Five Questions Likely to Flow from 'Water-to-Water' Cases

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In two recent decisions, *Hawai'i Wildlife Fund v. County of Maui* and *EQT Production v. Department of Environmental Protection*, courts have considered the nuances of "water-to-water theory" and what constitutes a single discharge. While these cases may seem particularly distinct, one decided in the U.S. Court of Appeals for the Ninth Circuit regarding discharges into the Pacific Ocean under the Clean Water Act and one decided before the Pennsylvania Supreme Court under the Clean Streams Law, both cases add new color to a long and unresolved discourse regarding what constitutes a single release, how penalties are calculated, and what actions or inactions may escalate such a calculation. In the wake of *Maui County* and *EQT*, we can expect further debates regarding interpretation and application of both state and federal water law.

On Feb. 1, in *Hawai'i Wildlife Fund v. County of Maui*, D.C. No. 1:12-cv-00198 SOM-BMK (9th Cir. Feb. 1, 2018), the Ninth Circuit upheld the district court's grant of summary judgment in favor of environmental groups challenging Maui County's long-established practice of injecting partially treated wastewater from its wastewater treatment plant into wells. The wells discharge wastewater into groundwater that, according to environmental groups, subsequently migrates through groundwater to the Pacific Ocean.

The Clean Water Act prohibits discharges of pollutants "to navigable waters from any point source," and further defines "navigable waters" as "the waters of the United States, including the territorial seas." In *County of Maui*, the central question was whether the Clean Water Act covers discharges from point sources *through groundwater* to navigable waters.

The Ninth Circuit court answered that question in the affirmative. In doing so, it rejected Maui County's argument that the Clean Water Act only prohibits discharges where pollutants "travel via a 'confined and discrete conveyance'" to jurisdictional waters. The U.S. Environmental Protection Agency (EPA) filed an *amicus curiae* arguing that the Clean Water Act forbids discharges only in instances where there is a "direct hydrological connection" between a point source and a navigable water of the United States. The Court of Appeals rejected EPA's argument.

Maui County petitioned the Ninth Circuit court of appeals for an *en banc* reconsideration. On March 30, the court of appeals rejected the petition and Maui County has intimated that it will appeal to the U.S. Supreme Court. Assuming the decision in *County of Maui* holds, additional questions may arise regarding enforcement. The Clean Water Act prescribes penalties per day, per violation. The courts and the legislature will have more work cut out for them to answer numerous questions regarding how to calculate penalties "per day, per violation" when discharge is ongoing or continuous. Parties may also be looking for guidance regarding whether each injection site constitutes a new violation or if penalties should be calculated by discharge points. In a similar vein, if injection does not occur on a daily basis but discharge is continuous (or vice versa) guidance may be needed to confirm whether penalties are calculated based on the instances of injection or the instances of discharge.

Some of these very questions are being highlighted at the state level in *EQT Production v. Department of Environmental Protection*, J-8-2017 (Pa. March 28, 2018). Back in 2015, EQT Production, a petroleum and natural gas exploration and pipeline transport company, challenged civil penalties levied by the Pennsylvania Department of Environmental Protection (DEP) for contamination caused by a leaking impoundment. EQT began a formal cleanup under

Pennsylvania's Act 2 program. Subsequently, DEP issued a civil penalty settlement demand under the Clean Streams Law for $1.27 million, $900,000 of which was related to ongoing violations. Much like the Clean Water Act, the Clean Streams Law also provides for penalties per day, per violation. EQT argued that the Clean Streams Law does not provide for penalties that exceed those accrued during the period of the actual discharge and that Act 2 governs the remediation, rather than the Clean Streams Law.

As I noted in my Feb. 23, 2016 column "**Arsenal Coal' Exception and the Status of Pre-Enforcement Reviews**," rather than appealing to the Environmental Hearing Board, EQT filed its appeal directly with the Commonwealth Court, seeking a declaratory judgment holding that DEP's policy on "continuing violation" penalties was prohibited under the Clean Streams Law. Shortly thereafter, the DEP filed a complaint for over $4.5 million in civil penalties before the Environmental Hearing Board.

The Commonwealth Court sustained the DEP's preliminary objections, holding that the Environmental Hearing Board had exclusive authority to determine the appropriate penalty. The case then made its first journey up to the Supreme Court, which held that EQT's challenge to the DEP's interpretation of the Clean Streams Law presented a "sufficient, actual controversy" for the Commonwealth Court to consider. On remand, the Commonwealth Court held that the DEP misinterpreted the Clean Streams Law.

On March 28, on appeal once again, the Pennsylvania Supreme Court affirmed 5-2 the Commonwealth Court's holding that the DEP's interpretation of the statute as providing for new and continuing violations as a plume of polluted groundwater moved into regions of uncontaminated areas of surface and groundwater (referred to as the "water-to-water theory"), was too broad. As a result, the Supreme Court appears to have invalidated the DEP's practice of imposing ongoing penalties against dischargers for the continuing migration of contaminants within waters of the commonwealth. In the court's majority opinion, Chief Justice Thomas Saylor held that "… we believe that if the General Assembly wished to create the sort of massive civil penalty exposure administered by the department on a strict-liability basis … it

would have said so more expressly. In the absence of such clarity, we find the agency's expansive construction of a statute that is inexplicit in such regards to be too unreasonable to support an affordance of deference."

Notably, the court declined to address the DEP's continuing violation theory of liability for the passive migration of contamination from soil into water, instead leaving that for the Commonwealth Court to tackle at a later date.

Considered together, *EQT* and *County of Maui* raise some interesting questions. Though it remains to be seen if and how the legislature might act on these areas of uncertainty and how further judicial decisions may impact the interpretation of these water-to-water issues, we can expect some debate of the following questions:

- Does each injection site constitute a new violation or does each discharge point constitute a violation?
- If injection does not occur on a daily basis but discharge is continuous, should penalties be calculated based on the instances of injection or the instances of discharge?
- Are continuing violation penalties overbroad only in instances of water-to-water theory?
- Is a penalty only properly assessed on the first day that the leak begins, regardless of the ultimate extent of the contamination?
- If a discharger fails to remedy a leak, should such a failure yield additional penalties as though such inaction were a new violation?

An EQT spokeswoman noted that the "Supreme Court correctly captures much of the problem with the DEP's interpretation, which is that it creates uncertainty and leads to a never-ending and unquantifiable liability in cases of this nature." But with so many outstanding questions left by both federal and state courts' interpretations of water law, it seems that uncertainty in the quantification of liability may remain in these types of cases. More clarification may shortly be on the horizon, however. In its latest *EQT* decision, the Pennsylvania Supreme Court held that soil-to-water theory was "not sharply in focus before us," but suggested that the matter should be addressed in the Commonwealth Court's upcoming review of the EHB's penalty determination. Similarly, if *County of Maui* ends up before the Supreme Court, we may get

additional guidance on how the judiciary may best interpret water-to-water theory and its accompanying penalties.

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