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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARTIN AND SUZANNE MATTEO, HUSBAND AND WIFE, ROBERT AND CAROLE VALENTINE, HUSBAND AND WIFE, and STEVE EMERY,

Petitioners,

vs.

HILCORP ENERGY COMPANY, COMMONWEALTH OF PENNSYLVANIA, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, in her official capacity as ATTORNEY GENERAL of the COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CHRISTOPHER ABRUZZO, in his Official Capacity as SECRETERY of the DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Respondents,

Docket No. 266 MD 2014

PRELIMINARY OBJECTIONS TO PETITON FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed on behalf of Respondent Hilcorp Energy Company

Counsel of Record for Respondent Hilcorp Energy Company:

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MARTIN AND SUZANNE MATTEO, HUSBAND AND WIFE, et al.

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MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Respondent, Hilcorp Energy Company ("Hilcorp"), by and through is undersigned counsel, Kevin L. Colosimo and Daniel P. Craig of Burleson LLP hereby submits this Motion To Dismiss for lack of equitable jurisdiction, and respectfully moves this Honorable Court to issue an order dismissing the action because the Petitioners have failed to exhaust their administrative remedies and because the effect of the challenged legislation upon the Petitioners is not direct and immediate. For all the reasons set forth in Hilcorp's accompanying Memorandum, Hilcorp asks this Honorable Court to enter an Order in substantially the form as the Proposed Order attached hereto.

DATED this 20th day of May, 2014.

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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HILCORP ENERGY COMPANY, COMMONWEALTH OF PENNSYLVANIA, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, in her official capacity as ATTORNEY GENERAL of the COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CHRISTOPHER ABRUZZO, in his Official Capacity as SECRETERY of the DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Respondents,

Docket No. 266 MD 2014

MEMORANDUM IN SUPPORT OF PRELIMINARY OBJECTIONS TO PETITON FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed on behalf of Respondent Hilcorp Energy Company

Counsel of Record for Respondent Hilcorp Energy Company:

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I. INTRODUCTION

This action arises from the Application of Hilcorp Energy Company ("Hilcorp") for Well Spacing Units (the "Application"), which is currently pending before the Department of Environmental Protection (the "Department"). The Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint") on May 2, 2014 with this Court. The Petitioners assert that "the equitable jurisdiction of the Commonwealth Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when the parties would otherwise be forced to submit to the regulations and incur the cost and burden that the regulations would inevitably impose." (Complaint, ¶34, *citing Commonwealth of Pennsylvania v. Locust Township,* 968 A.2d 1263, 1272 (Pa. 2009)). However, it would be improper for this Court to exercise its original equitable jurisdiction in this case because (a) the matter is not ripe for review, (b) Petitioners have unjustifiably failed to exhaust all statutorily prescribed administrative remedies and, (c) Petitioners will suffer no "direct and immediate" impact as a result of any action taken by the Department on the Application.

II. FACTS

Hilcorp originally filed its Application with the Department on July 17, 2013. The Department responded by claiming that it lacked jurisdiction to rule on the Application, and that jurisdiction over the matter rested with the Environmental Hearing Board (the "Board"). The Board issued an Opinion and Order on November 20, 2013, dismissing the Application for lack of original jurisdiction, and directing Hilcorp to submit its Application to the Department for consideration and action. In its Opinion and Order, the Board stated, "the Application should be submitted to the Department of Environmental Protection for its consideration and action. Once the Department takes final action on the Application, an Appeal to the Environmental Hearing

Board may be filed in accordance with the Environmental Hearing Board Act." *Hilcorp Energy Co. v. Dep't of Envirn. Protection,* EHB Docket No. 2013-155-SA-R. Hilcorp formally re-filed its Application with the Department on December 2, 2013.

III. ARGUMENT

A. This Court should decline to exercise jurisdiction over Petitioner's Declaratory Judgment Action because the case is not ripe for review

Petitioners assert that jurisdiction in this case is proper pursuant to the Declaratory Judgment Act, 42 Pa.C.S. § 7531 et seq., which allows a party to obtain a declaration of existing legal rights, duties, or status of parties by filing a petition pursuant to the Act. The Act's purpose is to clear up uncertainty and insecurity with respect to legal relations, and is intended to be liberally construed and administered. 42 Pa.C.S. § 7541 (a).

While the right to relief under the Declaratory Judgment Act is broad, and specifically not limited by the provisions of 1 Pa.C.S. § 1504 (relating to statutory remedies as preferred over common law), there are limitations to a court's ability to issue a declaration of rights. 42 Pa.C.S. § 7541 (b). The doctrine of ripeness is a judicially created principle that requires an actual controversy be present in order for a court to exercise jurisdiction. *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.2d 866, 874 (Pa. 2009). The purpose of the doctrine of ripeness, when it comes to administrative law, is to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect state agencies from judicial interference until an administrative decision has been formalized and its efforts felt in a concrete way by the challenging parties." *Id.*

In order to determine whether a matter is ripe for review, courts apply a two-pronged test, examining (1) whether the issues presented are adequately developed for judicial review, and (2) what hardship the parties will suffer if review is delayed. *Alaica v. Ridge*, 784 A.2d 837,

842 (Pa. Cmwlth. 2001). In evaluating the first prong of the ripeness test, courts have identified two concepts relevant to the inquiry: (1) "whether the asserted deprivation of rights is immediate ... or is hypothetical and contingent upon certain future events" and (2) "whether resolution of the ... dispute will involve substantial factfinding." *Id.* If the dispute is fact intensive, the uncertainty of future events poses a greater challenge to a court's ability to clearly identify the relevant issues for review. *Id.* In this case, both prongs of the ripeness test lead inexorably to the conclusion that no actual controversy is present in this case and the matter is not ripe for review.

(1) The issues presented are not sufficiently developed to permit judicial review.

As to the first prong of the ripeness test, the issues presented for review have not been adequately developed. Petitioners assert that "if Hilcorp is successful, Petitioners will certainly lose their interests in the oil and gas that Hilcorp seeks to extract, and furthermore, Petitioners may lose further rights in their subsurface and surface estates." However, if the Department ultimately issued an order establishing spacing units over the Pulaski Accumulation, Petitioners' alleged "deprivation of rights" would not be immediate or even automatic because no action could be taken on that order until Petitioners have had the opportunity to appeal the decision to the Board. 35 Pa. C.S. § 7514. If Petitioners' appeal to the Board fails, they can then appeal that decision to the Commonwealth Court, which has exclusive jurisdiction of appeals from final orders of the Environmental Hearing Board pursuant to 42 Pa. C.S. § 763. Therefore, Petitioners' will ultimately have the opportunity to make their case to this Court once a factual record is developed by the Department and the issues in this case become more concrete after consideration by both the Department and the Board. Thus, the adverse impact would not be immediate, but contingent upon the rulings of the Department, the Board and ultimately this Court.

The resolution of this dispute will also involve extensive factfinding. In the Petition for Review, Petitioners summarize their arguments in this case with five assertions. (Complaint, ¶ 24). Four of the assertions are qualified by the phrase, "as applied to the facts of this case." *Id.* The final assertion states, "The Conservation Law's dual purposes of protecting correlative rights and preventing waste are not achieved in cases of horizontal drilling, and therefore, the Conservation Law does not apply in such instances." *Id.* It follows that all of Petitioners arguments are underpinned by a specific factual scenario. Since no factual record has been developed at this point in the case, this Court should decline to exercise jurisdiction in this matter until after the Department and the Board have developed factual records and taken action on the application. While it appears that Petitioners' argument regarding the PRPA does not rely on a fact specific analysis, but is simply an issue of statutory construction, the Department and the Board are each charged and capable of engaging in statutory construction analysis. Each of Petitioners' other claims require a fact specific inquiry.

(2) Petitioners will suffer no hardship if review is delayed.

As to the second prong of the ripeness test, the Petitioners will suffer no hardship if review is delayed until after the administrative process has been exhausted. The existence of a statutorily prescribed appeals process for any Department action, as more fully described below in Section B, ensures that the Petitioners will suffer no hardship as a result of a potential spacing order issued by the Department until the Board has reviewed the Department's decision, and this Court has reviewed the decisions of both administrative bodies, so long as Petitioners pursue those appellate avenues.

B. This court should refrain from exercising jurisdiction because Petitioners have failed to exhaust available administrative remedies

The well-established doctrines of primary jurisdiction and exhaustion of administrative remedies should lead this Court to decline to exercise equitable jurisdiction in this case. The doctrine of primary jurisdiction is a judicial doctrine whereby a court tends to favor allowing an agency the opportunity to make an initial determination on an issue before the court will exercise its jurisdiction. *Jackson v. Centennial Sch. Dist.*, 501 A.2d 218, 220 (Pa. 1985). The doctrine of exhaustion of administrative remedies, which "precludes a party's challenging administrative decision making from obtaining judicial review, ..., without first exhausting administrative remedies," acts as a restraint upon the exercise of a court's equitable powers, reflecting the recognition that the General Assembly intended strict compliance with statutory remedies. *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 437 (Pa. 1982), *quoting Canonsburg Gen. Hosp. v. Dep't of Health*, 422 A.2d 141 (Pa. 1980). The Pennsylvania Supreme Court has consistently held that "where a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of redress. *Jackson,* 501 A.2d at 220. The Supreme Court has also stated that a court is precluded from hearing a matter in which the Petitioners have failed to exhaust administrative remedies without good cause. *Id.* While there is an exception to the requirement of exhaustion of administrative remedies, which states that "where the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required," *see Tex. Keystone v. DCNR*, 851 A.2d 228 (Pa.Cmwlth. 2004), the facts of this case do not comport with this exception.

Before the Petitioners can invoke the jurisdiction of this Court, they must allow the Department to create a factual record and take action on the application, and if necessary, pursue

an appeal to the Board. Petitioners may initially challenge the validity of the Conservation Law as applied to their interest in oil and gas at the hearing on Hilcorp's Application before the hearing officer appointed by the Department. 58 Pa. C.S. § 407. If the Department issues an order establishing spacing units, Petitioners may appeal that decision to the Board pursuant to the Environmental Hearing Board Act, 35 Pa. C.S. § 7514, which states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board..." If Petitioners' appeal to the Board fails, they can then appeal that decision to the Commonwealth Court, which has exclusive jurisdiction over appeals from final orders of the Board pursuant to 42 Pa. C.S. § 763.

Again, this case does not fall within the exception to the doctrine of exhaustion of administrative remedies as the administrative process is vital to the ultimate outcome of this case. As discussed in Section A (2), *supra,* the resolution of this dispute will involve extensive factfinding. Aside from the Petitioners' arguments regarding the PRPA, all of Petitioners' claims challenge the Conservation Law on an "as applied" basis. However, the Department has yet to take action on Hilcorp's Application, so the Conservation Law has not yet been applied in this case.

C. Petitioners would suffer no "direct and immediate" impact as a result of the Department's eventual action on the Application, rendering the invocation of equitable jurisdiction for pre-enforcement review inappropriate

Petitioners assert that the Commonwealth Court's equitable jurisdiction "allows parties to raise pre-enforcement challenges to the substantive validity of laws when the parties would otherwise be forced to submit to the regulations and incur the cost and burden that the regulations would inevitably impose." *Citing Locust Township*, 968 A.2d at 1272. However, there must be a "direct and immediate" impact on the "industry regulated" in order establish the

justiciability of a pre-enforcement challenge to the Commonwealth Court. *Arsenal Coal Co. v. Commonwealth*, 477 A.2d 1333, 1339 (Pa. 1984). Here, the Petitioners baldly state that they "will be significantly irreparably injured by enforcement of the Conservation Law as it will forever alter their rights in the properties where they live," that "[t]he harm to the Petitioners is immediate, and that the Petitioners have no other lawful means with which to stay the proceedings under the Conservation Law." (Complaint, ¶ 104). However, Petitioners fail to recognize the well-establish process by which an agency action becomes final and by which that final action is ultimately appealable to the Commonwealth Court. Petitioners are attempting to forgo that process and their appeal to this Court is premature.

While the Pennsylvania Supreme Court has recognized that a party "may invoke the original equitable jurisdiction of the Commonwealth Court in a case seeking pre-enforcement review of a substantial challenge to the validity of regulations promulgated by an administrative agency," the exercise of such jurisdiction is improper "where there exists an adequate statutory remedy." *Arsenal Coal*, 477 A.2d at 1338. This Court has interpreted *Arsenal* as holding that a statutory remedy is inadequate when it provides an agency the power to hold hearings and issue adjudications only after an order or decision has been issued. *Schuylkill Prods. v. Commonwealth DOT,* 962 A.2d 1249, 1256 (2008). Moreover, the impact is not immediate and direct unless the regulation at issue is self-executing. *Toilet Goods Assoc. v. Gardner*, 387 U.S. 158 (1967).

In this case, the existence of a statutorily prescribed appeals process for any action of the Department ensures that no Department order with regard to Hilcorp's Application will result in a "direct and immediate" effect on the Petitioners. The statutory remedies provided are adequate because the Conservation Law Provides for a hearing prior to the Department taking action on a

well spacing application, meaning the "regulation" is not self-executing. 58 Pa C..S. § 407 (3). An illustration of a self-executing regulation for which a pre-enforcement review by the Commonwealth Court is appropriate is where, in the absence of such review, the party subject to the regulation has only two options: (1) "submit to the regulations and incur the cost and burden which the regulations will inevitably impose;" or (2) "refuse to comply and defend itself in actions imposing sanctions for non-compliance." *Locust Township,* 968 A.2d at 1272. In other words, pre-enforcement review of an agency action is appropriate where an agency promulgates a regulation that will immediately impose duties upon or limit the activity of a given industry absent any further action by the agency, and that the only other avenue for a party to challenge the regulation would be to violate it, incur the penalties associated with the violation, and then challenge the validity of the regulation to which it has already been subjected.

A review of the cases cited by Petitioners in support of their contention that they have legal standing to invoke the equitable jurisdiction of the Commonwealth Court reveals that the circumstances under which this Court may exercise equitable jurisdiction for a pre-enforcement review do not exist in this case.

In *Arsenal,* the Petitioner, Arsenal Coal Company and other anthracite coal mine operators ("Arsenal") sought pre-enforcement review in the Commonwealth Court of a comprehensive recodificatation of regulations governing the anthracite coal industry, asserting that the promulgation of those regulations was outside the scope of the authority granted to the Environmental Quality Board by the General Assembly. 477 A.2d at 1335. The Court acknowledged that the Surface Mining Conservation and Reclamation Act provided the statutory remedy of an appeal to the Board upon any order, permit, license or decision of the Department of Environmental Resources, but specified that the Board does not have the authority to engage

in pre-enforcement review. *Id.* at 1339. Therefore, absent a pre-enforcement review by the Commonwealth Court, Arsenal would have had to seek and be denied a permit or license, or violate the regulations and face sanctions, before it could avail itself of the jurisdiction of the Board to challenge the validity of the regulations. *Id.* at 1340.

The same scenario is present in *Locust Twp.*, where an agricultural operator requested that the Attorney General review a local ordinance that regulated intensive animal operations and consider whether to bring a legal action against the township to invalidate it. 968 A.2d 1275. (2009). The agricultural operator believed his operation conformed to state law but was inconsistent with the new ordinance, and that state law preempted the ordinance. *Id.* at 1267. The Attorney General argued, and the Commonwealth Court agreed, that this case fell "squarely within the paradigm described by *Arsenal Coal*." *Id.* at 1272. The ordinance regulated "the keeping, housing, confining, raising, feeding, production or other maintaining of livestock or poultry animals" in an operation of a certain size. *Id.* at 1267. In the absence of a pre-enforcement challenge to the validity of the ordinance, the agricultural operator would have been required to either (1) suffer the cost of altering its activities to comply with the new ordinance, or (2) violate the ordinance and suffer the penalties associated therewith before it could then appeal to the local Zoning Hearing Board to challenge the ordinance's validity.

The petitioners in *Arsenal Coal* and *Locust Twp.* exemplify the sort of aggrieved parties that the Commonwealth Court's ability to exercise equitable jurisdiction over pre-enforcement review is intended to protect. The party seeking the review must have suffered a grievance immediately upon the effective date of the agency's action, due to the fact that the existing activities of the aggrieved party would otherwise be interrupted without any further government action, or those existing activities would immediately lead to a violation of the challenged

regulation, subjecting the aggrieved party to penalties. The aggrieved party must be in the position that it is required to take affirmative action in order to comply with the new regulation before it would be afforded the opportunity to challenge the validity of the new regulation.

In this case, Petitioners do not find themselves in the unfortunate situation of having to affirmatively comply with a regulation or be subject to penalties for non-compliance as a result of the Department's potential order establishing spacing units over the Pulaski Accumulation before they will have standing to challenge the validity of the Conservation Law. Petitioners are not engaged in any activity regulated by the Conservation Law. Rather, they own property rights that may ultimately be affected by operation of the Conservation Law. Petitioners may initially challenge the validity of the Conservation Law as applied to their interest in oil and gas at the hearing on Hilcorp's Application before the hearing officer appointed by the Department. If the Department issues an order establishing spacing units, Petitioners may appeal that decision to the Board pursuant to the Environmental Hearing Board Act, 35 Pa. C.S. § 7514, which states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board..." If Petitioners' appeal to the Board fails, they can then appeal that decision to the Commonwealth Court, which has exclusive jurisdiction of appeals from final orders of the Environmental Hearing Board pursuant to 42 Pa. C.S. § 763. This process ensures that Petitioners will not suffer any actual injury nor will they be required to alter an existing activity prior to being afforded multiple opportunities to challenge the validity of the Conservation Law on constitutional and other grounds. Instead, Petitioners seek to bypass a clear and well established administrative remedy process and jump straight to the Commonwealth Court. However, the outcome of the proceedings before the hearing officer and a potential order establishing spacing units over the Pulaski Accumulation will not affect

Petitioners' interests in real property until well after Petitioners are provided the opportunity to exhaust statutorily prescribed administrative remedies and then appeal the outcome of those remedial actions to the Commonwealth Court. Where a remedy is prescribed by statute, that prescription must be strictly pursued "to the exclusion of other methods of redress." *Jackson*, 501 A.2d at 220.

Therefore, this Court should decline to exercise jurisdiction in this matter because Petitioners would suffer no "direct and immediate" impact as a result of the Department's eventual ruling on the Application, rendering the invocation of original equitable jurisdiction for pre-enforcement review improper.

IV. CONCLUSION

This Court should decline to exercise jurisdiction over this case because the matter is not ripe for review, as the issues presented are inadequately developed and Petitioners will suffer no hardship if review is delayed, Petitioners have unjustifiably failed to exhaust all statutorily prescribed administrative remedies before seeking judicial review and Petitioners would suffer no "direct and immediate" impact as a result of the Department's eventual ruling on the Application, rendering the invocation of original equitable jurisdiction for pre-enforcement review improper.

DATED this 20th day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 20th day of May, 2014, via First Class mail upon the following:

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HILCORP ENERGY COMPANY, et al.

Respondents.

PROPOSED ORDER

NOW, this ___ day of _____, 2014, upon consideration of Hilcorp Energy Company's Preliminary Objections to Petitioners' Petition to for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief, and pursuant to Pa. R.C.P. 1028(a)(1), this case is DISMISSED without prejudice for lack of jurisdiction. Petitioners may appeal an agency decision to this Court in this matter once they have exhausted all available administrative remedies.

BY THE COURT:

_____