IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: **No. CP-41-CR-0002-2014**
	:
XTO ENERGY INC.,	:
Defendant	:

OPINION AND ORDER

This matter came before the court on Defendant XTO Energy Inc.'s (hereinafter "XTO") omnibus pre-trial motion, which contains eight counts: (1) a petition for writ of habeas corpus; (2) a motion to dismiss the Solid Waste Management Act (SWMA) charges on due process grounds; (3) a motion to dismiss the Clean Streams Law (CSL) charges as unconstitutionally vague; (4) a motion to dismiss all of the charges as de minimis; (5) a motion to dismiss on the grounds of selective prosecution; (6) a motion for an evidentiary hearing regarding destruction of potential Brady material; (7) a motion for disclosure of other crimes, wrongs, or acts pursuant to Pa.R.Evid. 404 (b); and (8) a motion to reserve right. The relevant facts follow.

XTO Energy Inc. (XTO) owns the Marquardt well site in Penn Township, Lycoming County, Pennsylvania. There are two natural gas wells on the site. During natural gas production, these wells release waste water containing toxic substances, such as chlorides, barium, strontium, and aluminum. This waste water is collected and must be treated or disposed of in accordance with the Solid Waste Management Act (SWMA), the Clean Streams Law (CSL) and Pennsylvania Department of Environmental Protection (DEP) regulations.

Located on the Marquardt site on November 16, 2010 were 49 mobile tanks used to store waste water. Valves located on the front and back of the tanks can be opened to allow water to be pumped into or out of the tank using a hose. The valve on the rear of a storage tank is primarily used for emptying the tank and is typically fitted with a four-inch threaded plug. The plug is installed and removed with a wrench. In order to empty a storage tank using the rear valve, the plug must first be removed and the valve then opened. Although the rear valves on the tanks could be locked, none of the valves were equipped with a lock or any other device to prevent unauthorized use.

Neither XTO nor anyone acting on its behalf conducted inspections of the wastewater storage tanks at the Marquardt well site. There was no fence or barrier around the Marquardt site to keep unauthorized individuals from entering the site. The site was unguarded and there were no alarms, surveillance cameras, or other security measures in place.

XTO leased the storage tanks and controlled the transportation of waste water to them. Additionally, XTO was responsible for determining whether to place secondary containment, i.e., a liner that captures liquids in the event of a spill, under the waste water storage tanks. None of the wastewater storage tanks were placed on secondary containment.

In October 2010, XTO began to store wastewater at the Marquardt site from the two wells on the site and three other nearby well sites. XTO utilized Clark Trucking to transport wastewater to the storage tanks at the Marquardt site and hired Bosque Disposal

Systems, LLC (Bosque) to process water at the site until construction of a central waste water processing facility could be completed.

As of November 16, 2010, a group of six storage tanks (Tank 18174, Tank 18153, Tank 18152, Tank 18165, Tank 18162 and Tank 27943) were connected by a manifold system installed on the front of the tanks. The manifold system allowed wastewater to flow freely between the tanks, turning the tanks into one large reservoir.

In the early afternoon on November 16, 2010, a DEP inspector conducted an unannounced inspection at the Marquardt site. No one else was present at the site when he arrived. Although it was raining steadily when the inspector arrived, he heard the sound of running water coming from the rear of a wastewater storage tank. Upon closer inspection, he noticed that the drain plug had been removed from the rear valve on Tank 18174 and the valve was partially open. Wastewater was flowing out of the valve and onto the ground behind the tank. The inspector traced the flow of the discharged wastewater to an unnamed tributary of Sugar Run.

The inspector also observed that the rear drain plugs on Tanks 18153, 18152, 18165, 18162 and 27943 had been removed and were lying on the ground below the tanks. The rear valves on all five tanks were closed, but liquid and sand were present in the rear valves on the tanks. The inspector also noted sand and displaced gravel on the ground underneath the rear valve on Tank 27943. The inspector's observations were consistent with prior discharges of gas well wastewater from these five storage tanks. The inspector also noticed that drain plugs had been removed or were missing from the rear valves on

numerous other storage tanks at the Marquardt site.

Shortly after the inspector discovered wastewater discharging from Tank 18174, Michael Hahn, XTO's Operations Supervisor arrived at the site. Hahn told the inspector he believed the discharge was the result of vandalism; however, there is no record of XTO ever reporting an incident of vandalism at the Marquardt site to the police.

The inspector returned the next day and observed dead vegetation behind Tank 18174. The vegetation was likely killed by chlorides in the discharged wastewater. The inspector also noticed dead vegetation and displaced gravel on the ground behind a storage tank located nine tanks south of Tank 18174. The inspector did not recall seeing any dead vegetation behind this tank when he inspected the site in October 2010. The rear valve on this tank was closed and there was a pool of water on the ground under the tank. Samples of the water were collected and analyzed, revealing high levels of chlorides, barium, strontium, and dissolved solids. These findings were consistent with a prior discharge of wastewater from this storage tank.

Shortly after November 16, 2010, samples of the unnamed tributary to Sugar Run were collected and analyzed, which confirmed that the water was polluted by elevated levels of chlorides, aluminum, barium, and dissolved solids. The discharge of wastewater also necessitated the excavation and removal of contaminated soil.

On September 10, 2013, the Attorney General's office charged XTO with three violations of the SWMA, 35 P.S. §6018.610(a)(1), (2), (4), and five violations of the CSL, 35 P.S. §691.611. In Count 1, the Commonwealth asserts that XTO, by its own

conduct or the conduct of another, dumped, deposited or permitted the dumping or depositing of a solid waste onto the ground and into an unnamed tributary of Sugar Run on one or more occasions from October 1, 2010 through November 16, 2010 without obtaining a permit. In Count 2, the Commonwealth asserts that XTO, by its own conduct or the conduct of another, operated or utilized a solid waste disposal facility by discharging or permitting the discharge of gas well waste water onto the ground without first obtaining a permit from DEP. In Count 3, the Commonwealth asserts that XTO, by its own conduct or the conduct of another, stored or disposed of or assisted in the storage and disposal of solid waste contrary to the rules and regulations under the SWMA and/or contrary to the terms and conditions of its permit and/or in a manner that created a public nuisance or adversely affected the public health, safety and welfare. The Commonwealth asserts in Count 4 that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharge of wastewater into an unnamed tributary of Sugar Run without first obtaining a permit in violation of section 691.307(a) of the CSL. Count 5 asserts that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharge of wastewater into an unnamed tributary of Sugar Run without first obtaining a permit from DEP in violation of 25 Pa. Code § 92a.1 et seq. In Count 6, the Commonwealth asserts that XTO, by its own conduct or the conduct of another, negligently failed to notify DEP of one or more discharges of wastewater in violation of 25 Pa. Code § 91.33(a). The Commonwealth asserts in Count 7 that XTO, by its own conduct or the conduct of another, failed to take necessary measures at the Marquardt well site to

prevent wastewater from directly or indirectly reaching an unnamed tributary of Sugar Run through accident, carelessness, maliciousness, hazards of weather or from another cause in violation of 25 Pa. Code § 91.34(a). Count 8 asserts that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharge of wastewater into an unnamed tributary of Sugar Run and thereby caused pollution to the waterway.

Following a preliminary hearing, all charges were held for court.

In the first count of XTO's omnibus motion, XTO contends that the evidence presented at the preliminary hearing was insufficient to establish a prima facie case for the charges filed against it.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of *habeas corpus*. *Commonwealth v. Marti*, 779 A.2d 1177, 1179 n.1 (Pa. Super. 2001). At a *habeas corpus* hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a *prima facie* case against the defendant. See *Commonwealth v. Williams*, 911 A.2d 548, 550 (Pa. Super. 2006). When deciding whether a *prima facie* case has been established, the court must view the evidence and any reasonable inferences that can be drawn from the evidence in the light most favorable to the Commonwealth. *Commonwealth v. Santos*, 583 Pa. 96, 876 A.2d 360, 363 (2005); *Commonwealth v. Landis*, 48 A.3d 432, 444 (Pa. Super. 2012)(citation omitted).

XTO contends that all of the charges filed against it must be dismissed because the Commonwealth failed to present any evidence that XTO caused, as a probable

consequence of XTO's conduct, an illegal discharge under the SWMA. Although XTO presents an interesting argument, the court is constrained to disagree for several reasons.

First, XTO can be liable not only for its own conduct but also the conduct of its contractors, Clark Trucking and/or Bosque Systems. See *Commonwealth v. Blue Chip Transp. Co*., 61 A.3d 296, 300-301 (Pa. Commw. 2012); *Waste Conversion, Inc. v. Commonwealth*, 568 A.2d 738, 742 (Pa. Commw. 1990).

Second, none of the SWMA violations with which XTO is charged includes the word "cause" as an element of the offense. XTO is charged with three violations of the SWMA. The relevant portions state:

> It shall be unlawful for any person or municipality to:
>
> (1) Dump or deposit, or permit the dumping or depositing of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid wastes has been obtained from the department…;
> (2) Construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility without a permit from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department;
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> ***
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> (4) Store, collect, transport, process, treat, beneficially use, or dispose of, or assist in the storage, collection, transportation, processing, treatment, beneficial use or disposal of, solid waste contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare;

35 P.S. §6018.610(1), (2), and (4).

In comparison, subsection (9), with which XTO is not charged, states:

> (9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

35 P.S. §6018.610(9).

The Pennsylvania appellate courts recognize that "where some things are specifically designated in a statute, things omitted should be understood as having been excluded; this principle is that expressed by the maxim 'expressio unis est exclusio alterius.'" *Robinson v. County of Snyder*, 664 A.2d 652, 654 (Pa. Commw. 1995), quoting *East Stroudsburg University v. Hubbard*, 140 Pa. Commw. 131, 138, 591 A.2d 1181, 1895 (1991).

With the exception of Count 8, the Clean Streams Law (CSL) violations also do not require a causal link. See *Thompson and Phillips Clay Co. v. Dep't. of Environmental Resources*, 582 A.2d 1162, 1164-1165 (Pa. Commw. 1990)(the source or origin of the polluted water is irrelevant; the decisive factor is the discharge).

Third, causation is not an element in the standard jury instructions for the SWMA violations or CSL violations. PaSSJI (Crim) §§19.691A, 19.691B, 19.6018D, 19.6018E.

Therefore, the Court is constrained to agree with the Commonwealth that none of XTO's alleged violations except Count 8 contain a causation element.

Even Count 8 does not necessarily require that the acts of XTO caused the discharge, because XTO can be liable if it permitted the discharge. 35 P.S. §391.307. Rather, the causation in Count 8 relates to the discharge causing pollution to the waterway. The Commonwealth presented ample evidence for *prima facie* purposes to show that the discharge caused pollution to the unnamed tributary to Sugar Run.

The term "pollution" includes:

> contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of an liquid, gaseous, radioactive, solid or other substances into such waters.

35 P.S. §691.1.

Jeremy Daniel testified that the discharge caused pollution to an unnamed tributary to Sugar Run. He sampled areas of the tributary upstream from the discharge and compared them to samples from the area downstream from the discharge. The area downstream had very high conductivity when compared to the background in the area, as well as elevated levels of barium, strontium, chlorides and total dissolved solids. Preliminary Hearing Transcript, pp 47-56. This testing showed that the discharge polluted the tributary by altering its physical and chemical characteristics. Furthermore, a discharge of industrial wastes without a permit constitutes a nuisance under the CSL. 35 P.S. §691.307(c).

XTO also contends that the evidence was insufficient to establish that the produced water from the Baker tank was a "waste." The court cannot agree.

Solid waste is defined in the SWMA as: "Any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials." 35 P.S. §6018.103. Other than some exceptions related to the coal mining industry not applicable here, residual waste is: "Any garbage, refuse, other discarded material or other waste including solid, liquid, semisolid or contained gaseous materials resulting from industrial, mining and agricultural operations and any sludge from an industrial, mining or agricultural water supply treatment facility, waste water treatment facility or air pollution control facility, provided that it is not hazardous." 35 P.S. §6018.103.

Under the CSL, industrial waste includes "any liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from any manufacturing or industry…" 35 P.S. §691.1.

Ian Kephart, an XTO employee, testified that the water that was being stored in the Baker tanks was flowback water from fracking the well or production water extracted from the gas produced by the well, both of which contained contaminants such as a barium and chlorides. Preliminary Hearing Transcript, at 248-249, 251. When asked what needed to be done with that water, Mr. Kephart replied, "You need to dispose of it sometime." *Id.* at 249. Therefore, as the substance in the Baker tanks was wastewater from industrial operations, it meets the definition of residual waste under the SWMA and

industrial waste under the CSL.

XTO further contends that the water does not meet the definition of residual waste found in the regulations because XTO stored the water to recycle, not discard, it. Again, the court cannot agree.

Initially, the court notes that the definition of residual waste found in the regulations is identical to the definition in the SWMA. The definition quoted, in part, by XTO in its brief comes from the definition of the term "waste" in the regulations. The court also notes that XTO cherry-picked that definition to suit its purposes. Although the definition of waste begins with "[d]iscarded material which is recycled or abandoned", it goes further to explain what is meant by "discarded material" and "abandoned." The full paragraph states:

> (i) Discarded material which is recycled or abandoned. **A waste is abandoned by being disposed of**, burned or incinerated **or accumulated, stored or processed before or in lieu of being abandoned by being disposed of**, burned or incinerated. **A discarded material includes** contaminated soil, **contaminated water**, contaminated dredge material, spent material or by-product recycled in accordance with subparagraph (iii), processed or disposed.

25 Pa. Code §287.1 (emphasis added).

The flowback and/or production water that was being stored in the Baker tanks meets this definition. The water was contaminated with barium, strontium, and chlorides from the chemicals used in fracking. XTO hired Clark Trucking to transport water accumulated from the Marquardt site, as well as other nearby XTO well sites, to the Baker tanks where it was going to be stored until XTO's contractor, Bosque Systems,

could process it at the Marquardt site. Furthermore, regardless of what XTO's intentions were, wastewater from Tank 18174 was, in fact, discarded or disposed of when it was dumped, deposited, spilled, leaked or discharged onto the ground at the Marquardt site.

XTO argues that the Commonwealth did not establish a prima facie case for Count 2 of the Information because it failed to establish that XTO operated or utilized a solid waste disposal facility. According to XTO's argument, to establish a prima facie case the Commonwealth was required to show that XTO either affirmatively permitted disposal to occur at the site or that the site was a place where disposal took place in an ongoing or systematic manner. The court cannot agree.

The SWMA defines the word "facility" as: "All land, structures and other appurtenances or improvements where municipal or residual waste disposal or processing is permitted or takes place, or where hazardous waste is treated, stored or disposed." 35 P.S. §6018.103. "Disposal" is defined as the "incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth."

From these definitions, it is apparent that a solid waste disposal facility includes land, structures, and other appurtenances and improvements where the deposition, injection, spilling, leaking or placing of residual waste into or on the land or water takes place in a manner that the waste enters the environment or is discharged to the waters of the Commonwealth. XTO's Marquardt site is or, at least in the Fall of 2010, was such a

place.

As previously discussed, the Commonwealth has presented prima facie evidence that wastewater in the Baker tanks constitutes residual waste. The Commonwealth also presented evidence, including testimony from XTO employee Ian Kephart, from which one could conclude that the Baker tanks in question were leased by XTO and utilized in its natural gas operations at the Marquardt site.

Jeremy Daniel testified that on November 16, 2010 the plug for the rear valve of Tank 18174 was lying on the ground and the rear valve was partially open, which allowed wastewater to run out of the tank and onto the ground. Mr. Daniel also traced the flow of that wastewater and determined that it had reached an unnamed tributary to Sugar Run. According to Mr. Daniel's preliminary hearing testimony, he also found evidence of prior recent discharges of wastewater at the Marquardt site, including an area of dead vegetation, displaced gravel and sand, and sedimentary deposits on the ground. Any such prior discharge or discharges would have occurred between Mr. Daniel's last visit to the site on October 10, 2010 and November 16, 2010. There was no secondary containment in or around this area of the Baker tanks to prevent any discharge of water from going into the ground or flowing to an unnamed tributary to Sugar Run. Pollutants, such a barium, strontium, chlorides and total dissolved solids, from these discharges were found in the ground and in the unnamed tributary to Sugar Run.

The rear valve plugs of several other Baker tanks in addition to Tank 18174 were either completely missing or had been removed and were laying on the ground.

Michael Temple testified that these plugs are inserted or removed with a wrench. Preliminary Hearing Transcript, at 203.

Russell Reynolds, who was a former employee of Clark Trucking, testified that he was trained to not let even a drop of the wastewater spill on the ground. Preliminary Hearing Transcript, at 124 He also testified that Clark Trucking did not use the rear valves to transfer the wastewater from the trucks into the Baker tanks. *Id.*, at 120-121.

At the request or direction of XTO, Bosque Systems employees left the Marquardt site to perform treatment activities at another XTO site in West Virginia on or about November 10, 2010.

Agent Paul Zimmerman compared Clark Trucking's deliveries of wastewater between November 12 and November 16, 2010 with the amount of wastewater remaining in the series of tanks from which the discharge originated and estimated that 57,000 gallons of wastewater were released. Preliminary Hearing Transcript, at 323. He also testified that neither XTO nor any other individual or entity had a permit to operate a solid waste disposal facility at the Marquardt site or to discharge wastewater onto the ground or into the waters of the Commonwealth at the Marquardt site. *Id*. at 324.

When the facts and the reasonable inferences that can be drawn from the facts are viewed in the light most favorable to the Commonwealth, the fact finder could conclude that: XTO operated the Marquardt site; the Marquardt site included land, structures, appurtenances and improvements including Baker tanks; Tank 18174 was not one of the nine tanks Bosque was using as part of its treatment operations, see generally

Preliminary Hearing Transcript (Exhibit 1) and diagram attached to Exhibit 2; XTO stored residual waste in the form of gas well wastewater in the Baker tanks; such residual waste was dumped, deposited, spilled or leaked from XTO's Baker tanks onto the ground; and XTO did not have a permit to operate a solid waste disposal facility. As well, Bosque's employees were no longer on site on November 16, 2010, and Clark Trucking was not using the rear valves of the Baker Tanks, but XTO was on site on a daily basis.

The court finds that these facts are sufficient to establish a prima facie case that XTO operated or utilized a solid waste disposal facility without a permit.

With respect to Count 6, XTO contends that the evidence was insufficient to establish a prima facie case that XTO willfully or negligently failed to notify DEP of a discharge in violation of 25 Pa. Code §91.33(a).

Section 91.33(a) states:

> (a) If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would damage property, is discharged into these waters -- including sewers, drains, ditches or other channels of conveyance into the waters -- or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.

XTO claims it cannot be guilty of this offense when it was not aware that the discharge was

occurring until DEP's investigator, Jeremy Daniel, notified it.

XTO's recitation of the facts in its brief, however, does not view the facts in the light most favorable to the Commonwealth. It ignores the fact that Mr. Daniel found evidence of a prior discharge or discharges. There was dead vegetation and a pool of wastewater under or near tank 27943, there was an area of displaced sand or gravel, and there was sedimentation in the rear valves of several tanks. XTO employees were at the Marquardt site on a daily basis, yet no one notified DEP of the prior discharge(s).

XTO also claims that the imposition of absolute criminal liability, regardless of XTO's intent for allegedly discharging or permitting the discharge, would violate XTO's due process rights under both the United States and Pennsylvania constitutions. The Pennsylvania Commonwealth Court, however, specifically rejected such claims in *Baumgardner Oil Co. v. Commonwealth*, 606 A.2d 617, 625-626 (Pa. Commw. 1992). This court is bound to follow the Commonwealth Court's decisions. *Commonwealth v. Randolph*, 718 A.2d 1242, 1245 (Pa. 1998)("It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court.").

XTO next asserts that the CSL is unconstitutionally vague.

The standard for evaluating a constitutional claim is exacting. "A statute will be found unconstitutional only if it 'clearly, palpably and plainly' violates constitutional rights. Under well-settled principles of law, there is a strong presumption that legislative enactments do not violate the constitution. Further, there is a heavy burden

of persuasion upon one who questions the constitutionality of an Act." *Commonwealth v. McPherson*, 752 A.2d 384, 388 (Pa. 2000).

> Under the void-for-vagueness standard, a statute will only be found unconstitutional if the statute is 'so vague that persons of common intelligence must guess at its meaning and differ as to its application.' However, a statute will pass a vagueness constitutional challenge if the statute 'defines[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' Due process requires that a criminal statute give fair warning of the conduct it criminalizes. Furthermore, even if the General Assembly could have chosen 'clearer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague.'

Commonwealth v. Davidson, 938 A.2d 198, 207-208 (Pa. 2007)(citations omitted). Furthermore, "[i]t is well established that vagueness challenges that do not involve First Amendment freedoms must be examined in light of the facts at hand." *Commonwealth v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003).

Count 4 alleges that XTO violated Section 691.307 of the CSL, which states:

> **§ 691.307. Industrial waste discharges**
>
> (a) No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department…

35 P.S. §691.307.

This section is not unconstitutionally vague. XTO did not have a

permit to discharge natural gas wastewater into the waters of the Commonwealth. There also is nothing in the rules or regulations that would allow XTO to do so. In light of this section and case law from the Commonwealth Court, a reasonable person in the natural gas industry would realize that neither it nor its employees or agents could utilize the Baker tanks in such a manner that wastewater would be discharged from them and then enter any water of the Commonwealth.

Count 5 alleges that XTO violated the DEP regulations found at 25 Pa. Code 92a.1, which provides as follows:

§ 92a.1 Purpose and scope.

(a) *Purpose.* The regulatory provisions contained in this chapter implement the NPDES Program by the Department under the Federal Act.
(b) *Scope*. A person may not discharge pollutants from a point source into surface waters except as authorized under an NPDES permit.

This section also is not unconstitutionally vague. The definition of "person" includes any public or private corporation. 25 Pa.Code 92a.2 Discharge is defined as an "addition of any pollutant to surface waters of this Commonwealth from a point source." *Id.* Pollutant is a "contaminant or other alteration of the physical, chemical, biological, or radiological integrity of surface water that causes or has the potential to cause pollution as defined in section 1 of the State Act (35 P.S. §691.1)." *Id*. Point source is defined as a "discernible, confined and discrete conveyance, including, but not limited to any … container … from which pollutants are or may be discharged." *Id*. Surface waters are

[p]erennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps and estuaries…."

A reasonable corporation in XTO's position would realize that it was unlawful for wastewater containing barium, strontium, chlorides and total dissolved solids to be discharged from its Baker tanks in such a manner that the wastewater entered the unnamed tributary of Sugar Run and altered its physical and chemical integrity.

Count 6 charges XTO with violating 25 Pa.Code 91.33(a), which states:

> If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonable possible to do so, to notify known downstream users of the waters.

This section clearly puts an entity such as XTO on notice that it must immediately call the Department if a substance that would result in pollution or the danger of pollution is discharged or placed so that it might discharge or flow into the waters of the Commonwealth, because of an accident, incident or other activity on its premises.

In Court 7, XTO is charged with a violation of section 91.34(a) of the Pennsylvania Code, which provides as follows:

91.34 Activities utilizing pollutants

> (a) Persons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.

25 Pa. Code §91.34(a). XTO contends that the term "necessary measures" is unconstitutionally vague, because the regulation fails to specify the measures it is required to take. The Commonwealth disagrees and asserts that there were numerous, common sense measures that XTO could have taken to prevent the discharge from occurring or from reaching the tributary of Sugar Run, such as replacing missing plugs in the discharge valves of the Baker tanks, placing locks on the Baker tanks valves, placing secondary containment underneath the Baker tanks, and/or placing a fence around the Marquardt site or utilizing other security measures to prevent unauthorized third parties from accessing the Marquardt site or the Baker tanks.

This regulation presents a closer question than the other statues and regulations. Unlike the other provisions, which clearly define all of the relevant terms, this regulation does not define the term "necessary measures." Despite this fact, however, the court finds that the regulation is not unconstitutionally vague under the facts and circumstances of this case. The regulation clearly puts an entity such as XTO on notice that it was required to take some measures to prevent the wastewater that was discharged, leaked or spilled from its Baker tanks from reaching the waters of the Commonwealth, through accident, negligence, maliciousness, hazards of weather or from another cause. The evidence presented by the Commonwealth indicates that XTO did not take any such

measures. The court also finds that the failure to take any measures represents a gross deviation from the standard of care.

In Count 8, it is alleged that XTO, by its own conduct or the conduct of another, negligently discharged or permitted the discharge of wastewater into an unnamed tributary of Sugar Run and thereby caused pollution to the waterway. This charge is not unconstitutionally vague. The CSL clearly prohibits the discharge of industrial wastes into the waters of this Commonwealth. 35 P.S. §§691.301, 691.307, 691.602(b). The CSL also defines the terms "industrial waste", "pollution" and "waters of the Commonwealth." 35 P.S. §691.1. The Commonwealth presented *prima facie* evidence that the wastewater in the Baker tanks was an industrial waste, the unnamed tributary to Sugar Run was a water of the Commonwealth, and that the discharge of wastewater from tank 18174 caused pollution to that unnamed tributary.

XTO next asserts that the Information should be dismissed under section 312 of the Pennsylvania Crimes Code, because it alleges only *de minimus* conduct by XTO.

Section 312(a) states:

> The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the conduct of the defendant:
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> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
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> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably

> be regarded as envisaged by the General Assembly or other authority in forbidding the offense.

18 Pa.C.S.A. §312(a).

XTO contends that it is appropriate for the court to dismiss the charges under both 312(a)(2) and (3) due to "its highly attenuated role in the alleged offense" and the fact that "an impact was not documented from the… release" (Exhibit 6, DEP Macroinvertebrate Study). The court cannot agree.

When the facts and inferences are viewed in the light most favorable to the Commonwealth, XTO's role cannot be considered "highly attenuated." XTO owned and operated the Marquardt site. It generated the wastewater that was being stored in the Baker tanks. It hired Clark Trucking to transport wastewater to the Marquardt site from other XTO well sites. Clark Trucking, however, did not utilize the rear valves of the Baker tanks. Although XTO also hired Bosque Systems to process and/or treat the wastewater at the Marquardt site, Bosque Systems employees left the Marquardt site at the request or direction of XTO to perform treatment activities at another XTO site in West Virginia on or about November 10, 2010. XTO employees were at the Marquardt site on a daily basis during the work week. Joseph Sleppy, an XTO employee, checked the production equipment on a daily basis, but he never checked the Baker tanks in question to make sure that the valves were closed or that no wastewater was leaking, spilling or being discharged from the Baker tanks and he never saw anybody inspecting those tanks. Preliminary Hearing Transcript, at

148, 159-160, 182.

An XTO employee suggested to the DEP inspector that the discharge(s) were the result of vandalism. XTO, however, never made a police report of vandalism, and there was no testimony presented at the preliminary hearing to suggest that discharge(s) occurred because the Baker tanks had been damaged by vandals. Furthermore, XTO did not take any measures to ensure that unauthorized third parties could not access the site or the Baker tanks.

A discharge from the rear valve of Baker tank 18174 occurred on November 16, 2010. A prior discharge or discharges from the rear valves of Baker tanks occurred between October 10, 2010 and November 16, 2010. When DEP compared the paperwork for deliveries of wastewater to the Baker tanks to the contents of those tanks, DEP discovered that approximately 57,000 gallons of wastewater were released from XTO's Baker tanks onto the ground and into an unnamed tributary to Sugar Run. While there might not have been any biological impact to the macroinvertebrates in the unnamed tributary, such does not necessarily mean that there was no environmental impact from the discharges, because there were physical and chemical changes to the ground and to the waterway. There was an area of dead vegetation near the Baker tanks, and there were elevated levels of barium, strontium, chlorides and total dissolved solids in the unnamed tributary downstream from the discharge.

The SWMA and the CSL were passed to prevent the unauthorized

depositing or discharging of wastes onto the land and into the streams of this Commonwealth. That is precisely what the Commonwealth alleges happened in this case. The court does not view discharges of over 50,000 gallons of wastewater as being "too trivial" to warrant the condemnation of conviction.

XTO also claims that "other unique circumstances in the case present 'extenuations' that warrant dismissing the information." These "extenuations" include the following: (1) XTO thoroughly remediated the site to DEP's standards; (2) without admitting liability, XTO entered into a settlement with the U.S. EPA and DOJ; (3) there was no adverse environmental impact; and (4) the DEP inspector admitted he didn't know who directly caused the discharge.

The court does not believe that these are the type of extenuations contemplated by section 312. According to section 312, the extenuations must be such that the conduct of the defendant cannot reasonably be considered as envisaged by the General Assembly or other authority in forbidding the offense.

The SWMA imposes absolute liability. 35 P.S. §6018.606(i). For years, the Commonwealth Court has interpreted the SWMA and the CSL as imposing liability on entities such as XTO for the actions and conduct of their employees, agents and contractors. *Commonwealth v. Blue Chip Transp. Co*., 61 A.3d 296, 300-301 (Pa. Commw. 2012); *Waste Conversion, Inc. v. Commonwealth*, 568 A.2d 738, 742 (Pa. Commw. 1990). Additionally, the Commonwealth Court has held that "neither the Law through its clear language nor the courts have held that a causal link is a prerequisite for the imposition of

liability." *Thompson and Phillips Clay Co. v. Dep't. of Environmental Resources*, 582 A.2d 1162, 1165 (Pa. Commw. 1990). The General Assembly has not amended the statutes in response to those decisions to limit liability only to the particular party who directly caused the discharge. There are also provisions requiring an entity such as XTO to take measures to prevent discharges by vandals or other third parties. 25 Pa. Code 91.34 ("Persons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause."); 25 Pa. Code §91.35(a)("a person may not operate, maintain or use or permit the operation, maintenance or use of a wastewater impoundment for the production, processing, storage, treatment or disposal of pollutants unless the wastewater impoundment is …protected from unauthorized acts of third parties…."). Therefore, the court believes the General Assembly did envisage XTO's conduct as falling within the scope of the SWMA and the CSL.

The statutes and regulations also contemplate that an entity such as XTO will be responsible for either remediation of the site or payment of the costs of abatement. See 35 P.S. §6018.601 (any person or municipality committing a violation of the SWMA, any rule or regulation of the department, any order of the department or any term or condition of a permit shall be liable for the costs of abatement of any pollution and any nuisance caused by such violation); 35 P.S. §691.316 ("Whenever the department finds that

pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department…"); 25 Pa. Code §91.33(b)(a person "shall remove from the ground and from the affected waters of this Commonwealth to the extent required by this title the residual substances contained thereon or therein"). Therefore, XTO could have been required to remediate the site to DEP standards even if it had not voluntarily done so.

The court also does not view XTO's civil settlement with the U.S. EPA and DOJ as justifying dismissal of these criminal charges. The United States and Pennsylvania are separate sovereigns. Pennsylvania may have an interest in prosecuting this case that the United States would not. There also may be different standards for imposing criminal liability under the federal laws and Pennsylvania's Crimes Code.

While these allegedly "unique circumstances" may be factors for the court to consider at sentencing if XTO is convicted, the court does not believe XTO is entitled to dismissal of the charges based on section 312 of the Crimes Code.

Nothing in this decision should be construed as the court expressing any opinion regarding either party's likelihood of success on the merits at trial. It is inappropriate for the court to make credibility determinations in deciding whether the Commonwealth has established a *prima facie* case; instead, the credibility of the witnesses and the weight of the evidence are issues for the factfinder at trial. *Commonwealth v. Black*, 108 A.3d 70, 77 (Pa. Super. 2015); *Commonwealth v. Landis*, 48 A.3d 432, 448 (Pa.

Super. 2012). The court is simply viewing the facts and circumstances in the light most favorable to the Commonwealth as is required at this stage of the proceedings and finding that the evidence is sufficient for the charges to proceed to trial.

XTO next asserts that the court should dismiss the charges on the grounds of selective prosecution.

The Commonwealth has broad discretion in deciding whom to prosecute. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Wayte*, 470 U.S. 598, 607 (1985); *Commonwealth v. Olavage*, 894 A.2d 808, 811 (Pa. Super. 1996). Prosecutorial discretion, however, is subject to constitutional constraints. *Armstrong,* 517 U.S. at 464; *Wayte*, 470 U.S. at 608.

The burden of proof to establish a selective prosecution claim rests solely with the defendant. *Olavage*, supra. The defendant must show that: (1) other similarly situated persons were not prosecuted for similar conduct; and (2) the defendant was intentionally and purposefully singled out for an invidious reason, such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification. *Commonwealth v. Mulholland*, 702 A.2d 1027, 1034 (Pa. 1997); *KC Equities v. DPW*, 95 A.3d 918, 934 (Pa. Commw. 2014); *Commonwealth v. Sanico*, 830 A.2d 621, 629 (Pa. Commw. 2013). Moreover, a defendant must produce some evidence tending to show the existence of the essential elements of "discriminatory effect and discriminatory intent" before discovery on this issue may even be authorized. *Armstrong*, 517 U.S. at 468; *KC Equities*, 95 A.3d at 934; *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1031 (Pa.

Commw. 2006). As noted by these cases, the law is clear that the showing needed "to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Armstrong*, 517 U.S. at 464; *KC Equities*, supra; *Koken*, supra.

For the reasons set forth in the Commonwealth's briefs, the court finds that XTO has not made a sufficient showing of discriminatory effect and discriminatory intent to authorize discovery on this issue. The court is not convinced that the incidents referred to in XTO's brief are similar to the current case. Among other things, it appears that the quantity of the wastewater discharged, approximately 57,000 gallons, in this case was significantly larger than the incidents cited in XTO's brief. The court also is not persuaded that the single campaign statement allegedly made by Attorney General Kathleen Kane, when considered in context, shows that her office "improperly selected XTO because of its status as a natural gas well operator exercising its statutory right under Pennsylvania's Oil and Gas Act to engage in hydro-fracturing." Furthermore, neither Ms. Kane nor the OAG is responsible for the statements of PennEnvironment or the "Raging Chicken Press." Moreover, assuming for the sake of argument that XTO was exercising a statutory right, it does not have the right to do so in a manner that results in the discharges of thousands of gallons of wastewater onto the land and into the waters of this Commonwealth in violation of Article 1, section 27 of the Pennsylvania Constitution, the SWMA, and the CSL. Certainly, XTO is not suggesting that its "right" to engage in hydro-fracturing gives it, its employees, agents, independent contractors or other parties on its premises the right to open the valves on its Baker tanks and allow wastewater polluted with barium, strontium,

chlorides and total dissolved solids to flow onto the ground and into the waters of this Commonwealth.

XTO also asserts that the court should grant an evidentiary hearing on its claim that the Commonwealth destroyed potential *Brady* material when it destroyed handwritten notes of interviews of potential witnesses. Again, the court cannot agree.

“[U]nless a defendant can show bad faith… the failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Commonwealth v. Feese*, 79 A.3d 1101, 1108 (Pa. Super. 2013)(quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

XTO claims it is entitled to an evidentiary hearing to evaluate whether the Commonwealth intentionally destroyed that evidence in bad faith, contending that the Commonwealth destroyed the handwritten notes in violation of its own policy.

The OAG’s Destruction Policy is set forth in *Feese* as follows:

> To eliminate any inconsistencies in the handling of original handwritten notes of an investigation which includes tape recordings, all agents in Criminal Investigations will comply with the following policy:
>
> Any details within original handwritten investigative notes will be transposed into the investigative report. When an investigative report is approved by the Regional Director/Senior Supervisory Agent/Supervisory Agent, the original investigative notes will be destroyed. The official and only record of the investigation [("ROI")] is the approved investigative report with listed attachments.
>
> The following are listed exceptions:
>
> • Hand written or typed statements with witnesses, cooperators (actual and potential) and informants that contain a date and signature affixed.

> • Investigations that are worked in conjunction with Federal authorities.
>
> The noted exceptions will require original notes/statements to be maintained as an attachment to the investigative report in the case file. Informant statements will be maintained in the regional/office informant file.

Feese, 79 A.3d at 1109.

XTO argues that this investigation was worked in conjunction with Federal authorities; therefore, the Commonwealth was required to maintain the notes as an attachment to the investigative report. In reaching this conclusion, however, XTO utilizes an expansive definition of the word "conjunction" such that any investigation that merely overlapped in time - even parallel, separate investigations of the same incident - would meet the definition. The Commonwealth, however, defines "conjunction" as joint or in combination, union or association with Federal authorities.

The court agrees with the Commonwealth's interpretation of the policy. Earlier in these proceedings, the Commonwealth submitted affidavits that it did not conduct a joint investigation with Federal authorities. Therefore, the court agrees that there was no breach of the policy in this case.

XTO has been given copies of the investigative reports and knows who the Commonwealth interviewed as part of its investigation. There is nothing prohibiting XTO from contacting those individuals and inquiring whether they provided any other statements that are not contained in the investigative reports. Additionally, the court permitted XTO to issue a subpoena to the federal authorities to obtain any inconsistent

witness statements. Nevertheless, XTO has not produced a scintilla of evidence or made a single factual allegation to show that the Commonwealth failed or refused to disclose that the potential witnesses ever gave any inconsistent statements or had any knowledge or information regarding what individual or entity may have caused the release.

In light of these facts and circumstances, the court finds that XTO is not entitled to discovery or a hearing in connection with its claim that the Commonwealth destroyed potential *Brady* material.

As part of its omnibus motion, XTO also moved for disclosure of other crimes, wrongs, or acts pursuant to Pa.R.Evid. 404(b). In accordance with the court's prior practice, the court will grant this motion and require the Commonwealth to provide such notice no later than the date of the pre-trial, unless the reason for such is discovered afterwards. See Pa.R.E. 404(b)(3).

Finally, XTO seeks to reserve the right to file additional pretrial motions. The court will grant this request, provided any such motion could not have been filed previously due to the receipt of new or additional discovery.

ORDER

AND NOW, this ___ day of April 2015, upon consideration of XTO's omnibus pretrial motion, it is ORDERED and DIRECTED as follow:

The court grants Defendant's motion to enter an order requiring the Commonwealth to provide notice of any Pa.R.E. 404(b) evidence. The Commonwealth shall provide such notice no later than the date of the pre-trial, unless the reason for such

was discovered afterwards.

The court grants Defendant's motion to reserve the right to file additional pre-trial motions, provided any such motion could not have been filed previously due to the receipt of new or additional discovery.

In all other respects, Defendant's omnibus pretrial motion is denied.

By The Court,

____
Marc F. Lovecchio, Judge

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