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 E. CHRISTOPHER ABRUZZO, in his Official Capacity as SECRETARY of the DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Respondents.

Docket No. 266 MD 2014

TYPE OF PLEADING:
AMENDED PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed on behalf of:
Petitioners

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HILCORP ENERGY COMPANY, et al.	)	
Respondents.	)	

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AND NOW, Petitioners, Martin and Suzanne Matteo, husband and wife, Robert and Carole Valentine, husband and wife, and Steve Emery, by and through their attorney and pursuant to Pa.R.C.P. 1028(c)(1), file the within Amended Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief against Respondents, Hilcorp Energy Company, Commonwealth of Pennsylvania, Office of the Attorney General of Pennsylvania, Kathleen G. Kane, in her official capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection (DEP), and E. Christopher Abruzzo, in his official capacity as Secretary of the DEP, and in support thereof set forth as follows:

INTRODUCTION

1. The Oil and Gas Conservation Law, 58 P.S. §§ 401-419 (Conservation Law), was enacted in 1961 and generally applies to oil and gas resources below the Onondaga horizon. ***See*** 58 P.S. § 401. Its purpose is to encourage the development of the natural oil and gas resources of the Commonwealth

> without waste; and to provide for the drilling, equipping, locating, spacing and operating of oil and gas wells so as to protect correlative rights and prevent waste of oil or gas or loss in the ultimate recovery thereof, and to regulate such operations so as to protect fully the rights of royalty owners and producers of oil and gas to the end that the people of the Commonwealth shall realize and enjoy the maximum benefit of these natural resources.

Id.

2. The Conservation Law created an Oil and Gas Conservation Commission that was charged with "prescribing rules and regulations governing the practice before the commission." 58 P.S. § 510(a). Although the commission was abolished by the General Assembly, the regulations governing practice and procedure under the Conservation Law are set forth at 25 Pa. Code §§ 79.1-79.33.

3. Hilcorp is a privately held oil and gas company based in Houston, Texas. Hilcorp has significant operations in at least five states and to date, has leased more than 160,000 acres in the Utica Shale.

4. On July 17, 2013, Hilcorp filed an application with the DEP titled, "Application of Hilcorp Energy Company for Well Spacing Units," (Application) a copy of which is attached hereto as "Exhibit A." The Application is docketed with the Office of Oil and Gas Management at 2013-01. The application was filed pursuant to 58 P.S. § 407(1), which states that "[a]fter one well has been drilled **establishing a pool** in a horizon covered by this act, an application may be filed by the operator of the discovery well or the operator of any lands directly and immediately affected by the drilling of the discovery well, or subsequent wells in said pool." 58 P.S. § 407(1) (emphasis added).

5. Notably, upon the filing of the Application, the DEP determined that it did not have authority to act upon the Application and that Hilcorp should instead submit it to the Environmental Hearing Board (EHB). Hilcorp did so, only to receive a decision from the EHB

stating that it in fact should submit the Application to the DEP as the decision was within its purview. ***Hilcorp Energy Co. v. Dept. of Envt'l Prot.***, EHB Docket No. 2013-155-SA-R at 18 (2013).

6. The Application alleges that there is a pool underlying approximately 3,267 acres located in the northwest corner of Lawrence County and southeast corner of Mercer County, in Pulaski Township, and identifying the alleged pool as the Pulaski Accumulation. The Application further alleges that the pool is part of the Utica Shale and lies approximately 3,800 feet below the Onondaga horizon.

7. A "pool" is defined as "an underground reservoir containing a common accumulation of oil and gas, or both, not in communication laterally or vertically with any other accumulation of oil or gas." 58 P.S. § 402(10).

8. The alleged Pulaski Accumulation comprises 3,267 acres, and Hilcorp alleges to have acquired the right to "drill on and produce from 3,232.5833 acres." Exhibit A at 3.

9. Petitioners own and reside on properties that make up part of the remaining approximately 34 acres. Petitioners have not sold or leased their mineral rights, and due to the adverse environmental impact of the proposed drilling, they have no intention of doing so.

10. If Hilcorp is successful in its Application, Petitioners' interests in all or parts of their subsurface estate will be involuntarily integrated with those of the other tracts in the units that Hilcorp proposes in its Application. ***See*** 58 P.S. § 408.

11. DEP has appointed a hearing officer, Michael L. Bangs, Esquire, to hold a hearing on the Application.

12. Hearing Officer Bangs had scheduled a hearing in this matter for May 7-8, 2014, which hearing was subsequently continued. As of yet, no hearing has been held, nor is one currently scheduled.

13. Petitioners did not receive notice of the hearing until April 2, 2014.

14. Petitioners retained undersigned counsel to represent them, *pro bono*, on April 21, 2014.

15. Initially, the only two parties to this hearing process were the DEP and Hilcorp. Accordingly, on April 25, 2014, Petitioners' counsel filed a Petition to Intervene in the hearing scheduled before Hearing Officer Bangs, which is attached as "Exhibit B." On April 28, 2014, counsel also filed a Motion for Continuance to provide Petitioners and counsel adequate time to prepare for the hearing.

16. On May 1 2014, Hearing Officer Bangs requested that E. Christopher Abruzzo, Secretary of the DEP (Secretary), rule on Petitioners' Petition to Intervene. On May 2, 2014, the Secretary granted the petition. ***See*** "Exhibit E."

17. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the right to acquire, possess and protect property and to use that property as the individual sees fit without interference from the government. ***See*** PA. CONST. Art. I, § 1. In certain limited circumstances, the Commonwealth may constitutionally employ its police powers in a manner that may infringe upon citizens' property rights. However, the powers of the Commonwealth are not unlimited and a law will be deemed unconstitutional if it: 1) does not adequately safeguard a citizen's due process rights; 2) is vague due to insufficient specificity; or 3) results in a taking of real property for a private use.

18. Pursuant to 26 Pa.C.S. § 204(a), "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited." This provision is subject to limited exceptions, which do not apply in this case. ***See*** 26 Pa.C.S. § 204(b).

19. The Conservation Law requires that rules and regulations "shall" be promulgated "governing the practice and procedure" by which the DEP may grant an application for a well spacing order. 58 P.S. § 410(a). As of this date, the promulgated regulations are completely inadequate to ensure due process. ***See*** 25 Pa.Code §§ 79.21-79.28.

STATUTORY AUTHORITY AND JURISDICTION

20. Petitioners bring the instant Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to the "Declaratory Judgments Act," 42 Pa.C.S. § 7531, *et seq.* and Pennsylvania Rules of Civil Procedure 1602, *et seq.*

21. "[T]he purpose of the Declaratory Judgments Act is to 'settle and to afford **relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered**.'" ***Bayada Nurses, Inc. v. Com. of Pa., Dept. of Lavor and Industry***, 8 A.3d 866, 874 (Pa. 2008) (quoting 42 Pa.C.S. § 7541(a)) (emphasis added).

22. Because the Conservation Law results in the taking of private property for Hilcorp, a private enterprise engaged in extracting oil and gas for a profit, the Conservation Law conflicts with the Property Rights Protection Act (PRPA), 26 Pa.C.S. §§ 201-207, which only permits a taking of private property for a public purpose. ***See*** 26 Pa.C.S. § 204(b). Pursuant to the legislative notes of the PRPA, "[a]ll other acts and parts of acts are repealed insofar as they are inconsistent with this act." 26 Pa.C.S. § 201 Historical and Statutory Notes (2006).

23. The Conservation Law and its implementing regulations are unconstitutional, as they deprive Petitioners of their procedural due process rights.

24. Petitioners request that this Honorable Court declare that provisions of the Conservation Law violate the PRPA, and therefore, are repealed *sub silentio*, and enjoin their implementation to the extent that they affect a taking of private property for a private enterprise.

25. Petitioners request that this Honorable Court declare that provisions of the Conservation Law violate the Pennsylvania Constitution and enjoin the implementation of its unconstitutional provisions.

26. Petitioners request that this Honorable Court declare that the Conservation Law's intended purpose of protecting correlative rights and preventing waste is not furthered by the law's application, and enjoin the implementation of the Conservation Law in cases involving horizontal drilling.

27. The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 761 because this action has been filed against the Commonwealth government and officers thereof acting in their official capacities.

28. The Commonwealth Court has jurisdiction over Petitioners' constitutional challenge of the Conservation Law, because neither the DEP nor the EHB have authority to rule on the constitutionality of statutes; such rulings are within the exclusive province of the courts. ***See St. Joe Minerals Corp. v. Goddard***, 324 A.2d 800, 802-03 (Pa. Cmwlth. 1974), *followed by* ***Ter-Ex, Inc. v. Dept. of Envt'l Res.***, 1984 EHB 706, Docket No. 83-138-G (1984).

29. This issue is ripe for review as Hilcorp has initiated a process that directly implicates Petitioners' property rights and their constitutional rights to due process of law, thereby creating an actually controversy.

30. The Commonwealth Court has jurisdiction over Petitioners' remaining claims because Petitioners are not required to exhaust their administrative remedies at the DEP or the EHB where the administrative remedies are inadequate, pursuit of them would be pointless, and a suit in equity would provide a more efficient and thorough global resolution. ***See Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records***, 50 A.3d 1263, 1277 (Pa. 2012) (finding jurisdiction in the Commonwealth Court in a situation where the administrative remedy

was still new and under-developed, and the applicable statute did not provide notice to interested third parties who held a property interest in the subject of the administrative proceeding).

SUMMARY OF ARGUMENT

31. In this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief, Petitioners assert that:

a. Because the Conservation Law takes the private property of a land and mineral owner for a private rather than public purpose, and because this is done without just compensation first being made, but rather subjects the land and mineral owner into a forced gamble subject to a 200% penalty, the law facilitates an unconstitutional taking of private property without just compensation in violation of Article I, Section 10 of the Pennsylvania Constitution.

b. Because the Conservation Law is inconsistent with the PRPA's proscription against the use of eminent domain for the taking of private property for a private purpose, any provisions of the Conservation Law that permit such a taking have been repealed *sub silentio*.

c. The Conservation Law and the regulations promulgated thereunder violate Petitioners' procedural due process rights.

d. The Conservation Law is unconstitutionally vague.

e. The Conservation Law's dual purposes of protecting correlative rights and preventing waste are not achieved in cases of horizontal drilling, and the Conservation Law contains no provision permitting horizontal drilling.

PARTIES

32. Petitioners, Suzanne and Martin Matteo, are the owners of property located at 1230 New Bedford-Sharon Road, West Middlesex, Pennsylvania 16159.

33. Petitioners, Robert and Carole Valentine, are the owners of property located at 1251 Deer Creek Rd., West Middlesex, Pennsylvania 16159.

34. Petitioner, Steve Emery, is the owner of property located at 745 Sharon Bedford Rd., West Middlesex, Pennsylvania 16159.

35. Respondent, Hilcorp Energy Company, is a privately held oil and gas company with an address of 1201 Louisiana St., Ste. 1400, Houston, Texas 77002.

36. Respondent, Commonwealth of Pennsylvania, has an address of 225 Main Capitol Building, Harrisburg, Pennsylvania, 17120.

37. Respondent, Office of the Attorney General of Pennsylvania, is the law enforcement branch of the Commonwealth of Pennsylvania, with an address of 16th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

38. Respondent, Kathleen Kane, in her official capacity, is the Attorney General of the Commonwealth of Pennsylvania, with an official address of 16th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

39. Respondent, DEP, is an agency of the Commonwealth of Pennsylvania, with an address of 400 Market Street, Harrisburg, Pennsylvania 17101.

40. Respondent, E. Christopher Abruzzo, in his official capacity, is the Secretary of the DEP, with an official address of 400 Market Street, Harrisburg, Pennsylvania, 17120.

LEGAL STANDING OF THE PETITIONERS

41. 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. ***Commonwealth of Pennsylvania v. Locust Township***, 968 A.2d 1263, 1272 (Pa. 2009) (citing ***Arsenal Coal Co. v. Dept. of Environmental Resources***, 477 A.2d 1333, 1338 (Pa. 1984)).

42. Petitioners have a substantial, direct, and immediate interest in the outcome of the hearing on the Application. As shall be discussed in detail below, if Hilcorp is successful, Petitioners will certainly lose their interests in the oil or gas that Hilcorp seeks to extract, and

furthermore, Petitioners may lose their rights in their subsurface and surface estates. Petitioners are also enduring an ongoing violation of their due process rights due to the *ad hoc* nature of the proceedings before Hearing Officer Bangs.

FACTUAL AND PROCEDURAL BACKGROUND

43. In order to understand the Conservation Law's dual purposes of preventing waste and protecting correlative rights, one must first examine the history of oil and gas drilling, and in particular, the rule of capture.

44. The rule of capture has been stated as:

> Minerals belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.

Westmoreland & Cambria Natural Gas Co. v. DeWitt, 18 A. 724, 724 (Pa. 1889).

45. The rule of capture resulted in tremendous over-drilling because of the geologic quality of the movement of oil and gas to areas of low pressure.

> A typical definition of the rule of capture is that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass. The doctrine puts the onus on the landowner alleging trespass to actively develop their mineral interests, as they are faced with the possibility that a neighbor will drain the resources before they do. The policy behind this rule is one that encourages production of fossil fuel resources and discourages litigation.

Joseph A. Dammel, *Notes from Underground; Hydraulic Fracturing in the Marcellus Shale*, 12 Minn. J.L. Sci. & Tech. 773, 782-83 (2011) (footnote and quotation marks omitted).

46. The rule of capture is "largely a rule of self-help under which landowners, suffering from potential drainage, were not awarded a share in neighboring wells because they were deemed to have the ability to prevent drainage and protect their interest by drilling their

own well." Sharon O. Flanery & Ryan J. Morgan, *Overview of Pooling and Unitization Affecting Appalachian Shale Development*, 32 Energy & Min. L. Inst. 457, 459-60 (2011).

47. In addition to over-drilling, the rule led to "undue surface waste, waste of economic resources, and waste of oil and gas reserves through premature depletion." ***Id.*** at 460.

48. It was against this backdrop that our legislature enacted the Conservation Law. It seeks to prevent waste, which it defines as:

> (i) Physical waste, as the term is generally understood in the oil and gas industry, which includes--
>
> A. Permitting the migration of oil, gas or water from the stratum in which it is found to other strata, if such migration would result in the loss of recoverable oil or gas, or both;
>
> B. The drowning with water of any stratum or part thereof capable of producing oil or gas in paying quantities, except for secondary recovery purposes, or in hydraulic fracturing or other completion practices;
>
> C. The unnecessary or excessive surface loss or destruction of oil or gas, and
>
> D. The inefficient or improper use, or unnecessary dissipation of reservoir energy.
>
> (ii) The drilling of more wells than are reasonably required to recover, efficiently and economically, the maximum amount of oil and gas from a pool.

58 P.S. § 402(12).

49. The Conservation Law also seeks to protect correlative rights, which it defines as:

> the rights of each owner of oil and gas interests in a common pool or source of supply of oil or gas, to have a fair and reasonable opportunity to obtain and produce his just and equitable share of the oil and gas in such pool or sources of supply, without being required to drill unnecessary wells or incur other unnecessary expense to recover or receive such oil or gas or its equivalent.

58 P.S. § 402(2).

50. "A primary feature of many conservation laws was the imposition of spacing

requirements, which limited the number of wells that could be drilled within a specified acreage...[from which] the concept of pooling tracts together for production first emerged." Flanery & Morgan, *supra*, at 461.

51. These laws developed during the early and middle 20th century, horizontal drilling had only recently been invented and certainly had not reached the levels at which it is used today.

52. An important point of law is that "[d]rilling a non-vertical wellbore that extends into a neighbor's subsurface property has long been considered a form of trespass." Lindsey Trachtenberg, *Reconsidering the Use of Forced Pooling for Shale Gas Development*, 19 Buff. Envt'l. L.J. 179, 190 (2011).

53. **There is nothing in the Conservation Law that permits non-vertical drilling into a non-consenting property owner's subsurface estate. Hilcorp's attempt to avail itself of this law for horizontal drilling is without factual precedent and is clearly without basis in law.**

54. Laws such as the Conservation Law typically comprise provisions for pooling and unitization, terms that are very closely related and often used interchangeably.

> [T]he term[] "unitization ... refer[s] to the consolidation of mineral, leasehold, or royalty interests covering all or a portion of a common source of supply. Compulsory unitization involves the use of the state police power to compel owners of mineral interests and royalty interests to consolidate their separately owned estates over all, or a portion of, a common source of supply. On the other hand, "pooling" or a "pooled unit" will refer to the joining together of small tracts or portions of tracts for the purpose of having sufficient acreage to receive a well drilling permit under the relevant state or local spacing or drilling laws and regulations.

Bruce M. Kramer, *Compulsory Pooling and Unitization with an Emphasis on Statutory and Common Law of the Eastern United States*, 27 Energy & Min. L. Inst. 223, 224-25 (2007).

55. The Conservation Law contains a forced unitization provision, which, in relevant

part, states:

> (a) When two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of a spacing unit, the interested persons may integrate their tracts or interests for the development and operation of the spacing unit. In the absence of voluntary integration, the commission, upon the application of any operator having an interest in the spacing unit, shall make an order integrating all tracts or interests in the spacing unit for the development and operation thereof and for the sharing of production therefrom. The commission as part of the order establishing a spacing unit or units shall prescribe the terms and conditions upon which the royalty interests in the unit or units shall, in the absence of voluntary agreement, be deemed to be integrated without the necessity of a subsequent separate order integrating the royalty interests.

58 P.S. § 408(a). ***See also*** 25 Pa. Code §§ 79.31-79.33 (Integration of Interests in Spacing Units).

56. The Conservation Law contains no definition for "integration" or "royalty interests." However, it does define a "royalty owner" as "the owner of any interest in the oil or gas in place, or oil or gas rights, who has not executed an oil and gas lease, to the extent that such owner is not designated an "operator" under the preceding clause." 58 P.S. § 402(8). An "operator" is defined as:

> (7) **"Operator"** shall mean any owner of the right to develop, operate, and produce oil and gas from the pool. *In the event that there is no oil and gas lease in existence the owner of the oil and gas rights shall be considered as "operator" to the extent of seven-eighths of the oil and gas in that portion of the pool underlying the tract owned by such owner, and a royalty owner as to a one-eighth interest in such oil and gas.* In the event that the oil is owned separately from the gas, the owner of the substance being produced or sought to be produced from the pool shall be considered as **"operator"** as to such pool.

58 P.S. § 402(7) (emphasis added).

57. According to these definitions, Petitioners are both "operators" and "royalty owners" under the Conservation Law.

58. Noticeably absent from the Conservation Law is any mention of a minimum

threshold that would require the applicant for a well spacing order to control a certain percentage of the land (or interests thereunder) overlying the alleged pool. For instance, Ohio requires an applicant to "control sixty-five percent of the land overlying the pool." Ohio R.C. § 1509.28(A). Similarly, New York requires that an applicant "control through fee ownership, voluntary agreement, or integration ... no less than sixty percent of the acreage within the proposed spacing unit for such well." N.Y. ENVTL. CONSERV. LAW § 23-0501(2).

59. Therefore, in the absence of any authority to the contrary, under the Conservation Law, an owner of less than one percent of the land overlying a pool could apply for a well spacing order and pursue the involuntary unitization of the remaining ninety-nine percent interests.

60. Ohio law also safeguards the surface estate of the integrated interests whereas the Conservation Law is silent on this topic. ***See*** Ohio R.C. § 1509.27 ("No surface operations or disturbances to the surface of the land shall occur on a tract pooled by an order without the written consent of or a written agreement with the owner of the tract that approves the operations or disturbances.").

61. This void in the Conservation Law is particularly troublesome to Petitioners because "Pennsylvania recognizes the mineral owner's right to reasonable use of overlying surface property in order to access his minerals." Trachtenberg, *supra*, at 189. ***See also Chartiers Block Co. v. Mellon***, 25 A. 597, 598 (Pa. 1893) (considered the seminal case for reasonable use in Pennsylvania); ***Humberston v. Chevron U.S.A., Inc.***, 75 A.3d 504, 511 (Pa. Super. 2013) (applying the reasonable use doctrine to allow a wastewater impoundment against the surface owner's objections); ***Belden and Blake Corp. v. Dept. of Conserv. and Nat. Res.***, 969 A.2d 528, 532 (Pa. 2009) (applying the reasonable use doctrine against the Commonwealth itself where public park lands had been leased). In at least one other state "a forced pooled

surface and mineral owner is required by the State to accept the surface damage to his property." ***Cormack v. Wil-Mac Corp.***, 661 P.2d 525, 526 (Okla. 1983).

62. The notice provision of the Conservation Law is part of Section 407(2) and it states:

> Upon the filing of an application as above set out, notice of the hearing shall be given by the [Department] by publication for two successive weeks in a newspaper in general circulation in each county where such any land which may be affected by such order is located, and by the commission mailing a copy of such notice to all persons who have specified to the commission an address to which all such notices may be mailed. The first publication and the mailing of such notice shall be at least fifteen days before the date fixed for hearing.

58 P.S. § 407(2). ***See also*** 25 Pa. Code § 79.22 (Notice of hearing). Thus, under the Conservation Law, an operator or royalty owner is entitled to no more than 15 days' notice. Importantly, there are no requirements regarding how the notice is to apprise the operator or royalty owner of the rights or interests at stake at the hearing. Nor is there any provision for informing the operator or property owner as to how he or she may participate in the hearing or the steps to take in preparation for the hearing, such as consulting an attorney.

63. The notice received by Petitioners, attached as Exhibit C, only informs them that they can support the Application, or oppose and/or present their own plan of development. It also directs them to a page on the DEP website set up for this hearing:

http://www.portal.state.pa.us/portal/server.pt/community/conservation_law/21703

64. Because the Conservation Law provides for the involuntary taking of a property owner's mineral interests, it also provides a mechanism for compensating the property owner.

65. Before discussing the Conservation Law's compensation scheme, it is helpful to consider the following explanation of some other states' laws:

> If pooling is accomplished prior to drilling, the pooled working interest owners will be given the opportunity to participate in the risk of drilling the well. If they choose not to participate, in many states (e.g., North

> Dakota), they will be "carried" (i.e., they will not participate in the risk of drilling), but will be subject to a risk penalty (e.g., 300% of drilling and completion costs and perhaps operating costs, recoverable from the carried parties' share of production) to compensate the operator or participating parties for assuming the risk. In other states (e.g., Oklahoma), a pooled party will be given several elections, which range from participating up front to being compensated with money, overriding royalty or both for essentially assigning its interest in the well to the operator and participating parties.

Kramer, *supra*, at 931 n.186.

66. The Conservation Law's scheme offers the involuntary operator or royalty owner, referred to as "nonparticipating," several options.

> If requested, each such integration order shall provide just and equitable alternatives whereby an operator who does not elect to participate in the risk and cost of the drilling and operation, or operation, of a well may elect to surrender his leasehold interest to the participating operators on some reasonable basis and for a reasonable consideration which, if not agreed upon, shall be determined by the commission, or may elect to participate in the drilling and operation, or operation, of the well on a limited or carried basis upon terms and conditions determined by the commission to be just and reasonable. If one or more of the operators shall drill, equip, and operate, or pay the costs of drilling, equipping or operating a well for the benefit of a nonparticipating operator, as provided for in an order of integration, then such operator or operators shall be entitled to the share of production from the spacing unit accruing to the interest of such nonparticipating operator, exclusive of one-eighth of the production, until the market value of such nonparticipating operator's share of the production, exclusive of such one-eighth of production **equals double the share of such costs** payable by or charged to the interest of such nonparticipating operator. If there is a dispute as to the costs of drilling, equipping or operating a well, the commission shall determine such costs.

58 P.S. § 408(C) (emphasis added). ***See also*** 25 Pa. Code §§ 79.31-79.33 (Integration of Interests in Spacing Units).

67. The options provided by Section 408(C) have been described as follows:

> The statute provides three choices to nonparticipating operators who may be forced to join the spacing unit under the terms of the integration order:
>
> > 1) to participate in the spacing unit by paying their share of the "reasonable actual cost" plus a "reasonable charge for supervision and for interest on past due accounts";

> 2) to sell their leasehold interests to the participating operators for reasonable consideration, as agreed upon or as determined by the commission; and
>
> 3) to participate on a limited or carried basis upon terms determined by the commission to be just and reasonable.
>
> For lands that have not been leased, the owner of the land is considered an "operator" as to 7/8 and a "royalty owner" as to 1/8. This means that an unleased landowner who is force pooled would receive a 1/8 royalty plus compensation under one of the three alternatives described above.

Jeffrey A. Shlegel, *Forced Pooling in the Marcellus Shale; Where is Pennsylvania Headed?*, http://www.jonesday.com/forced_pooling_in_marcellus_shale/#_ednref16.

68. Additionally, when a non-participating operator or royalty owner does not participate up front in the cost of drilling, he or she must not only pay for such costs from the future royalty payments, **but must pay 200% of such costs**. Thus, the non-participating operator or royalty owner ***must pay a penalty*** for not having participated in the risk assumed by the driller. ***See*** 58 P.S. § 408(C).

ARGUMENT

COUNT I – DECLARATORY JUDGMENT

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

I. Petitioners seek a declaration that the Conservation Law is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.

69. Paragraphs 1 through 68 are incorporated by reference as though set forth fully herein.

70. The Pennsylvania Supreme Court has explicitly recognized the rights of landowners in this regard as embodied in Article I, Section 1 of the Pennsylvania Constitution, "[t]he right of landowners in this Commonwealth to use their property as they wish, unfettered

by governmental influence except as ***necessary*** to protect the interests of the public **and of neighboring property owners**, is of ancient origin, recognized in the Magna Carta, and now memorialized in Article I, Section 1 of the Pennsylvania Constitution." ***In re Realen Valley Forge Greenes Associates***, 838 A.2d 718, 727 (Pa. 2003) (emphasis added). Article 10 of Pennsylvania Constitution prohibits private property from being "taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. Art. I, § 10.

71. Pursuant to Article I, Section 25 of the Pennsylvania Constitution, not even the Pennsylvania General Assembly has the authority to transgress the rights set forth in Article I. ***See*** PA. CONST. Art. I, § 25. Furthermore, "...property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish." ***In re Realen Valley Forge Greenes Associates***, 838 A.2d 718, 728 (Pa. 2003).

72. The Pennsylvania Constitution mandates that private property can only be taken to serve a public purpose. ***In re Opening Private Rd. for Benefit of O'Reilly***, 5 A.3d 246 (Pa. 2010). Private property cannot be taken for the benefit of another private property owner. ***Kelo v. City of New London***, 545 U.S. 469 (2005).

73. The Pennsylvania Supreme Court has maintained that to satisfy this obligation of serving a "public purpose," the public must be the primary and paramount beneficiary of any taking. ***In re Opening Private Rd. for Benefit of O'Reilly***, 5 A.3d 246, 258 (Pa. 2010). In considering whether a primary public purpose was properly invoked, the Pennsylvania Commonwealth Court has looked for the "real or fundamental purpose" behind a taking. ***In re Opening a Private Rd. for Benefit of O'Reilly Over Lands of (a) Hickory on Green***

Homeowners Ass'n & (b) Mary Lou Sorbara, WL 1709846 (Pa. Commw. Ct. 2011). Stated otherwise, the true purpose must primarily benefit the public. ***Id.***

74. The question that must be asked is what public purpose is being served by the appropriation of an interest in real property by a for-profit corporation for the extraction of natural gas? If such is deemed a "public purpose," then any oil and gas corporation by analogy should have the right by use of eminent domain powers to acquire real property and mineral rights.

75. Counsel for Hilcorp, Kevin L. Colosimo, Esquire, and Daniel P. Craig, Esquire, have recently written an article in which they admit that "[c]ompulsory pooling and unitization laws effectively grant a private power of eminent domain; **the state exercises its police power to take an interest in private property for private use**." Kevin L. Colosimo, Esq. & Daniel P. Craig, Esq., *Compulsory Pooling and Unitization in the Marcellus Shale: Pennsylvania's Challenges and Opportunities*, 83 Pa. B. A. Q. 47, 62 (2012) (emphasis added), attached hereto as "Exhibit D."

76. Because it cannot be justified on the basis of any paramount public purpose, the Conservation Law facilitates an unconstitutional taking of private property for a private purpose in violation of Article I, Section 1 of the Pennsylvania Constitution.

77. Because the Conservation Law permits the taking of the private property of a land and mineral owner without just compensation first being made, and instead subjects the land and mineral owner into a forced gamble subject to a 200% penalty, the law facilitates an unconstitutional taking of private property without just compensation first being made in violation of Article I, Section 10 of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa.R.Civ.P. 1602 and the Declaratory Judgments Act, 42 Pa.C.S. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Respondents as follows:

I. For a decree declaring and adjudging the Conservation Law permits an unconstitutional taking in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution;

II. For a decree to permanently enjoin future application of the Conservation Law; and

III. For such other relief as the Court may deem just and proper, including attorney's fees and costs.

COUNT II – DECLARATORY JUDGMENT

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

II. Petitioners seek a declaration that the Conservation Law is repealed *sub silentio* in so far as it is inconsistent with PRPA.

78. Paragraphs 1 through 77 are incorporated by reference as though set forth fully herein.

79. The Conservation Law is inconsistent with the limitations on the use of eminent domain under the PRPA. Pursuant to the Act, except as set forth in § 204(b), the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited. Specifically, the appropriation of an interest in real property by a corporation for the extraction of oil or gas is not listed as an exception under § 204(b).

80. Pursuant to the legislative notes of the PRPA, "[a]ll other acts and parts of acts are repealed insofar as they are inconsistent with this act." 26 Pa.C.S. § 201 Historical and Statutory Notes (2006).

81. Because the Conservation Law is inconsistent with the PRPA's proscription against the use of eminent domain for the taking of private property for a private purpose, any provisions of the Conservation Law that permit such a taking have been repealed *sub silentio*.

See also Colosimo, *supra*, at 64 (emphasis added) (suggesting that the General Assembly enact a law for compulsory pooling in the Marcellus Shale that carves out an "exemption for the specific provisions of **compulsory pooling legislation that would otherwise be inconsistent with the PRPA**").

WHEREFORE, pursuant to Pa.R.Civ.P. 1602 and the Declaratory Judgments Act, 42 Pa.C.S. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Respondents as follows:

I. For a decree declaring and adjudging that the Conservation Law, in so far as it is inconsistent with PRPA, has been repealed *sub silentio*;

II. For a decree to permanently enjoin future application of such provisions of the Conservation Law; and

III. For such other relief as the Court may deem just and proper, including attorney's fees and costs.

COUNT III – DECLARATORY JUDGMENT

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

III. Petitioners seek a declaration that the Conservation Law is a violation of Petitioners' procedural due process rights.

82. Paragraphs 1 through 81 are incorporated by reference as though set forth fully herein.

83. "The guarantee of due process, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights, particularly Article I, Sections 1, 9 and 11 of the Pennsylvania Constitution." ***Lawson v. Pa. Dept. of Public Welfare***, 744 A.2d 804, 806 (Pa. 2000). Furthermore, "due process is fully applicable to adjudicative hearings involving substantial property rights...." ***Id.*** (omission in original) (quotation marks omitted).

84. In ***In re Merlo***, 17 A.3d 869 (Pa. 2012), the Court identified three factors to consider when evaluating a due process claim:

Determining what process is due in a particular situation

> generally requires consideration of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 872.

85. An owner of private property has a fundamental liberty interest in the use, enjoyment and protection of that property. "The right of private property—'the inherent and indefeasible right * * * of acquiring, possessing and protecting property'—which necessarily includes not only the ownership but also the right of use of private property, is ordained and guaranteed by the Constitution of the United States and the Constitution of Pennsylvania." ***Sandyford Park Civic Assoc. v. Lunneman***, 152 A.2d 898, 900 (Pa. 1959) (omission in original).

86. The second factor in a due process claim is the risk of deprivation through the procedures used. In the instant case, the procedure used is *ad hoc* and insufficient to ensure due process.

87. The Conservation Law does not require that operators or royalty owners be joined as parties in the hearing or the application process. Although the Conservation Law requires the promulgation of rules to govern the procedure under the law, ***see*** 58 P.S. § 410(a), the existing rules and regulations do not accord Petitioners rights that would ensure meaningful participation in the process, nor is there a substitute procedural safeguard that will adequately protect their rights.

88. The notice requirements under the Conservation Law are devoid of any specific requirements regarding an explanation of the landowner's rights and what interests are at stake should the landowner not oppose an application

89. When Petitioners received notice of the hearing, they had no idea what was at stake or how to protect their interests. Even after undersigned counsel began his representation, there was great uncertainty as to how proceed. Although Petitioners have now been granted intervention, they still do not know what rights they will have at the hearing. For instance, they are still not privy to documents Hilcorp submitted to Hearing Officer Bangs, which are under seal pursuant to a protective order dated February 19, 2014. ***See Pa. Office of Open Records***, 4 A.3d at 1271 (stating, "Due process principles apply to quasi-judicial or administrative proceedings and require an opportunity, inter alia, to hear the evidence adduced by the opposing party, cross-examine witnesses, introduce evidence on one's own behalf, and present argument.").

90. The Conservation Law therefore puts the onus on the unsuspecting landowner to ascertain from the notice that substantial rights are at stake, then discern that he or she must file a petition to intervene to protect those interests, and then prepare for the hearing within 15 days against an oil or gas company that is generally in a far superior legal, financial and technical position to defeat the landowner's interests.

91. This approach stands in contrast to that of our neighboring States. For instance, when an application for a spacing order is made in Ohio, every owner of land within the proposed area must be personally notified of the date, time, and place of the hearing, and the nature of the order being considered, and such notice must be given at least thirty days prior to the hearing. ***See*** Ohio R.C. § 1509.25. New York requires that thirty days' "actual notice" must be given to all owners of land wholly or partially within the proposed area, which includes a

copy of the proposed integration order and a full explanation of the landowners' rights and the costs of non-compliance. ***See*** N.Y. ENVTL. CONSERV. LAW § 23-901(c).

92. In the instant case, Petitioners have reviewed the DEP's filing and it is clear that that it has not taken a position on Hilcorp's Application with respect to Petitioners' property interests.

93. Therefore, Petitioners' only option was to petition to intervene. Under the Conservation Law, an affected landowner is not guaranteed the right to protect his or her interests but instead must submit a petition, which of course can be denied, before the landowner even becomes a party. It is of fundamental concern that Petitioners were not even sure whether a Petition to Intervene was the appropriate avenue to protect their interests, because the procedures governing the hearing were unclear.

94. There is a substantial risk of deprivation of a landowner's interests in such a scenario. Moreover, even when a petition to intervene is granted, the landowner has insufficient time to prepare for the hearing, as the notice only provides 15 days. Fifteen days is clearly insufficient to secure expert testimony to rebut the applicant's evidence, and generally it is not sufficient time to build an adequate case. This is assuming the landowner even knows what to prepare or the extent to which he or she will be permitted to take part in the process. **The regulations promulgated under the Conservation Law contain no provisions regarding pleadings, discovery, motion practice, or examination of witnesses.** Thus, a landowner does not even know whether cross-examination of the applicant's expert witnesses, a basic right in challenging an adversary's case, is permitted.

95. Although the Conservation Law requires that the Department promulgate rules to govern practice and procedure during the hearing, no regulations have been promulgated that might fill the gaps as required by due process. ***See*** 58 P.S. 410(a). The existing regulations

state merely that landowners, as "operators," have the right to appear and oppose or support the spacing plan, but say nothing about the procedures governing the hearing. ***See*** 25 Pa.Code §§ 79.23.

96. As a consequence, even though the Conservation Law was enacted in 1961, there has been no attempt by the Department to ensure that the practice and procedure during the hearing would be reasonable and effective.

97. From the very beginning of this case, the parties and the Department were confused about the most basic of questions: the proper forum for the hearing. Hilcorp attempted to persuade the EHB to preside, a proposition that was emphatically rejected. ***See Hilcorp Energy Co. v. Dept. of Envt'l Prot.***, EHB Docket No. 2013-155-SA-R at 18 (2013).

98. However, the General Assembly intended the hearing to be governed by more specific rules, as indicated by the Conservation Law's requirement that **"[t]he commission shall prescribe rules and regulations governing the practice and procedure before the commission."** 58 P.S. § 410(a) (emphasis added).

99. In short, the entire process is *ad hoc*, and falls woefully short of ensuring Petitioners' procedural due process rights.

100. The final factor to evaluate is the government interest. However, that interest is slight, as the discussion in Count V, *infra*, shall demonstrate, as the Conservation Law's dual purpose of preventing waste and protecting correlative rights is not furthered in cases of horizontal drilling. Rather, the interest is primarily a private one that accrues to the oil or gas company.

WHEREFORE, pursuant to Pa.R.Civ.P. 1602 and the Declaratory Judgments Act, 42 Pa.C.S. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Respondents as follows:

I. For a decree declaring and adjudging that the Conservation Law violates Petitioners' procedural due process rights;

II. For a decree to permanently enjoin future application of the Conservation Law; and

III. For such other relief as the Court may deem just and proper, including attorney's fees and costs.

COUNT IV – DECLARATORY JUDGMENT

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

IV. Petitioners seek a declaration that the Conservation Law is unconstitutionally vague, and as such is a violation of Petitioners' procedural due process rights.

101. Paragraphs 1 through 100 are incorporated by reference as though set forth fully herein.

102. "A law may be unconstitutionally vague and thus violate the Due Process Clause of the United States Constitution if it fails to provide the necessary information such that an ordinary citizen could understand what conduct is prohibited." ***Eagle Environmental II, L.P. v. Commonwealth of Pennsylvania, Department of Environmental Protection***, 884 A.2d 867, 881 (Pa. 2005).

103. A "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." ***Commonwealth v. Asamoah***, 809 A.2d 943, 946 (Pa. 2002).

104. As previously discussed, the Conservation Law is vague for several reasons:

a. Petitioners cannot anticipate what rules of practice and procedure should be followed with respect to this hearing, and therefore, they are subjected to a gauntlet in order to safeguard their interests.

b. Petitioners cannot discern what surface rights will be affected as a result of this process, considering especially that the reasonable use doctrine might be held to apply to Petitioners' land even though there was no contract between Petitioners and Hilcorp. Their property interest is left vulnerable when their oil and gas interests are transferred to another by compulsory pooling, because the subsurface estate is dominant over the surface estate. ***Belden and Blake Corp. v. Dept. of Conserv. & Nat. Res.***, 969 A.2d 528, 532 (Pa. 2009) (citing cases). If the DEP transfers Petitioners' subsurface interests to Hilcorp, with those interests may go a common law right to the reasonable use of Petitioners' surface estates. ***See Chartiers Block Co. v. Mellon***, 25 A.597, 598 (Pa. 1893) (considered the seminal case for reasonable use in Pennsylvania). The reasonable use doctrine has been held to allow many types of industrial activity on the lands of non-consenting surface owners, over their objections. ***See Humberston v. Chevron U.S.A., Inc.***, 75 A.3d 504, 511 (Pa. Super. 2013) (allowing the construction of a large wastewater impoundment); ***Snyder Bros., Inc. v. Yohe***, 676 A.2d 1226, 1228, 1232 (Pa. Super. 1996) (allowing the construction of a pipeline); ***Belden and Blake***, 969 A.2d at 532 (applying the reasonable use doctrine against the Commonwealth itself where public park lands had been leased).

c. Petitioners cannot discern whether Hilcorp will be permitted to trespass into their subsurface estates if it is successful in its application.

d. Petitioners cannot discern what interests they will lose in an integration order, i.e., just their rights in the Utica shale, or all of their mineral rights? The Conservation Law contains no provision explaining what stratigraphic intervals are included in the interests forfeited under the law.

e. The Conservation Law contains no minimum of threshold of controlling interests before one can apply for a well spacing order. Therefore, the Conservation Law could be used towards an absurd end where, for example, an owner of a one percent interest seeks to integrate the remaining ninety-nine percent interests.

105. As the Commonwealth Court has stated,

> A statute that forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. Only if the statute contains reasonable standards to guide prospective conduct does it satisfy the requirements of due process.

Watkins v. St. Bd. of Dentistry, 740 A.2d 760, 764 (Pa. Cmwlth. 1999) (citation omitted).

106. The Conservation Law is replete with voids that create a guessing game as to the process parties must follow and the rights at stake.

107. For the foregoing reasons, the Conservation Law is unconstitutionally vague.

WHEREFORE, pursuant to Pa.R.Civ.P. 1602 and the Declaratory Judgments Act, 42 Pa.C.S. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Respondents as follows:

I. For a decree declaring and adjudging that the Conservation Law violates Petitioners' procedural due process rights because it is unconstitutionally vague;

II. For a decree to permanently enjoin future application of the Conservation Law; and

III. For such other relief as the Court may deem just and proper, including attorney's fees and costs.

COUNT V – DECLARATORY JUDGMENT

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

V. Petitioners seek a declaration that the Conservation Law's dual purpose of preventing waste and protecting correlative rights does not apply in cases of horizontal drilling.

108. Paragraphs 1 through 107 are incorporated by reference as though set forth fully herein.

109. When the Conservation Law was enacted, the legislature was contemplating how to remedy the maladies of the rule of capture caused by the incentives inherent in vertically drilling into a pool of oil and gas and draining the pool without regard to the neighboring landowners' rights or whether a certain amount of the oil or gas became unrecoverable as a result of over-drilling.

110. It is clear, however, that "[u]nlike a conventional vertical well, a horizontal shale well actually drills through the formation and its drainage is a limited area beyond the completion locations in the horizontal bores." Flanery & Morgan, *supra*, at 507.

111. As more recently explained,

> **Under a typical compulsory pooling statute, a well operator may not drill a well into the surface of an unleased landowner without that landowner's consent. However, the typical compulsory pooling statute only contemplates vertical drilling operations**. A vertical well only disturbs the subsurface of the land on which the surface operations take place. The rest of the tracts making up the pooled unit merely have the oil or gas underlying the tract, which is part of the common source of supply, drained from the subsurface. Otherwise, there is no physical disturbance to the subsurface of any of these pooled tracts of land. A horizontal well, on the other hand, is likely to physically traverse the subsurface of multiple tracts of land within the pooled unit.

Colosimo, *supra*, at 60 (emphasis added) (footnote omitted).

112. Hilcorp's Application is an attempt at fitting the proverbial square peg in a round hole because the Conservation Law was never intended for horizontal drilling.

113. Absent an agreement permitting it, horizontal drilling into another landowner's subsurface estate is clearly a trespass. The Conservation Law is completely silent on this issue. Certainly, the legislature would not enact a law permitting something that is otherwise proscribed as a trespass under common law without expressly stating so in the legislation.

114. Furthermore, a gas drilling company can simply direct its well bore around the properties of non-participating owners and there will be minimal, if any, drainage of gas from the shale formations underlying those property owners' lands. Therefore, their correlative rights are protected by preventing the well bore from penetrating their subsurface estates.

115. To the extent that these property owners' gas becomes unrecoverable or uneconomical to develop, that should be their choice. If, in their judgment, they value their clean water over the economic benefits of royalty payments, they certainly should not be forced to forego that choice.

116. 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.

WHEREFORE, pursuant to Pa.R.Civ.P. 1602 and the Declaratory Judgments Act, 42 Pa.C.S. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Respondents as follows:

I. For a decree declaring and adjudging that the Conservation Law does not apply in cases involving horizontal drilling;

II. For a decree to permanently enjoin future application of the Conservation Law; and

IV. For such other relief as the Court may deem just and proper, including attorney's fees and costs.

COUNT VI – PRELIMINARY INJUNCTION

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

117. Paragraphs 1 through 116 are incorporated by reference as though set forth fully herein.

118. The Conservation Law is an unconstitutional legislative enactment in violation of the Pennsylvania Constitution.

119. The issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm to Petitioners that cannot be compensated by monetary damages alone.

120. Petitioners will be significantly and irreparably injured by enforcement of the Conservation Law as it will forever alter their rights in the properties where they live. The harm to the Petitioners is immediate, and the Petitioners have no other lawful means with which to stay the proceedings under the Conservation Law.

121. These injuries cannot be quantified and the Petitioners have no adequate remedy at law regarding the same.

122. The injunctive relief sought by the Petitioners will not result in greater harm to the Respondents than would be suffered by the Petitioners if the injunctive relief is not granted.

123. Granting the Petitioners the requested preliminary injunctive relief is in the public interest.

124. By virtue of the foregoing, the Petitioners have demonstrated a likelihood of success on the merits and that a balance of the equities favors the issuance of a preliminary injunction against Respondents to stay enactment of the unconstitutional legislation.

WHEREFORE, Petitioners, respectfully requests this Honorable Court:

I. Enter a Preliminary Injunction halting the proceedings on Hilcorp's Application;

II. Award the Petitioners any further relief, including attorney's fees and costs, as this Court deems just and proper.

COUNT VII – PERMANENT INJUNCTION

Martin and Suzanne Matteo et al. v. Hilcorp Energy Company, et al.

125. Paragraphs 1 through 123 are incorporated by reference as though set forth fully herein.

126. The Conservation Law is unconstitutional in cases involving horizontal drilling in shale formations. The Conservation Law was not enacted for this purpose.

127. The issuance of a mandatory permanent injunction is necessary to prevent immediate and irreparable harm to Petitioners that cannot be compensated by monetary damages alone.

128. Petitioners will be significantly irreparably injured by enforcement of the Conservation Law as it will forever alter their rights in the properties where they live. The harm to the Petitioners is immediate, and the Petitioners have no other lawful means with which to stay the proceedings under the Conservation Law.

129. These injuries cannot be quantified and the Petitioners have no adequate remedy at law regarding the same.

130. The injunctive relief sought by the Petitioners will not result in greater harm to the Respondents than would be suffered by the Petitioners if the injunctive relief is not granted.

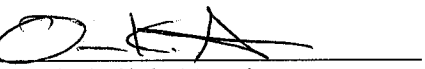
131. Granting the Petitioners the requested permanent injunctive relief is in the public interest.

WHEREFORE, Petitioners, respectfully requests this Honorable Court:

I. Enter a Permanent Injunction enjoining the DEP from accepting applications for horizontal drilling into shale formations under the Conservation Law;

II. Award the Petitioners any further relief, including attorney's fees and costs, as this Court deems just and proper.

Respectfully submitted,

By: 

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