EQT* and the arguments advanced by both parties.¹⁸ Part III of this Note describes the general practices of the DEP regarding pollution control and the acceptance of continuing violation theories in other jurisdictions.¹⁹ Part IV outlines the Pennsylvania Supreme Court's reasoning in overruling the DEP's reading and analyzes the decision through statutory purpose and interpretation.²⁰ Finally, Part V predicts the impact *EQT* will have over the DEP's ability to remediate pollution and the future validity of other continuing violation theories.²¹

II. FACTS

The departure from the DEP's established Clean Streams Law jurisprudence has its genesis in an otherwise unremarkable contaminant spill.²² In 2012, *EQT*, a fracking company, operated a drilling

14. See 35 PA. CONS. STAT. § 6026.102(3) (1989) (decreeing predictable and uniform cleanup standards are necessary in eliminating environmental hazards).

15. See *EQT*, 181 A.3d at 1148 (ruling in favor of *EQT* by rejecting continuing violation charges for passive migration of contaminants while allowing DEP to raise remediation funds through other Pennsylvania statutes).

16. For further discussion of DEP's prior enforcement of Clean Streams Law in Pennsylvania and its treatment of this enforcement by Pennsylvania courts, see *infra* notes 50-74 and accompanying text.

17. For a further critique of the majority's opinion and the dissent, see *infra* notes 125-162 and accompanying text.

18. For a further discussion of the factual background of the case and arguments advanced by both parties, see *infra* notes 22-49 and accompanying text.

19. For a further discussion of the DEP's prior enforcement of continuing violation theories and the state of continuing violation theories in other jurisdictions, see *infra* notes 50-102 and accompanying text.

20. For a further discussion of the narrative overview and reasoning of both majority and dissenting opinions along with a critical comparison between the two, see *infra* notes 103-162 and accompanying text.

21. For a discussion predicting the potential impact of *EQT* on both potential polluters and the DEP, see *infra* notes 163-183 and accompanying text.

22. See *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128, 1130 (Pa. 2018) (discussing leak from fracking impoundment which began litigation).

station in Tioga County, Pennsylvania.²³ Leaks from an impoundment containing fracking waste water resulted in pollution to the surrounding soil and waterways.²⁴ Anticipating enormous liability under the DEP's continuing violation reading of the Clean Streams Law, EQT filed for a declaratory judgment proceeding.²⁵ EQT expressed concern over the DEP's "continuing violation" theory, which would supposedly create liability as long as any contaminant remained in the environment.²⁶ According to EQT, this could lead to potentially unending liability.²⁷ EQT instead contended that Section 301 violations only occurred on days they initially polluted the water, and not on days when their contaminants existed in the water or passively entered new waters.²⁸

Shortly thereafter, the DEP filed a complaint against EQT with the Environmental Hearing Board, seeking \$4,532,296 in financial sanctions.²⁹ In justifying this sanction, the DEP largely relied on its

23. *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 153 A.3d 424, 426 (Pa. Commw. Ct. 2017) (explaining EQT's operations in Duncan Township). EQT Production Company is a large fracking company that operates numerous wells in Marcellus formations. See EQT Corp (EQT), REUTERS, (last visited Sept. 4, 2018), <https://www.reuters.com/finance/stocks/company-profile/EQT> (discussing operations of EQT Production Company). The Duncan Township operation at issue, which is located in Tioga County, is a Marcellus formation well. See generally *id.* (noting EQT's wells in Pennsylvania are primarily Marcellus formation wells); PROFILES OF PENNSYLVANIA 919 (David Garoogian ed., 4th ed. 2016) (providing profile of Duncan Township and noting location within Tioga County).

24. *EQT*, 181 A.3d at 1130 (discussing leaks in EQT's fracking equipment which led to litigation). The parties disputed the exact factual details which led to the case, but this was irrelevant to the court's inquiry. *Id.* at 1130 n.2. It was undisputed that EQT polluted industrial waste into waters of the Commonwealth. *Id.* Drillers create fracking waste water when the driller recaptures fracking fluid used to create fractures in shale. See generally Kristen Allen, Comment, *The Big Fracking Deal: Marcellus Shale—Pennsylvania's Untapped Resource*, 23 VILL. ENVTL. L.J. 51, 56-58 (2012) (describing fracking process).

25. *EQT*, 181 A.3d at 1130 (discussing EQT's lawsuit in attempt to avoid massive liability).

26. *Id.* at 1130-31 (explaining EQT's concerns over DEP's Clean Streams Law jurisprudence). EQT noted the difficulty of removing every single contaminant polluted from the waters and referenced the ability of modern technology to detect miniscule contaminant concentrations. *Id.* at 1143.

27. *Id.* (discussing EQT's fear of unlimited liability considering complete remediation of all contaminants would be nearly impossible and DEP would charge violations even for failure to remediate miniscule amounts of contaminants).

28. See *id.* (stating view that DEP's soil-to-water theory contradicted plain language of governing law, Clean Streams Law jurisprudence, and General Assembly's legislative intent).

29. See *id.* (explaining DEP's filing of civil penalty complaint against EQT for 2012 Duncan Township fracking pollution).

continuing violation theory of the Clean Streams Law.³⁰ In a motion opposing EQT's injunction for declaratory relief, the DEP affirmed its continuing violation theory by arguing subsequent violations occurred if contaminants passively traveled between every new discrete body of water (the "water-to-water" theory) and also by passively migrating from soil to water (the "soil-to-water" theory).³¹ EQT subsequently applied for summary relief and petitioned the court for two pronouncements.³² First, EQT asked the court to declare that violations occur only when a person or entity allows contaminants enter waters of the Commonwealth.³³ Second, EQT asserted the mere presence of contaminants in the waters of the Commonwealth does not constitute a violation of the Clean Streams Law.³⁴

When the DEP replied that EQT's requested pronouncements did not address the DEP's soil-to-water and water-to-water continuing violation theories, EQT refocused explicitly on the water-to-water theory.³⁵ EQT argued the water-to-water theory, if executed to the full extent, would lead to absurd consequences.³⁶ Specifically, EQT contended that, under the DEP's interpretation, one spill would lead to perpetual liability because it is practically impossible to remove every microscopic particle from the spill.³⁷ More broadly, an entity who polluted a lake or one long river with no tributaries would receive only one violation per day, whereas an entity who polluted a river with numerous tributaries would be liable for unlimited consequences.³⁸ Additionally, according to EQT, there was no neutral system to restrain these potentially unlimited

30. *EQT*, 181 A.3d at 1131 (discussing DEP's reasons for seeking damage amount).

31. *See id.* at 1131-32 (discussing DEP's two continuing violation theories).

32. *Id.* at 1132 (discussing EQT's attempt to resolve case).

33. *Id.* (discussing EQT's first argument on appeal).

34. *Id.* (discussing EQT's second argument on appeal).

35. *See EQT*, 181 A.3d at 1134 (discussing DEP's argument that EQT's did not address DEP's legal theories and EQT's subsequent refocusing of issues).

36. *See id.* at 1143 (stating EQT's concerns over DEP charging violations for passive conduct); Brief for Appellee Eqt Production Company at 31, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018), (No. 6 MAP 2017) (arguing DEP's interpretation of Clean Streams Law is "absurd").

37. *EQT* at 181 A.3d at 1131 (arguing liability under Clean Streams Law using DEP's reading would never end because removing all contaminants from environment is practically impossible).

38. *Id.* at 1142 (discussing difficulty of determining exactly where one water body ends and another begins); Brief for Appellee Eqt Production Company at 31, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (using examples of real-life tributaries to bolster argument regarding absurdity of DEP's interpretation).

sanctions the DEP levied — the DEP’s discretion was the only force placing a limit on the potentially boundless sanctions.³⁹ Finally, EQT advanced a unitary waters theory in the context of the Clean Streams Law, which, if adopted by the court, would treat all waters in the Commonwealth as “a collective group of waters” and effectively invalidate the DEP’s water-to-water theory.⁴⁰

For its part, the DEP insisted the continuing violation theory promoted one of the purposes of the Clean Streams Law — restoring polluted waters back to their natural state.⁴¹ The water-to-water continuing violation theory would thus encourage entities to rapidly remediate their pollution after a spill.⁴² The DEP also asserted the plain language of “into” supported the theory, as the phrase “one stream falls or runs into another” contemplates passive movement.⁴³ Rebutting EQT’s fear of potentially unlimited liability, the DEP suggested the difficulty in linking downstream contaminants

39. See *EQT*, 181 A.3d at 1143 (arguing DEP holds polluters at mercy of DEP because DEP’s reading has no limiting principle); Brief for Appellee Eqt Production Company at 28-31, *EQT Prod. Co. v. Dep’t of Env’tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (expressing concerns over lack of control regarding DEP’s continuing violation theory).

40. *EQT* at 181 A.3d at 1142 (arguing Clean Streams Law refers to Commonwealth’s waters as one instead of discrete bodies of water). EQT argued the phrase “any of the waters” found in the Clean Streams Law implies the statute views the waters as a collective rather than a collection of discrete water bodies. *Id.*; but see *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 315 (Pa. 1973) (implying by court’s holding that Clean Streams Law views waters individually and not collectively).

41. *EQT*, 181 A.3d at 1141 (stating statutory purposes bolsters DEP’s reading of Clean Streams Law); see 35 PA. CONS. STAT. § 691.4(3) (1989) (stating remedial purpose of Clean Streams Law as preventing new pollution and reclaiming polluted waters to non-polluted state); Commonwealth of Pennsylvania, Department of Environmental Protection’s Reply Brief at 20-23, *EQT Prod. Co. v. Dep’t of Env’tl. Prot.*, 181 A.3d 1128 (Pa. 2018), (No. 6 MAP 2017) (invoking statutory purpose to support DEP’s reading).

42. See Commonwealth of Pennsylvania, Department of Environmental Protection’s Reply Brief at 22, *EQT Prod. Co. v. Dep’t of Env’tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (suggesting entities would be more likely to remediate their own pollution under DEP’s water-to-water continuing violation theory).

43. See *id.* at 5 (arguing plain language meaning of preposition “into” supports DEP’s continuing violation water-to-water theory). As noted by the DEP and the Pennsylvania Supreme Court, the dictionary definition of the word “into” displays the example of “one stream falls or runs into another.” *EQT*, 181 A.3d at 1145; *Definition of Into*, WEBSTER DICTIONARY, <http://www.webster-dictionary.net/definition/into> (last visited Sept. 22, 2018) (providing examples of word “into”). The version the parties and the court used was actually an unofficial online compilation of several old public domain dictionaries, but an inquiry into an official Webster’s Dictionary yields a similar result. See *About*, WEBSTER DICTIONARY, <http://www.webster-dictionary.net/about.htm>, (last visited Sept. 22, 2018) (describing website as combination of 1913 Webster’s Dictionary and work submitted by volunteers); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1184 (William Babcock Grove ed. et al. 2002) (providing example of “the river ran [into] the sea”).

to the upstream polluter acts as an adequate safeguard.⁴⁴ The DEP argued the Pennsylvania Supreme Court in *Harmar Coal*, which involved the active transfer of waters, rejected EQT's unitary waters theory.⁴⁵ The DEP further used *Harmar Coal's* rejection of the idea that "pollution occurs [only] when polluting substances are '[first] discharged into [any] waters of the Commonwealth'" to bolster the water-to-water theory.⁴⁶

In its review of the issue, the Commonwealth Court rejected the DEP's water-to-water theory, declaring that the General Assembly did not intend to create such a massive liability system based upon passive conduct.⁴⁷ The DEP proceeded to appeal the judgment to the Pennsylvania Supreme Court.⁴⁸ In a 5-2 decision, the Pennsylvania Supreme Court affirmed the Commonwealth Court's judgment.⁴⁹

III. BACKGROUND

In 1937, the Pennsylvania General Assembly enacted the Clean Streams Law.⁵⁰ The Clean Streams Law aims to protect the waters of Pennsylvania.⁵¹ Section 301 of the statute forbids an entity from placing, "continu[ing] to discharge[,] or permit[ing] to flow" an industrial waste "into" the waters of the Commonwealth.⁵² The

44. See *EQT*, 181 A.3d at 1142 (arguing safeguard exists because DEP has burden of proof to link contaminant to violator).

45. See *id.* at 1140 (suggesting *Harmar Coal* contemplated discrete waters rather than waters as one collective).

46. See *id.* (arguing Pennsylvania Supreme Court previously rejected EQT's criticism of water-to-water theory in *Harmar Coal*); *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 313 (Pa. 1973) (implying pollution may occur after contaminants have entered water).

47. *EQT*, 181 A.3d at 1135-36 (discussing Commonwealth Court's reasoning in siding with EQT's Clean Streams Law jurisprudence).

48. See *id.* at 1129 (stating DEP appealed Commonwealth Court's judgment).

49. *Id.* at 1149 (declaring affirmation of Commonwealth Court's holding). The Pennsylvania Supreme Court also ruled on certain *sua sponte* aspects of the Commonwealth Court's analysis. See *id.* at 1138-39; *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 153 A.3d 424, 433-34 (Pa. Commw. Ct. 2017) (defining term "discharge" based upon independent formulation not argued by parties). The Pennsylvania Supreme Court unanimously ruled to vacate those portions of the analysis. *EQT*, 181 A.3d at 1139 (holding Commonwealth Court overstepped its authority regarding *sua sponte* holdings by independently formulating interpretation of Clean Streams Law).

50. 1976 Pa. Laws 1099 (stating Clean Streams Law was approved June 22 1937).

51. See 35 PA. CONS. STAT. § 691.4 (1989) (stating purpose of Clean Streams Law).

52. See *id.* § 691.301 (discussing prohibitions against discharge of industrial wastes). Section 301 of the Clean Streams Law states in full, "No person or municipality shall place or permit to be placed, or discharged or permit to flow, or con-

Clean Streams Law grants the DEP authority to prevent the pollution of the Commonwealth's waters, which are broadly defined as "any and all rivers, streams, [and] creeks . . . within or on the boundaries of this Commonwealth."⁵³ Section 605 addresses the civil penalties for violations, with each discrete violation carrying a fine of up to \$10,000 per day.⁵⁴ The Clean Streams Law serves not only to prevent new pollution, but also to restore polluted waters to their natural, unpolluted state.⁵⁵ The Clean Streams Law is one of many pollution control statutes governing the Commonwealth and frequently acts in tandem with other environmental statutes to provide Pennsylvanians with their constitutional entitlement to a clean environment.⁵⁶

A. Testing the Contaminated Waters: Prior Use of Continuing Violations in Enforcing the Clean Streams Law

In order to maximize the civil penalties assessed against polluters, the DEP has broadly interpreted the Clean Streams Law.⁵⁷ Since the 1970s, the DEP charged violations when polluters initially discharged a contaminant into a stream and again when that contaminant traveled from one stream to another.⁵⁸ For example, if

tinue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act." *Id.*

53. *Id.* § 691.1 (defining term "waters of the Commonwealth.")

54. *Id.* § 691.605(a) (stating civil penalties assessed may be up to \$10,000 for each day of violation).

55. *Id.* § 691.4(3) (stating purpose of the Clean Streams Law); see 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, 156-58 (1999) (describing purpose of Clean Streams Law as elimination of current and future water pollution)

56. See PA. CONST. art. I, § 27 (stating Pennsylvania citizens have constitutional right to clean environment); Edward R. Paul & Michael J. Shepard, *Statutory Pollution Control in Pennsylvania*, 16 *VILL. L. REV.* 851, 890 (1971) (noting statutes other than Clean Streams Law DEP may use to remediate water pollution).

57. See Commonwealth of Pennsylvania, Department of Environmental Protection's Reply Brief at 2, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (stating DEP's undisputed Clean Streams Law interpretation since 1970s).

58. See *id.* (discussing DEP's prior implementation and position regarding continuing violation theory). See, e.g., Department's Response Memorandum of Law to Norfolk Southern's Motion and Supporting Memorandum of Law for Partial Summary Judgment to Strike the Department's Imposition of Pre-calculated Daily Civil Penalties for Prospective Violations of Law at 3-4, *Norfolk S. Corp. v. Dep't of Env'tl. Prot.* (Pa. Env'tl. Hearing Bd. Feb. 27, 2007) (No. 2006-229-CP-R) (alleging ongoing damages of \$46,420 per day using Clean Streams Law and \$3,475,000 using Solid Waste Management Act and Hazardous Sites Cleanup Act). *But see* Brief for Appellee Eqt Production Company at 47-48, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (describing DEP's water-to-water continuing violation reading as "novel").

contaminants from one spill entered two different streams, the DEP would charge two violations per day instead of one.⁵⁹ The DEP also enforced penalties against those who pollute soil with contaminants, which later passively migrate through the soil and into any waters of the Commonwealth.⁶⁰ The DEP used these interpretations, otherwise known as “continuing violation” theories, to levy large penalties for short but disastrous environmental accidents and grant them necessary funds for expensive clean-ups.⁶¹ For example, Norfolk Southern Railway Company polluted water with large amounts of sodium hydroxide in a one-day spill, and the stream eventually carried the contaminants into other waterways.⁶² Partially due to continuing violation readings, the DEP and Norfolk Southern reached a \$7,350,000 settlement agreement.⁶³

Until recently, neither the Commonwealth Court nor the Pennsylvania Supreme Court explicitly ruled on the validity of continuing violation readings, but both lent vague support.⁶⁴ In 1998’s *Westinghouse Electric Co. v. DEP*,⁶⁵ an elevator manufacturer leaked chemicals into the environment over a period of several years.⁶⁶

59. See Department of Environmental Protection’s Reply Brief at 1, *EQT Prod. Co. v. Dep’t of Env’t. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (explaining DEP’s Clean Streams Law liability theory).

60. See *EQT Prod. Co. v. Dep’t of Env’t. Prot.*, 181 A.3d 1128, 1131-32 (Pa. 2018) (describing DEP’s soil-to-water reading of Clean Streams Law).

61. See *id.* at 1141 (discussing how DEP’s interpretation of Clean Streams Law facilitates its enforcement).

62. 37 PA. BULL. 6340 (Dec. 1, 2007) (discussing facts surrounding 2006 McKean County train derailment incident); 38 PA. BULL. 939 (Feb. 16, 2008) (noting proposed settlement agreement was accepted by Norfolk Southern); Brief for Pennsylvania Fish and Boat Commission as Amicus Curiae in Support of Appellant at 7, *EQT Prod. Co. v. Dep’t of Env’t. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (discussing real-life application of continuing violation theory).

63. Brief for Pennsylvania Fish and Boat Commission as Amicus Curiae in Support of Appellant at 8, *EQT Prod. Co. v. Dep’t of Env’t. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (discussing sanction imposed partly using the continuing violation theory). The DEP also used the Solid Waste Management Act and the Hazardous Sites Cleanup Act, among other environmental statutes, to impose the fine. 37 PA. BULL. 6340 (Dec. 1 2007) (noting proposed settlement agreement with damages based upon Solid Waste Management Act and Hazardous Sites Cleanup Act in addition to Clean Streams Law); 38 PA. BULL. 939 (Feb. 16, 2008) (noting Norfolk Southern accepted proposed settlement agreement).

64. See, e.g., *Westinghouse Elec. Corp v. Pa. Dep’t of Env’t. Prot.*, 705 A.2d 1349, 1356 (Pa. Commw. Ct. 1998) (charging violations only in initial discharges and not mere existence of contaminants).

65. *Id.* at 1356 (holding sufficient evidence of link between entity and “illegal discharge” of contaminant into water must be present to impose sanctions under Clean Streams Law).

66. *Id.* at 1350-51 (discussing pollution caused by elevator manufacturing plant over period of seven years). The contaminants polluted were degreasers trichloroethylene and 1,1,1-trichloroethane. *Id.* at 1350. Exposure to these contaminants may lead to heart, liver, and kidney defects. *Id.*

The same type of chemicals were later found in over sixty nearby residential wells.⁶⁷ Despite this, the Commonwealth Court found the defendant polluter liable for only two discharges because there was insufficient evidence to link the chemicals found in all the wells to the initial discharges.⁶⁸ The court indicated the alleged polluter would be liable for this continuing violation, however, had the contaminants been sufficiently linked to the initial discharges.⁶⁹

The Pennsylvania Supreme Court also lent possible support for the continuing violation reading in *Commonwealth v. Harmar Coal Co.*⁷⁰ *Harmar Coal* involved a coal mine operator who wished to discharge contaminants from an adjacent abandoned mine into the Commonwealth's waters without first treating the discharges.⁷¹ The Commonwealth Court theorized, in part, that the water in the abandoned mine was not controlled by the Clean Streams Law because the polluted water had already existed in the environment.⁷² The Pennsylvania Supreme Court overturned the Commonwealth Court's theory that "pollution occurs [o]nly when polluting substances are 'first discharged into [a]ny 'waters of the Commonwealth.'"⁷³ The Supreme Court disclaimed the Commonwealth

67. *Id.* (discussing DEP's discovery of degreasers trichloroethylene and 1,1,1-trichloroethane in nearby water supply and nearby residential wells).

68. *See id.* at 1356 (holding defendant could not be held liable for presence of contaminants in all nearby wells because there was insufficient evidence linking existing pollution to Westinghouse manufacturing plant). Below the Commonwealth Court, the Environmental Hearing Board found the DEP failed to provide specific proof of alleged leaking outside of two releases. *Id.* at 1352.

69. *See Westinghouse*, 705 A.2d at 1356 (stating court would have calculated other wells into damages had there been sufficient link between pollution in nearby wells and defendant's initial discharges).

70. *See Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 315 (Pa. 1973) (suggesting support for continuing violation theory).

71. *Id.* at 311-12 (discussing facts of Pittsburgh Coal Company's application for mine drainage permit). *Harmar Coal* involved two similar Commonwealth Court cases consolidated into one for appeal to the Supreme Court. *See id.* (describing consolidation of Harmar Coal Company's and Pittsburgh Coal Company's review for permit). Regarding the continuing violation theory, the Pittsburgh Coal Company case is more applicable, as the Court's reasoning could be construed to favor a continuing violation theory of the Clean Streams Law. *See id.* at 315 (rejecting Commonwealth Court's rationale in granting Pittsburgh Coal Company mine drainage permit because pollution does not only occur on initial discharges).

72. *Id.* at 314 (discussing Commonwealth Court's reasoning in granting Pittsburgh Coal Company mine drainage permit). The Commonwealth Court also held the water transferred did not constitute an "industrial waste" under the Clean Streams Law because the waste pre-existed Pittsburgh Coal Company's mining operation. *Id.* The Pennsylvania Supreme Court similarly overturned this holding. *Id.* at 315.

73. *Id.* at 315 (stating reasoning for reversing Commonwealth Court's decision that granted Pittsburgh Mining Company mine drainage permit).

Court's reasoning based on sections of the Clean Streams Law involving active mine drainage, concluding it was "illogical to limit the meaning of 'discharge from the mine' to 'drainage discharged from the mine being worked.'"74

B. Continuing Violations in Other Jurisdictions

Although not all jurisdictions have uniform clean water legislation, each jurisdiction's clean water legislation generally contain similar verbiage.⁷⁵ Courts construe the federal counterpart to Pennsylvania's Clean Streams Law, the Clean Water Act (CWA), to disfavor a continuing violation theory.⁷⁶ The United States Supreme Court first addressed this issue in 2004 with *South Florida Water Management District v. Miccosukee Tribe of Indians*.⁷⁷ In *Miccosukee*, a governmental agency pumped contaminated water from a canal into a nearby reservoir.⁷⁸ The legal issue before the Court was whether this transfer constituted a "discharge of a pollutant" that would require a NPDES permit.⁷⁹ The Supreme Court concluded that further factual development was needed in order to resolve the question of whether the canal and reservoir were distinct bodies of water, and in doing so, analogized this dispute with a pot of soup.⁸⁰ Quoting the Second Circuit, Justice O'Connor noted that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or any-

74. *See id.* at 313, 315 (discussing Sections 307 and 315 of Clean Streams Law and rejecting Commonwealth Court's interpretation of Section 315).

75. *See, e.g.*, 33 U.S.C. § 1311(a) (2012) (prohibiting "discharge" of pollutants); 35 PA. CONS. STAT. § 691.301 (1989) (restricting "discharge" of industrial waste "into" Pennsylvania waters); CAL. HEALTH & SAFETY CODE § 25249.5 (1987) (prohibiting "discharge" of toxic chemicals "into" specified water or land).

76. *See* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 105 (2004) (ruling against continuing violation theory in one context); *Friends of Everglades v. S. Fla. Water Mgmt. Dist.* 570 F.3d 1210, 1228 (11th Cir. 2009) (concluding EPA's adoption of unitary waters theory is reasonable and permissible construction of Clean Water Act).

77. *Miccosukee*, 541 U.S. at 105-06 (addressing continuing violation theory).

78. *Id.* at 99-102 (describing water pumping procedure at issue).

79. *Id.* at 102-03 (outlining legal dispute in case and lower courts' ruling on matter). NPDES permits are required of entities who discharge contaminants to limit quantity of contaminants in the environment. *Id.* at 103

80. *Id.* at 110, 112 (discussing factual disputes and using soup analogy to elucidate CWA). The Supreme Court overruled the Eleventh Circuit's affirmation of summary judgment due to a factual dispute concerning the relationship between the reservoir and the canal. *Id.* at 110. The quantity of water that flowed between the two via groundwater was disputed. *Id.*

thing else to the pot.”⁸¹ Therefore, violations of the CWA only occur if the transfer is between “meaningfully distinct water bodies.”⁸² By requiring the transfer to occur between “meaningfully distinct water bodies,” the Supreme Court implicitly rejected a continuing violation theory because such a theory charges violations for transfers between water bodies that are not “meaningfully distinct.”⁸³

The *Miccossukee* Court failed to adopt or reject a unitary waters theory, which, under the CWA, would treat all of the waters in the United States as one body.⁸⁴ In the context of pollution, the unitary waters theory dictates that the transfer of one contaminant from one body of water into another, through active or passive means, does not constitute an additional violation because the contaminant already existed within the navigable waters of the United States.⁸⁵ Although the Supreme Court has not decided the issue, most circuit courts have rejected the unitary waters theory, even when the EPA has advanced it.⁸⁶ The First Circuit, for example,

81. *Id.* (quoting *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (discussing soup analogy to illustrate what is and is not *Miccossukee* Tribe’s argument).

82. *See Miccosukee*, 541 U.S. at 112 (remanding case to determine whether water bodies were “meaningfully distinct”); *see also* *L.A. Cty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 83 (2013) (stating Court in *Miccossukee* held transfers of water do not constitute violations of Clean Water Act if between “two parts of the same water body.”).

83. *See Miccosukee*, 541 U.S. at 112 (requiring transfer to be between “meaningfully distinct” water bodies for CWA violation); *EQT Prod. Co. v. Dep’t of Envtl. Prot.*, 181 A.3d 1128, 1132 (Pa. 2018) (stating Clean Streams Law violations occur when contaminants passively spread to water bodies). The Supreme Court suggested passive flow between two water bodies would render them not “meaningfully distinct.” *Miccossukee*, 541 U.S. at 110 (stating “significant mingling” of two waters could render them indistinct). Hence the DEP’s water-to-water theory could not comport with a “meaningfully distinct” requirement. *EQT*, 181 A.3d at 1132 (explaining DEP’s water-to-water theory as charging violations for passive migrations of contaminants in new water bodies).

84. *Miccossukee*, 541 U.S. at 109 (declining to resolve unitary waters theory because not all parties had addressed the theory before lower courts and in their briefs); *but see id.* at 112-13 (Scalia, J., concurring in part and dissenting in part) (suggesting unitary waters theory was briefed adequately to render judgment on it).

85. *See* James H. Andreasen, *Still Defining “Discharge of a Pollutant” After Thirty Years*, 24-SPG NAT. RESOURCES & ENV’T 52, 54 (2010) (explaining unitary waters theory).

86. *See, e.g.,* *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996) (rejecting unitary waters theory); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (holding transfer of water between water bodies constitutes “discharge”); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (stating unitary waters theory has “a low batting average” and has “struck out” when raised in other circuits). Courts grant deference to the EPA and other executive agencies regarding issues of statutory interpretation when a statute is ambiguous. *See Chevron, U.S.A.*,

held such a theory would lead to “irrational result[s]” that would defy Congressional intent by legalizing unpermitted pollution of pristine water bodies.⁸⁷ In *Friends of The Everglades v. South Florida Water Management District*, the Eleventh Circuit became the only circuit to adopt the unitary waters theory.⁸⁸ Finding the CWA ambiguous with the singular term “any navigable water” and possibly plural term “navigable waters,” the *Friends* court decided the unitary waters theory was a reasonable interpretation.⁸⁹

Regarding passive transfers, some federal district courts have validated soil-to-water CWA continuing violations when contaminants were polluted into sediment.⁹⁰ The Fourth Circuit charged continuing passive violations of the CWA in *Sasser v. EPA*.⁹¹ In *Sasser*, a landowner began unpermitted construction on wetlands.⁹² When the Army Corps of Engineers discovered the construction, the Corps ordered the landowner to stop construction to remediate his error.⁹³ The landowner apparently halted construction but refused to dismantle his progress on the project.⁹⁴ Finding continuing violations of the CWA, the Fourth circuit asserted that “[e]ach

Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837-38 (1984) (holding if Congress has not explicitly instructed agency on portion of statute agency administers then legal issue is whether agency’s interpretation is reasonable and permissible).

87. *Dubois*, 102 F.3d at 1297 (1st Cir. 1996) (rejecting unitary waters theory because it allows for transferring water between polluted water bodies and pristine water bodies).

88. *Friends*, 570 F.3d at 1228 (accepting EPA’s promulgation of unitary waters theory in regulation).

89. *Id.* at 1227 (finding unitary waters theory of Clean Water Act reasonable). Before the Eleventh Circuit in *Friends*, the EPA was the proponent of the unitary waters theory. *Friends*, 570 F.3d at 1213 (noting EPA supported unitary waters theory). Once the court found the statute ambiguous, the court gave *Chevron* deference to the EPA’s interpretation. *Id.* at 1227 (finding statute ambiguous regarding continuing violations for transfers between two water bodies). In finding the EPA’s interpretation to be reasonable, it was one of two reasonable interpretations of the Clean Water Act and therefore could not be considered contrary to the law. *See id.* at 1228 (using marble analogy to state EPA’s construction of Clean Streams Law is reasonable). *Compare* Commonwealth v. Harmar Coal Co., 306 A.2d 308, 315 (Pa. 1973) (charging additional violations of clean water legislation when entity pollutes pristine water with contaminated water already in environment).

90. *See, e.g.,* United States v. Alcoa, Inc., 98 F. Supp. 2d 1031, 1038-39 (N.D. Ind. 2000) (holding entity liable for continued violations of CWA when sediment was polluted).

91. *Sasser v. Administrator*, U.S. Env’tl. Prot. Agency, 990 F.2d 127, 129 (4th Cir. 1993) (charging continuing violations for passive conduct when landowner refuses to dismantle construction on wetlands).

92. *See id.* at 128 (describing Sasser’s construction on former rice fields).

93. *See id.* (describing Corps of Engineer’s discovery of Sasser’s construction and EPA’s subsequent involvement).

94. *See id.* (discussing Sasser’s refusal to comply with EPA remediation order).

day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.”⁹⁵

Outside of the federal government, one California appellate court has addressed continuing violations in *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.*⁹⁶ In *Consumer Advocacy Grp.*, a consumer group found contaminants in areas where Exxon Mobil had once operated gas stations.⁹⁷ The statute of limitations for a traditional action had expired because Exxon Mobil had not operated a gas station in the any of the polluted areas for at least four years.⁹⁸ This forced the consumer group to proceed upon a novel passive migration theory, specifically, the ongoing passive migration of the contaminants from the soil into the war constituted new violations.⁹⁹ The case involved the interpretation of a voter ballot initiative containing the terms “discharge” and “release.”¹⁰⁰ To determine the meaning of these terms, the court examined the dictionary definition of the words and explanatory material in the voter ballot pamphlet given to voters on Election Day.¹⁰¹ The court

95. *Id.* at 129 (holding CWA violations occur each day contaminants remain in waterway).

96. *Consumer Advocacy Grp. v. Exxon Mobil Corp.*, 128 Cal. Rptr. 2d 454, 456-57 (Cal. Ct. App. 2002) (addressing continuing violation theory stemming from contaminants’ passive migration).

97. *See id.* (stating Exxon once operated gas stations at polluted sites).

98. *See id.* at 456 (explaining Exxon’s gas operations in areas of issue).

99. *Id.* at 457 (explaining plaintiffs had to proceed on passive migration theory because statute of limitations prevented more conventional approach). The plaintiffs argued that the passive movement from soil into water or water into water constituted a new violation of California’s Clean Streams Law analog. *See id.* at 456-57 (arguing how passive migration of contaminants allegedly left by Exxon constituted additional violations of California’s clean water legislation). This would circumvent the statute of limitations. *Id.*

100. *Id.* at 458 (discussing voter ballot initiative’s wording). *See* CAL. HEALTH & SAFETY CODE § 25249.5 (1987) (containing words “discharge” and “release”). The *Consumer Advocacy Grp.* court referred to the voter ballot initiative as “Proposition 65.” *See Consumer Advocacy Grp.*, 128 Cal. Rptr. 2d at 456 (discussing electorate’s passage of Proposition 65).

101. *See Consumer Advocacy Grp.*, 128 Cal. Rptr. 2d at 458-59 (discussing dictionary definitions of words and material found in voter pamphlet). The court noted that frequent definitions of “discharge” and “release” include “setting free” and “free[ing] from anything that restrains or fastens.” *Id.* (using dictionaries to ascertain meaning of ambiguous wording of Proposition 65). The voter ballot initiative pamphlet stated the initiative would “stop [companies from] dumping extremely dangerous chemicals into your drinking water” and “appl[ies] only to businesses that know” they are polluting. *Id.* at 459 (emphasis removed) (using ballot arguments for Proposition 65 and rebuttals to arguments against Proposition 65 to determine meaning of Proposition 65).

used this analysis in holding the terms refer to “a movement of chemicals from a confined space into the land or the water.”¹⁰²

IV. THE PENNSYLVANIA SUPREME COURT INTRODUCES FAIRNESS AND PREDICTABILITY TO STREAM POLLUTION LIABILITY IN *EQT*

A. Narrative Analysis

The Pennsylvania Supreme Court began with the apparent ambiguity of the Clean Streams Law.¹⁰³ Noting the broad terms “discharge” and “permit to flow” potentially overlap and do not explicitly address passive movement, the court looked to judicial analysis of similar statutes in other jurisdictions.¹⁰⁴ In particular, the court examined the California Court of Appeal for the Second District’s reading in *Consumer Advocacy Group v. Exxon Mobil Corp.*, which held the phrases “discharge” and “release” imply a release from confinement.¹⁰⁵ The court found this to be the “natural reading” of the Clean Streams Law and concluded using the terms “discharge” and “release” to describe passive movement would be a “less natural” reading of the statute.¹⁰⁶

Following this analysis, the majority then described the dilemma it experienced while interpreting the ambiguous word “into.”¹⁰⁷ The Pennsylvania Supreme Court stated the word “into” could be logically read to contemplate active and passive movement, like one body of water naturally falling into another.¹⁰⁸ Disclaiming *EQT*’s suggestion, the court reasoned the Clean Streams Law did not imply a unitary waters theory by using the phrase “any waters of the Commonwealth” instead of “any water,” as the phrase

102. *Id.* at 463 (holding voter ballot initiative applies to active not passive discharges); *see also* N.J. Dep’t of Env’t. Prot. v. Dimant, 51 A.3d 816, 831-32 (N.J. 2012) (holding term “discharge” when referring to damages requires nexus between contaminant’s existence in environment and polluter); *contra* Power Test Realty Co. Ltd. Partnership v. Coit, 134 A.3d 1213, 1221 (R.I. 2016) (holding term “discharge” may include passive leaching of contaminant).

103. *EQT v. Dep’t of Env’t. Prot.*, 181 A.3d 1128, 1144 (Pa. 2018) (stating Clean Streams Law is ambiguous regarding “ongoing migration of previously-released contaminants among the waters of the Commonwealth and their many parts.”).

104. *Id.* (noting broad terms in Clean Streams Law provide little judicial guidance in interpretation).

105. *See id.* (noting reading of “discharge” and “release” in *Consumer Advocacy Grp.*).

106. *Id.* (describing reading of words “release” and “discharge” found in *Consumer Advocacy Grp.* more “natural” than DEP’s interpretation).

107. *Id.* at 1145 (describing ambiguity surrounding word “into” in context of Clean Streams Law).

108. *See EQT*, 181 A.3d at 1145 (stating word “into” may contemplate passive movement).

“any waters” was later defined in another section of the statute to encompass individual waters.¹⁰⁹ The court also noted the plain meaning of “into” does not necessarily refer specifically to direct or indirect release into water.¹¹⁰ This analysis led the court to hold the plain reading of the statute did not completely rebut the DEP’s water-to-water reading.¹¹¹

This left the court with the challenging task of discerning the General Assembly’s intent regarding the meaning of the ambiguous phrases.¹¹² Relying on its prior finding that the California appellate court’s reading of a similar statute constituted the “most natural reading,” the Pennsylvania Supreme Court held the Clean Streams Law only applied to initial discharges.¹¹³ The court concluded the General Assembly would have explicitly codified the water-to-water theory if it had intended incorporate this strict liability system into the Clean Streams Law.¹¹⁴ Specifically, the General Assembly could have easily accomplished this by forbidding the movement of contaminants “into or among” the waters of the Commonwealth rather than only the movement of contaminants “into” the waters of the Commonwealth.¹¹⁵ While acknowledging the Clean Stream Law’s purpose is to promote “the constitutional entitlement of the citizenry to a clean environment,” the court could not justify enforcing the potent water-to-water theory on mere inferences.¹¹⁶

After examining the Pennsylvania Supreme Court’s prior ruling in *Harmar Coal*, the court stated the case was inapplicable to passive contaminant movement.¹¹⁷ Although the opinion contained language that may have supported the DEP’s continuing violation interpretation, the *Harmar Coal* court considered active

109. See 35 PA. CONS. STAT. § 691.1 (1989) (defining term “waters of the Commonwealth” to contemplate individual waters); *EQT*, 181 A.3d at 1146 (disagreeing with *EQT*’s argument that all waters in Commonwealth are one body).

110. See *EQT*, 181 A.3d at 1146 (stating word “into” can be “read to carry passive connotations.”).

111. *Id.* (rejecting *EQT*’s argument that plain meaning of statute fully supports its position).

112. See *id.* (stating General Assembly used “broad terms and phrases” when it prohibited release of industrial waste into Pennsylvania waters”).

113. *Id.* at 1146 (holding Clean Streams Law only applies in initial discharges).

114. See *id.* at 1147 (dismissing water-to-water theory of Clean Streams Law).

115. *EQT*, 181 A.3d at 1147 (stating how General Assembly could have crafted Clean Streams Law with water-to-water continuing violation system).

116. See *id.* (acknowledging importance of remediation and Clean Streams Law despite holding).

117. *Id.* at 1148 (stating *Harmar Coal* was not controlling in present case).

conduct, as opposed to passive conduct.¹¹⁸ Reiterating the decision's focus on Section 301 of the Clean Streams Law, the court stated the decision would not affect other efficacious environmental remediation measures.¹¹⁹ Moreover, the court declined to evaluate the soil-to-water continuing violation theory because it was not argued sufficiently before them.¹²⁰

In a dissenting opinion, Justice Donohue disagreed that the *Consumer Advocacy Grp.* court's interpretation was the most natural reading of the Pennsylvania Clean Streams Law.¹²¹ Justice Donohue noted the *Consumer Advocacy Grp.* court's interpretation was based on voter information pamphlets specific to that California initiative, as opposed to the language of a relevant statute.¹²² Furthermore, Justice Donohue suggested that even if the *Consumer Advocacy Grp.* initiative had a similar origin, the *Consumer Advocacy Grp.* reading conflicted with the passive "continu[ing] . . . to permit to flow" language within the Clean Streams Law.¹²³ Justice Donohue ultimately concluded the "common and approved usage of the [relevant] words" in the Clean Streams Law suggests the law intended to protect all waters of the Commonwealth and the water-to-water theory was, therefore, a permissible reading.¹²⁴

118. *See id.* (noting differences between *Harmar Coal* and present case). The court noted that *Harmar Coal* considered a permit application for the pumping of mine drainage from contained coal mine bases into surface waters, whereas *EQT* dealt with "instances of contaminants moving from uncontained parts of waters into other parts of waters." *Id.*

119. *See id.* (describing other avenues of remediation available to DEP); Paul & Shepard, *supra* note 56, at 890 (noting around time of environmental statute proliferation that DEP may use statutes other than Clean Streams Law to remediate water pollution). *See also* PA. CONST. art. I, § 27 (stating Pennsylvania citizens have constitutional right to clean environment).

120. *EQT*, 181 A.3d at 1149 (declining to address soil-to-water theory). The court noted the soil-to-water theory would be considered in the Commonwealth Court's forthcoming review of the EHB's penalty determination. *Id.*

121. *Id.* at 1151 (Donohue, J., dissenting) (disagreeing with majority's use of *Consumer Advocacy Group* in their analysis).

122. *See id.* (Donohue, J., dissenting) (describing differences between Pennsylvania Clean Streams Law and California voter ballot initiative).

123. *Id.* at 1152 (Donohue, J., dissenting) (stating conflict between majority's reading and phrase "continu[ing] . . . to permit to flow" found in Pennsylvania Clean Streams Law).

124. *See id.* at 1152-53 (Donohue, J., dissenting) (discussing language of Clean Streams Law and conclusion drawn from such language). Justice Donohue also stated the court failed to acknowledge a 2016 Rhode Island case which treated *Consumer Advocacy Group* unfavorably. *Id.* at 1151 n.3.

B. Critical Analysis: The Pennsylvania Supreme Court Introduces Fairness and Predictability in *EQT*

By refusing to infer a massive strict liability system from vague statutory text, the majority rescued potential polluters from a regulatory Sword of Damocles.¹²⁵ The dissent read the “continu[ing] . . . to permit to flow” language of the Clean Streams Law narrowly without acknowledging an alternative and more active connotation of the phrase.¹²⁶ Although the “continu[ing] . . . to permit to flow” language may be read as permitting contaminants to flow freely through the Commonwealth’s waters, the phrase could also contemplate a refusal to take rudimentary remedial steps.¹²⁷ Instead of construing the phrase as permitting contaminants to flow outside of the entity’s effective control, the “continu[ing] . . . to permit to flow” language may be read as permitting a leak from a place of containment to continue to flow into the environment.¹²⁸ Such an interpretation would be consistent with the other more active phrases of the Clean Streams Law and favored by traditional principles of statutory interpretation.¹²⁹

Notably, Justice Donohue’s dissent did catch errors made in the majority’s reasoning.¹³⁰ In particular, the almost bare reliance on the *Consumer Advocacy Grp.* decision in determining the “most natural” reading of the statute is questionable, considering the California appellate court undertook an analysis unique to the Califor-

125. *See EQT*, 181 A.3d at 1147 (stating General Assembly would have made massive liability system in Clean Streams Law more explicit if it intended to create such system).

126. *See id.* at 1152 (Donohue, J., dissenting) (stating “continu[ing] . . . to permit to flow” language contemplates passive conduct and conflicts with majority’s analysis).

127. *Id.* at 1150-51 (Donohue, J., dissenting) (disagreeing that ambiguity remains over language in Clean Streams Law).

128. *Id.* at 1145 (holding natural definition of term “release” contemplates initial release of contaminants and not later passive migration).

129. *See id.* at 1146 (finding Clean Streams Law to be ambiguous). *See also* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 110 (2004) (using soup analogy to demonstrate relevant matter at issue). *See generally* Yates v. United States, 135 S.Ct. 1074, 1085 (2015) (describing statutory interpretation principle *noscitur a sociis* as “a word is known by the company it keeps”). The Supreme Court noted the principle “*noscitur a sociis*” is to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the [relevant law].” *Id.* (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)).

130. *EQT*, 181 A.3d at 1151 (Donohue, J., dissenting) (stating that majority’s bare reliance on *Consumer Advocacy Group* in determining “most natural” reading of statute was misplaced).

nia voter ballot initiative.¹³¹ In determining the phrases “discharge” and “release” concerned the movement from a place of confinement to no confinement, the *Consumer Advocacy Grp.* court was largely guided by voter pamphlets given to voters at polling locations.¹³² Unlike the *EQT* court, the *Consumer Advocacy Grp.* court did not rest their interpretation simply on it being the “most natural” reading and did not refer to the public interest group’s reading as “less natural.”¹³³ If the *EQT* majority followed a similar analysis by analyzing the legislative history and statutory purpose of the Clean Streams Law, then reliance on *Consumer Advocacy Grp.* would be more appropriate.¹³⁴ The majority’s decision that the *Consumer Advocacy Grp.* reading was “most natural” instead rested on a discussion of unsupported, broad perceptions of the word “release.”¹³⁵ Such analysis does not withstand Justice Donohue’s criticism.¹³⁶

In order to explain precisely why the *Consumer Advocacy Grp.* court’s interpretation of the California voter ballot initiative is also the “most natural” interpretation of the Pennsylvania Clean Streams Law, one must examine areas not explicitly discussed in the majority opinion.¹³⁷ The most obvious analysis to undergo is analogous to the path the *Consumer Advocacy Grp.* court travelled — examining statutory purpose and history.¹³⁸ As the DEP noted in argument, the Clean Streams Law’s general purpose is not only to prevent additional pollution, but also to return polluted streams to their natural state.¹³⁹ Although this may improve Justice Dono-

131. *Id.* (Donohue, J., dissenting) (describing *Consumer Advocacy Group* court’s analysis regarding voter ballot initiative).

132. *See id.* (Donohue, J., dissenting) (summarizing *Consumer Advocacy Grp.* court’s reliance on voter pamphlets in determining meaning of ambiguous phrases in California voter ballot initiative); *supra* notes 96-102 and accompanying text (discussing *Consumer Advocacy Grp.* court’s analysis).

133. *EQT*, 181 A.3d at 1151 (Donohue, J., dissenting) (describing differences between *Consumer Advocacy Grp.* decision and present case).

134. *See id.* at 1146-48 (failing to analyze statutory history and barely examining statutory purpose).

135. *See id.* at 1145 (discussing how one would perceive stop of “release” of contaminant if initial discharge was stopped).

136. *See id.* at 1152 (Donohue, J., dissenting) (noting lack of term “initial” and “release” in Clean Streams Law).

137. *See id.* at 1145 (failing to legally analyze why *Consumer Advocacy Grp.* court’s reading is most “natural” reading available).

138. *Consumer Advocacy Grp. v. Exxon Mobil Corp.*, 128 Cal.Rptr.2d 454, 459 (Cal. Ct. App. 2002) (determining purpose of California voter ballot initiative by examining voter pamphlets given to voters at polling places).

139. *See Commonwealth of Pennsylvania, Department of Environmental Protection’s Reply Brief* at 19-23, *EQT Prod. Co. v. Dep’t of Env’t. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (arguing statutory purpose of remediating polluted streams furthers water-to-water continuing violation reading); Dernbach, *supra*

hue's position, it alone does not suggest such a powerful strict liability system.¹⁴⁰ Examination of the legislative history of Section 605, the civil penalties provision, leads to the opposite conclusion because "continued violation[s]" were once explicitly discussed in Section 605 prior to a 1976 amendment.¹⁴¹ This suggests the General Assembly would have kept an extensive continuing violation theory in Section 605 had it intended for such a reading.¹⁴²

Accounting for this conflict between statutory purpose and history regarding the Pennsylvania Clean Streams Law, the court's reliance on *Consumer Advocacy Grp.* court was improper, and a different approach must be taken.¹⁴³ A second area to examine extensively is the canon of statutory interpretation known as *in pari materia*, which examines the meaning of an ambiguous statute when read in light of statutes concerning a similar issue.¹⁴⁴ The theory that Section 301 of the Clean Streams Law explicitly concerns initial discharges and implicitly suggests remediation falters when reading other statutes that explicitly discuss stream pollution remediation.¹⁴⁵ In particular, the Land Recycling and Environmental Remediation Standards Act ("Act 2") explicitly addresses the remedial standards

note 55, at 156-58 (describing purpose of Clean Streams Law as elimination of all water pollution).

140. See *EQT*, 181 A.3d at 1147 (acknowledging importance of clean environment while refusing to enforce interpretation of Clean Streams Law not explicitly stated in statutory text).

141. See H. Leg. Journal, at 2751, Section 605 (July 15, 1970) (stating civil penalties may not exceed \$10,000 plus \$500 for "each day of continued violation"); 1976 Pa. Laws 1099 (stating amendments which remove "continued violation" language and bring Section 605 to modern state); Brief for Appellee Eqt Production Company at 19-21, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (arguing legislative history of Section 605 indicates DEP's continuing violation theory is not intended by General Assembly).

142. Brief for Appellee Eqt Production Company at 19-20, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (stating DEP's interpretation is incorrect because General Assembly has demonstrated ability to explicitly add continuing violations in Clean Streams Law but chose to remove continuing violations in 1976).

143. *Consumer Advocacy Group*, 128 Cal.Rptr.2d at 458-61 (using voter ballot pamphlets to determine purpose of voter ballot initiative and meaning of ambiguous words "discharge" and "release").

144. See *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (explaining *in pari materia* as construing several statutes together to determine meaning of ambiguous statute); Brief for Appellee Eqt Production Company at 47-48, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (advancing similar argument using *in pari materia* to argue Section 301 does not contemplate remediation).

145. See, e.g., 35 PA. CONS. STAT. § 6026.102(4) (1989) (stating policy of Act 2 as remediation of environmental pollution).

for pollution clean-up.¹⁴⁶ As the majority emphasized, *EQT* had no bearing on the potency of the DEP's ability to levy sanctions under specific remedial statutes.¹⁴⁷ It could then be established that Act 2's ambit is remediation and Section 301 of the Clean Streams Law only concerns initial discharges.¹⁴⁸

Although the dissent did not directly address this, Justice Donohue appeared to suggest that the Clean Streams Law contemplated a different type of remediation than the general remediation standard addressed by Act 2.¹⁴⁹ Justice Donohue explained the statute appeared to demand polluters halt their contaminants' flow once pollution occurred.¹⁵⁰ Yet this reading presupposes a potential polluter could suspend the natural passive flow of contaminants — a feat which would require the damming of rivers and streams.¹⁵¹ If non-governmental entities could practically dam polluted rivers, erecting a quick but unpermitted damming construction, as demonstrated in *Sasser*, would ironically lead to a violation of federal law.¹⁵² This logically leaves hunting each molecular contaminant flowing throughout the many waters of Pennsylvania as the only legal option available to polluters.¹⁵³ Even if entities launched this microscopic and preposterous hot pursuit, the Gen-

146. *See id.* § 6026.301(a) (discussing standards established by Act 2); *id.* § 6026.106(a) (stating Act 2 remediation standards must be met under Clean Streams Law).

147. *See EQT*, 181 A.3d at 1148 (describing other avenues of remediation available to DEP).

148. *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128, 1148 (Pa. 2018) (arguing both Clean Streams Law and Act 2 as remediation statutes defeats legislative intent of General Assembly).

149. *See id.* at 1151 (Donohue, J., dissenting) (indicating Clean Streams Law encourages polluters to limit flow of contaminants once contaminants enter water); Commonwealth of Pennsylvania, Department of Environmental Protection's Reply Brief at 4, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (arguing Clean Streams Law was partially intended to punish entities who failed to remediate existing pollution).

150. *See id.* at 1152 (Donohue, J., dissenting) (stating "continu[ing] . . . to permit to flow" language can only be read to prohibit flow of contaminants to any waters of Commonwealth).

151. *See* Brief for Appellee Eqt Production Company at 33, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (stating technical infeasibility of damming waterways in order to halt passive migration of contaminants).

152. *See Sasser v. Administrator, U.S. Env'tl. Prot. Agency*, 990 F.2d 127, 129 (4th Cir. 1993) (holding violations of CWA occur when unpermitted construction is erected in body of water).

153. *See* Brief for Appellee Eqt Production Company at 33, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (stating technical infeasibility of damming waterways in order to halt passive migration of contaminants).

eral Assembly would not reasonably prescribe these vain indefatigable efforts.¹⁵⁴ The cost of tracking down every contaminant among the numerous tributaries the water-to-water theory contemplates would be enormous and far outweigh the damage the diluted and microscopic contaminants incur.¹⁵⁵

Extending from this reasoning, one could borrow from tort doctrine, where environmental law was once mainly practiced, to further explain why the majority's interpretation is the "most natural."¹⁵⁶ Using elements of a tort negligence claim to explain the majority's decision, polluters whose contaminants passively migrate far downstream would probably not owe a legal duty to those downstream entities.¹⁵⁷ This is because, as previously mentioned, the expense of remediating this far-traveled pollution would be colossal compared to the injury that pollution incurred.¹⁵⁸ Similarly, there might not be sufficient proximate cause for a negligence action because the downstream contaminants may be too attenuated from their source.¹⁵⁹ A tort negligence action based upon a water-to-water theory would therefore fail.¹⁶⁰ Given the majority's explicit refusal to create strict liability out of the situation, downstream plaintiffs would be unable to recover damages.¹⁶¹ This reasoning,

154. See *EQT*, 181 A.3d at 1147 (stating General Assembly would have explicitly codified massive strict liability system if it intended to create one).

155. See *id.* at 1143 (noting complexity of water systems).

156. See Latham, *supra* note 2, at 750 (discussing how tort law had been traditionally used to remedy environmental harms before statutory pollution control).

157. See *id.* at 753 (discussing classic elements necessary to prove negligence in environmental context).

158. See *id.* at 752 (stating how risk of harm to another party must be found unreasonable). See generally *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (discussing calculus of negligence used in determining existence of legal duty). But see *United States v. Alcoa, Inc.*, 98 F. Supp. 2d 1031, 1038 (N.D. Ind. 2000) (making similar great cost of remediation versus violation argument unsuccessfully before federal district court).

159. See Latham, *supra* note 2, at 750 (noting environmental tort actions fail when cause is highly attenuated from plaintiff). The *EQT* court established that factual or "but-for" cause existed in the case. See *EQT*, 181 A.3d at 1146 (using strict but-for test to determine that *EQT*'s conduct led to downstream pollution at issue in case). See generally *Ryan v. N.Y. Cent. R.R. Co.*, 35 N.Y. 210, 211-13 (1866) (explaining legal principle severing tortfeasor from liability from remote harm caused by tortfeasor's negligence in context of house fire chain).

160. See Latham, *supra* note 2, at 752 (stating court must find risk of harm to another party unreasonable for duty of care to arise).

161. See *id.* at 753 (discussing elements necessary to prove negligence in environmental context). But see *Alcoa*, 98 F. Supp. 2d at 1039 (ruling against party who argued passive conduct in soil-to-water context should not lead to continuing liability because remediation expenses would greatly outweigh direct costs of violation); Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1444-59 (2005) (discussing limitations of tort doctrine in rectifying and deterring environmental injuries).

which likely affected the majority's general perception of the Clean Streams Law, is a potential explanation of why the majority chose the *Consumer Advocacy Grp.* court's interpretation as the "most natural" reading of the Clean Streams Law.¹⁶²

V. THE IMPACT OF *EQT v. DEP* ON ENVIRONMENTAL REMEDIATION AND CLEAN STREAMS LAW JURISPRUDENCE

Perceived fallout arising from *EQT v. DEP* mainly concerns the DEP's ability to levy penalties against entities who pollute the Commonwealth's waters.¹⁶³ Some who support the DEP's interpretation of the Clean Streams Law expressed the fear that, should *EQT*'s argument succeed, the DEP could only punish violators of the Clean Streams Law \$10,000 for disastrous one-day spills.¹⁶⁴ Under this prediction, *EQT v. DEP* would lead to a significantly underfunded DEP, unable to remediate stream pollution.¹⁶⁵ This belief is correct in the sense that the DEP would only be able to use Section 301 of the Clean Streams Law to fine violators \$10,000.¹⁶⁶ Fortunately, the DEP can also use alternative statutes to impose sanctions against those who engage in sudden and potent pollution.¹⁶⁷ For example, the one-day spill that led to a \$7,350,000 settlement agreement with Norfolk Southern used not only the Clean Streams Law, but also the Solid Waste Management Act and the

162. See *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128, 1145-46 (Pa. 2018) (finding *Consumer Advocacy Grp.* court's interpretation of "release" in environmental context to be natural based on general perceptions of word).

163. See, e.g., Brief for Pennsylvania Fish and Boat Commission as Amicus Curiae in Support of Appellant at 7, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (discussing how using *EQT*'s reading of Clean Streams Law would hamper DEP's ability to levy sanctions against polluters).

164. See *id.* (stating one-day polluters cannot be fined more than \$10,000 using *EQT*'s reading); David E. Hess, *Will Gas Drilling Company Overturn the Way DEP Has Calculated Penalties for Nearly 40 Years? We'll See*, PA ENVTL. DIGEST BLOG (May 12, 2017, 6:13 AM), <http://paenvironmentdaily.blogspot.com/2017/05/will-drilling-company-overturn-way-dep.html> (expressing concern regarding raising remediation costs without DEP's water-to-water reading).

165. See Brief for Pennsylvania Fish and Boat Commission as Amicus Curiae in Support of Appellant at 7, *EQT Prod. Co. v. Dep't of Env'tl. Prot.*, 181 A.3d 1128 (Pa. 2018) (No. 6 MAP 2017) (using 2006 Norfolk Southern disaster as example).

166. See *id.* (expressing concern over *EQT*'s interpretation of Clean Streams Law regarding raising remedial funds).

167. See, e.g., Department's Response Memorandum of Law to Norfolk Southern's Motion and Supporting Memorandum of Law for Partial Summary Judgment to Strike the Department's Imposition of Pre-calculated Daily Civil Penalties for Prospective Violations of Law at 3-4, *Norfolk S. Corp. v. Dep't of Env'tl. Prot.* (Pa. Env'tl. Hearing Bd. Feb. 27, 2007) (No. 2006-229-CP-R) (alleging ongoing damages of \$46,420 per day using Clean Streams Law and \$3,475,000 using Solid Waste Management Act and Hazardous Sites Cleanup Act).

Hazardous Sites Cleanup Act to impose fines.¹⁶⁸ The DEP additionally exercised an informal cap on civil penalty claims for imposing Section 301 violations once Act 2 remediation standards had been met, so the realistic impact of *EQT v. DEP* regarding remediation funds may be minimal.¹⁶⁹

EQT v. DEP may also affect future arguments concerning the soil-to-water theory promoted by the DEP but not currently addressed by the Pennsylvania Supreme Court.¹⁷⁰ The soil-to-water theory would charge additional violations every time a contaminant passively entered the water from polluted soil and, using a reasonableness tort doctrine analysis, may fare better than the water-to-water theory.¹⁷¹ It would be more reasonable, theoretically, to expect polluters to remove slow moving contaminants in soil than from quickly moving contaminants found in various turbulent rivers and tributaries.¹⁷² Unfortunately for this theory's proponents, the court's holding effectively spells doom for such an interpretation.¹⁷³ The *Consumer Advocacy Grp.* case the majority praised as finding the "most natural" interpretation of clean water legislation specifically involved the passive migration of contaminants through the soil.¹⁷⁴ While the court fell short of adopting *Consumer Advocacy Grp.*'s reasoning as law, soil-to-water proponents still must comport their theory with the court's definition of release as movement

168. *See id.* (using Solid Waste Management Act and Hazardous Sites Cleanup Act in attempt to impose multi-million-dollar liability). The DEP justified its sanctions under various laws other than the Clean Streams Law, including the Solid Waste Management Act and Hazardous Sites Cleanup Act. *Id.*; 37 PA. BULL. 6340 (Dec. 1, 2007) (alleging damages based upon Solid Waste Management Act and Hazardous Sites Cleanup Act in addition to Clean Streams Law); 38 PA. BULL. 939 (Feb. 16, 2008) (noting proposed settlement agreement was accepted by Norfolk Southern). *See* Paul & Shepard, *supra* note 56, at 890 (stating several other statutes that may be used to penalize water polluters).

169. *EQT*, 181 A.3d at 1147 n.21 (discussing DEP's informal practice which limited sanctions once Act 2 standards were met).

170. *See id.* at 1149 (declining to address soil-to-water theory because issue not fully argued before court).

171. *See* United States v. Alcoa, Inc., 98 F. Supp. 2d 1031, 1039 (N.D. Ind. 2000) (holding entity liable using soil-to-water continuing violation theory similar to one argued by DEP).

172. *See, e.g.,* Consumer Advocacy Grp. v. Exxon Mobil Corp., 128 Cal. Rptr. 2d 454, 456-57 (Cal. Ct. App. 2002) (noting contaminants left by Exxon remained in soil for at least four years).

173. *See EQT*, 181 A.3d at 1144 (finding release as movement from confinement to no confinement as natural reading of Clean Streams Law). *Contra EQT*, 181 A.3d at 1149 (stating nothing in majority's opinion should act as disapproval of soil-to-water theory).

174. *Consumer Advocacy Grp.*, 128 Cal. Rptr. 2d at 456-57 (discussing Exxon's alleged pollution via passive movement of particles through soil).

from a place of confinement to one of no confinement.¹⁷⁵ Proponents might suggest the soil is a place of confinement, but this argument is tenuous — contaminants in soil are not confined, they simply move slowly.¹⁷⁶ Under this precedent, a soil-to-water theory is unlikely to succeed.¹⁷⁷

Defenders of the DEP's previous practice may find consolation in the court's unceremonious but apparent rejection of the unitary waters theory.¹⁷⁸ While the court did not explicitly name the unitary waters theory, the court rejected EQT's argument that the Clean Streams Law views all of the waters in the Commonwealth as one.¹⁷⁹ The court also failed to overturn *Harmar Coal*, which directly conflicts with the unitary waters theory by forbidding the unpermitted transfer of polluted water from one polluted source to a pristine water body.¹⁸⁰ Although the court did not charge additional violations of the Clean Streams Law when contaminants entered new bodies of water, they did this in a way which did not support the unitary waters theory.¹⁸¹ The court instead focused on the release of contaminants rather than the waters themselves, avoiding what the First Circuit called an "irrational result."¹⁸² The Pennsylvania Supreme Court's decision will provide clarity to both

175. *EQT*, 181 A.3d at 1146 (holding Clean Streams Law only concerns initial releases).

176. See, e.g., *Consumer Advocacy Grp.*, 128 Cal. Rptr. 2d at 457 (describing contaminants found in soil as "passive[ly] migrat[ing]").

177. *EQT*, 181 A.3d at 1146 (emphasizing Clean Streams Law applies to initial releases).

178. See *id.* (disagreeing with EQT's argument regarding all waters in Commonwealth as one).

179. *Id.* at 1145-46 (finding waters of the Commonwealth a defined term and rejecting EQT's argument that Clean Streams Law treats all waters in Commonwealth as one).

180. See *id.* at 1148 (failing to overturn *Harmar Coal*); *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 315 (Pa. 1973) (charging additional violations of clean water legislation when entity pollutes pristine water with contaminated water already in environment). The *EQT* court indicated *Harmar Coal* was only inapposite and not overturned. See *EQT*, 181 A.3d at 1148 (validating *Harmar Coal*). See also *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (holding transfer of water between water bodies constitutes "discharge" in context of Clean Water Act).

181. See *EQT*, 181 A.3d at 1146-47 (avoiding unitary waters theory and focusing analysis instead on release of contaminants rather than waters themselves).

182. *Dubois v. U.S. Dep't. of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996) (rejecting unitary waters theory because transferring water between polluted water bodies and pristine water bodies allows for irrational result); see *EQT*, 181 A.3d at 1146-47 (focusing analysis on release of contaminants rather than their subsequent entrance into new waterways). Compare *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009) (rejecting continuing violation theory by holding CWA views all discrete waters as one).

potential polluters who are concerned with uncertainty regarding liability under the Clean Streams Law and to those who wish to ascertain the court's unitary waters theory jurisprudence.¹⁸³

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183. *See EQT*, 181 A.3d at 1145-46 (rejecting argument stating that Clean Streams Law views all waters in Commonwealth as one).

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