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.	:	**Docket No. 266 MD 2014**
HILCORP ENERGY COMPANY, *et al.*,	:	
Respondents	:	

BRIEF IN SUPPORT OF COMMONWEALTH RESPONDENTS' PRELIMINARY OBJECTIONS TO THE AMENDED PETITION FOR REVIEW

Pursuant to Pennsylvania Rule of Civil Procedure 1028, Respondents the Commonwealth of Pennsylvania; the Office of Attorney General; Kathleen Kane, Attorney General of the Commonwealth of Pennsylvania; Pennsylvania Department of Environmental Protection; and Christopher Abruzzo, the Secretary of the Department of Environmental Protection (hereinafter collectively "Commonwealth Respondents"), by and through their counsel, Michael L. Harvey, Senior Deputy Attorney General and Jonathan D. Koltash, Deputy Attorney General, submit the following brief in support of their preliminary objections.

BACKGROUND FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

This case concerns how the Oil and Gas Conservation Law (hereinafter "Conservation Law") should apply to various property owners who potentially could be forced to pool gas and oil under their property into a common pool. *See* 58 P.S. §§ 401 *et seq*.

The Conservation Law applies to oil and gas wells that penetrate the Onondaga Horizon or go to a depth of three thousand eight hundred feet; whichever is deeper. 58 P.S. §§ 403(b)(1), 406(a). The purpose of the law is to protect and preserve precious natural resources by avoiding the waste of oil and gas. 58 P.S. § 404.[1]

Before drilling a well subject to the Conservation Law, an operator needs a drilling permit from Respondent Department of Environmental Protection (hereinafter "Department"). 58 P.S. § 406(a). If an operator seeks to establish a well spacing or a drilling unit and integrate the property interests in that spacing unit, it must first submit an application for a well spacing and drilling unit order

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[1] The law defines "waste" as either physical waste or the drilling of more wells than are necessary. 58 P.S. § 402(12). Physical waste includes allowing gas, oil, or water to migrate to a different stratum resulting in the loss of recoverable oil or gas; "drowning" a stratum that is capable of producing oil or gas; unnecessary loss of oil or gas at the surface; and inefficient dissipation of energy from the reservoir. 58 P.S. § 402(12)(i).

before it can obtain a drilling permit. 58 P.S. § 407. The Department must determine if a driller's application sufficiently establishes the existence of a drilling unit and whether its plan appropriately sets forth the well spacing. *Id.* Ultimately, the spacing order must be based on the Department's determination that the size and shape of the spacing unit will result in the efficient and economic development of the pool. The Conservation Law and its regulations sets forth detailed criteria that the Department must review before issuing a spacing order. 58 P.S. § 407; 25 Pa. Code §§ 78.21-28. After establishing the spacing unit, the Department will issue a spacing order setting forth the minimum distance from the boundary of the unit where a well can be located. 58 P.S. § 407.

A spacing order cannot be issued until after a hearing is held and notice is given to the landowners who may be directly and immediately affected by the drilling. 58 P.S. § 407. Notice of the hearing is given by publicizing specific information regarding the proposed drilling operation in "a newspaper in general circulation in each county where any land which may be affected." The Department must also mail notice to anyone who has provided a mailing address and specified to the Department that they desire notice by mail. 58 P.S. § 407. At a minimum, notice must be published at least fifteen (15) days prior to the administrative hearing regarding the spacing order. 58 P.S. § 407(2).

When a spacing order contains multiple separately owned parcels of real estate, the owners may voluntarily integrate their parcels for the purpose of developing the natural gas resources within the spacing unit. *See generally* 58 P.S. § 408. In the absence of voluntary integration, an operator having an interest in an established spacing unit may apply for a drilling permit and an order integrating all properties in the spacing unit to force-pool nonparticipating landowner/operators. 25 Pa. Code § 79.31(3). The operator ultimately applies for a compulsory integration order.

Again, before the Department can issue a compulsory integration order, notice and a hearing must be held. 58 P.S. § 408(a). Notice of the aforementioned hearing must be given to each effected landowner/operator by certified mail, unless their address is unknown. Then notice can be provided by "publication for two successive weeks in a newspaper of general circulation in the county, or in each county if there be more than one, in which the lands embraced within the unit are situated." 58 P.S. § 408(a).

Initially, the Conservation Law gave enforcement authority to the Oil and Gas Commission (hereinafter "Commission"). 58 P.S. § 402(1). However, the powers vested in the Commission have subsequently been transferred to the Department. The Act of December 3, 1970, 71 P.S. § 510-1 *et. seq.*; 25 Pa. Code

Chapter 79; *see Hilcorp Energy Co. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, EHB Docket No. 20130155-SA-R (Issued: November 20, 2013). As a result of the transfer of authority from the Commission to the Department, any adjudications preceding the issuance of a drilling unit and well spacing order or compulsory integration order under the Conservation Law are before the Secretary and directly appealable to this Court. *See* 2 Pa. C.S. § 501(a). Those proceedings are governed by the Administrative Agency Law and the General Rules of Administrative Practice and Procedure (hereinafter "GRAPP"). *See* 58 P.S. § 410.11(a), 2 Pa. C.S. § 501(a); 1 Pa Code §§ 31.1 *et seq*. Unless otherwise inconsistent with the statute or regulations adopted therein, GRAPP governs the administrative proceedings in this matter.

On December 2, 2013, Respondent Hilcorp filed the pending application for a spacing order with the Department. The application is titled "Application of Hilcorp Energy Company for Well Spacing Units" (herein "Application"). (Amended Petition for Review, ¶ 4). The Application asserts that there is a pool[2] underlying approximately 3,267 acres located in the northwest corner of Lawrence County and southeast corner of Mercer County. (Amended Petition for Review, ¶

[2] 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).

6). The proposed spacing unit comprises 3,267 acres, 3,232.5833 of which Respondent Hilcorp has acquired rights too. (Amended Petition for Review, ¶ 8). Petitioners own properties that make up part of the remaining approximately 34 acres. (Amended Petition for Review, ¶ 9). As of the filing of the amended petition for review in this matter, Petitioners have not sold or leased their mineral rights, nor do they plan to do so, because of the alleged adverse environmental impact of drilling. (Amended Petition for Review, ¶ 9).

In accordance with the Conservation Law, the Department scheduled a hearing for May 7, 2014. (Amended Petition for Review, ¶¶ 5, 12).[3] As required, Petitioners received notice of that hearing on April 2, 2014. (Amended Petition for Review, ¶ 13). Upon receiving notice, Petitioners intervened and requested a continuance, which was granted. (Amended Petition for Review, ¶¶ 15, 16). The matter is currently pending before an Administrative Law Judge of the Department. The hearing at issue before the Department is limited to whether Respondent Hilcorp should be issued a spacing order in accordance with the requisite provisions of the Conservation Law.

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[3] A series of administrative issues were addressed prior to the scheduling of the aforementioned hearing. Those issues are not herein relevant to this matter.

On May 2, 2014, Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief with this Court. Before the Commonwealth Respondents responded, Petitioner filed an amended petition for review on June 6, 2014. (Exhibit A).[4] Petitioners' amended petition for review seeks review of the constitutionality of the Conservation Law and pre-enforcement review of its application. Specifically, the amended petition for review challenges the constitutionality of the Conservation Law, as well as seeks a pre-enforcement review from this Court on how it may affect Petitioners' property rights at the conclusion of the administrative process.

The Commonwealth Respondents filed preliminary objections to the amended petition for review and this brief simultaneously therewith. (Exhibit B). Respondent Hilcorp has also filed preliminary objections to the amended petition for review.

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[4] Petitioners' amended petition for review has been attached hereto in accordance with Pa.R.A.P. No. 2111.

ARGUMENT

Rule 1028 of the Pennsylvania Rules of Civil Procedure permits a respondent to raise preliminary objections where, *inter alia*, (1) lack of subject matter jurisdiction or (2) the pleading is legally insufficient (demurrer). Pa. R.C.P. 1028(a)(1), (4). Petitioner's complaint in this case should be dismissed against the Commonwealth Respondents for the following reasons.

I. RESPONDENTS COMMONWEALTH OF PENNSYLVANIA, KATHLEEN KANE, ATTORNEY GENERAL FOR THE COMMONWEALTH OF PENNSYLVANIA, AND THE OFFICE OF ATTORNEY GENERAL ARE NOT PROPER PARTIES AND, AS SUCH, SHOULD BE DISMISSED.

Petitioners have named the Commonwealth of Pennsylvania, the Office of the Attorney General, and Kathleen Kane, Attorney General for the Commonwealth of Pennsylvania, as Respondents in this matter. (Amended Petition for Review, ¶¶ 36, 37, 38). The sole mention of these parties, however, is to identify them and to provide their addresses of record. (Amended Petition for Review, ¶¶ 36, 37, 38). Nothing in the amended petition for review establishes that any of these parties are necessary to this case.

It is well established the interest in enforcing and defending a statute belongs to the governmental official who implements the law. *Wagman v. Attorney General of Com.*, 872 A.2d 244 (Pa. Cmwlth. 2005) (holding that "[i]n order for

the Attorney General to be a proper party, [the statute in question] must give [her] powers or duties with respect to the law's enforcement or administration"); *see also Allegheny Sportsmen's League v. Ridge,* 790 A.2d 350 (Pa. Cmwlth. 2002), *aff'd,* 860 A.2d 10 (Pa. 2004); *Pennsylvania School Boards Association, Inc. v. Commonwealth Association of School Administrators,* 696 A.2d 859 (Pa. Cmwlth. 1997), *appeal dismissed,* 550 Pa. 228, 704 A.2d 631 (1998) (Governor was not an indispensable party because the statute in question did not give the governor any powers or duties with respect to the law's enforcement or administration)). The petition for review is devoid of factual allegations which establish that the Commonwealth, Attorney General Kane, or the Office of Attorney General has any duty to enforce the statute at issue, the Conservation Law. To the contrary, the Commonwealth Respondents assert that none of these parties are charged with the enforcement or administration of the Conservation Law. *See generally* 58 P.S. § 701 *et seq.* Judgment against the Commonwealth, Attorney General Kane, or the Office of Attorney General would not provide Petitioners with any relief.

It appears that Petitioners have named these parties as respondents because they are constitutionally challenging the application of a statute. The mere fact that a challenged statute may be declared unconstitutional does not, in and of itself, make the Commonwealth a necessary party. *Pennsylvania Sch. Boards Ass'n, Inc.*

v. Com. Ass'n of Sch. Adm'rs, Teamsters Local 502, 696 A.2d 859, 867 (Pa. Cwlth. 1997). Constitutional challenges occur all the time and the possibility that a statute may be declared unconstitutional is not enough to require that the Commonwealth, the Attorney General, or the Office of Attorney General be made parties to the suit.

If this were not the case, little purpose would be served by Pennsylvania Rule of Civil Procedure Rule 235, which requires that: "In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention." The rule clearly anticipates situations in which constitutional challenges to statutes are made without a Commonwealth party and in which the Attorney General *may* wish to intervene.

Because Petitioners have failed to establish that the Commonwealth, Attorney General Kane, or the Office of Attorney General are proper parties to this matter, the amended petition for review should be dismissed against these parties.

II. BECAUSE PETITIONERS ARE AFFORDED SUFFICIENT DUE PROCESS UNDER THE ADMINISTRATIVE AGENCY LAW AND THE GENERAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE, THEY HAVE FAILED TO ESTABLISH THAT THEY HAVE BEEN DENIED DUE PROCESS AND, AS SUCH, COUNT III OF THE AMENDED PETITION FOR REVIEW SHOULD BE DISMISSED.

In Count III of the Amended Petition for Review, Petitioners allege that the Conservation Law is unconstitutional because it violates their procedural due process rights. (Amended Petition for Review, Count III). Specifically, Petitioners assert that Department's process is "ad hoc," that they are unclear as to whether they would be given a hearing, and to what extent there will be any pleadings in the underlying administrative case. (Amended Petition for Review, ¶¶ 86, 89, 94).

After the transfer of power from the Commission to the Department, all adjudications held under the Conservation Law are ultimately before the Department. *See* 2 Pa. C.S. § 501(a). It is well established that "[w]hen there are no specific provisions regarding adjudicatory actions of an agency, the Administrative Agency Law . . . provides a default mechanism for the provision of hearings and for appeals from administrative adjudications, which comport with due process requirements." *Texas Keystone Inc. v. Pennsylvania Dep't of Conservation & Natural Res.*, 851 A.2d 228, 235 (Pa. Cmwlth. 2004) (citing

Turner v. Pennsylvania Public Utility Commission, 683 A.2d 942, 946 (Pa. Cmwlth. 1996)). Thus, any adjudication before a Department must be in accordance with the Administrative Agency Law and GRAPP. *See* 2 Pa. C.S. § 501(a).

The Administrative Agency Law provides Petitioners with sufficient guidance as to the procedures to be used in the matter. Moreover, Petitioners admit that the Department has provided them, in accordance with the Conservation Law, the necessary requirements of due process - notice and an opportunity to be heard.

In support of their argument that they have been denied due process, Petitioners appear to contend that states bordering Pennsylvania require different mechanisms to notify potential interested parties. This fact, however, does not make Pennsylvania's process improper. Nor does the fact that Petitioners may favor an approach of a neighboring state over the one established in the Conservation Law.[5] GRAPP, in accordance with the Conservation Law, set forth

[5] Indeed, the United States Supreme Court has recognized that states may differ in their procedures and that the Court should "avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time while leaving "the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance." *Smith v. Robbins*, 528 U.S. 259, 275 (2000) (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring).

detailed provisions regarding what procedure is to be followed to provide an interested party with due process. In this case, Petitioners have failed to establish that they have, in fact, been denied due process of law. Therefore, Count III of Petitioner's amended petition should be dismissed.

III. BECAUSE PETITIONERS HAVE FAILED TO ESTABLISH THAT THE CONSERVATION LAW IS UNCONSTITUTIONALLY VAGUE, COUNT IV OF THE AMENDED PETITION FOR REVIEW SHOULD BE DISMISSED.

In Count IV of the Amended Petition for Review, Petitioners allege that the Conservation Law is unconstitutionally vague. (Amended Petition for Review, ¶ 102). Specifically, Petitioners assert that the statute is vague because the rules and procedure for how a hearing before the Department will proceed are unclear. In addition, they claim that 1) their surface rights could be affected, 2) it is unclear whether Hilcorp would be permitted to enter onto their subsurface estates, and 3) what mineral rights they may lose if Hilcorp is eventually granted a drilling permit. Finally, Petitioners' complain that the law does not establish a minimum threshold of controlling interest that is required before one can apply for a spacing order. (Amended Petition for Review, ¶¶ 86, 89, 94). Notwithstanding their allegations, Petitioners' assertions in Count IV do not establish that the Conservation Law is unconstitutionally vague.

Generally, the doctrine of void for vagueness applies only to statutes effecting conduct either in criminal law or constitutional law. *See Pennsylvania State Ass'n of Jury Com'rs v. Commonwealth*, 53 A.3d 109, 120-21 (Pa. Cmwlth. 2012). "Vague statutes offend the constitution because they may (1) trap the innocent by failing to give a person of ordinary intelligence reasonable opportunity to know what is prohibited so that he may act accordingly; or (2) result in arbitrary and discriminatory enforcement in the absence of explicit guidelines for their application. . . . [A] legislative enactment will be deemed invalid 'only if it is so vague and indefinite that courts are unable to determine with any reasonable degree of certainty the intent of the legislative body or so incomplete, conflicting and inconsistent in its provision that it cannot be executed.'" *Blanco v. State Bd. of Private Licensed Sch.*, 631 A.2d 1076, 1080 (Pa. Cmwlth. 1993) (quoting *Pennsylvania Builders Association v. Department of Revenue,* 122 Pa. Cmwlth. 493, 506, 552 A.2d 730, 737 (1989) ,*aff'd per curiam,* 524 Pa. 134, 569 A.2d 928 (1990) (citations omitted)).

Petitioners have not established that the Conservation Law will somehow trap them because it failed to give them any opportunity to know that some type of conduct is prohibited. To the contrary, the Conservation Law does not regulate the conduct of Petitioners at all. To the extent Petitioners contend that the

Conservation Law is vague regarding the process for adjudication their claims, the Conservation Law, in conjunction with the Administrative Code will not result in arbitrary and discriminatory enforcement. As previously stated, the law sets forth detailed provisions regarding how parties are to be notified of impending hearings regarding their property rights. Where the Conservation Law does not set forth procedure for how adjudications are to proceed, the Administrative Agency Law clearly establishes sufficient process for the Department to follow. As such, the Conservation Law is not vague regarding what process the Department is to provide to potentially interested parties.

Moreover, after a sufficient administrative record is constructed, Petitioners will have a right to appeal the Department's determinations to this Court. Any final decision by the Department in this matter is an "adjudication" within the meaning of 2 Pa. C.S. § 101, and is appealed to this Court. *See* 42 Pa. C.S. § 763(a)(1). Such an appeal can not only occur after a spacing unit order is issued, but also after a compulsory integration order is issued. This Court would subsequently be reviewing two Department determinations with the benefit of an administrative record, including the expert opinion and legal conclusions of the Department.

With regard to Petitioners assertion that the Conservation Law is unconstitutionally vague because it does not set forth detailed provisions informing them what surface rights could be affected, whether Hilcorp would be permitted to enter onto their subsurface estates, or what mineral rights they may lose, the Conservation Law and the regulations adopted pursuant to it provide sufficient guidance to the Department, a subject matter expert, to make an informed decision. The law does not have to be so specific that it binds the agency in every circumstance. To the contrary, the purpose of administrative agencies is to serve as subject matter experts and make informed decisions about technical issues.

The Conservation Law sufficiently provides the Department with guidance on how and when it is to be applied. The Department, as a subject matter expert, is more than adept at interpreting the provisions of the statute within the limitations provided by the legislature.[6] Through expert testimony, the Department can adjudicate various issues, such as the nature of the earth beneath any properties at issue, whether incorporating these parcels is necessary to efficiently and

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[6] Petitioners' assertion that the law is unconstitutionally vague because it does not establish a minimum threshold of controlling interest that is required before one can apply for a spacing order is meritless. The fact that law does not establish a minimum controlling interest that is required before one can apply for a compulsory integration order does not make the statute vague. To the contrary, that was a policy decision left to the legislature. The fact that Petitioners do not favor that policy choice does is irrelevant. Nor is the fact that neighboring states may have made different policy choices.

economically extract the gas and oil beneath them, and what would be just compensation should these properties be incorporated.

A review of the statute and regulations establishes that sufficient guidelines exist for how the Department should adjudicate cases of this nature. By way of example, the Department has the ability to determine if a driller's application sufficiently establishes the existence of a drilling unit and whether its plan appropriately sets forth the well spacing. *Id.* If a spacing order is to be issued, it must be based on the Department's determination that the size and shape of the spacing unit will result in the efficient and economic development of the pool. The Conservation Law and its regulations establish detailed criteria that the Department must review before issuing a spacing order. 58 P.S. § 407; 25 Pa. Code §§ 78.21-28.

Petitioners have failed to establish that the Conservation Law is unconstitutionally vague, thus, Count IV of the Amended Petition for Review should be dismissed.

IV. BECAUSE PETITIONERS HAVE FAILED TO ESTABLISH THAT AN ACTUAL CONTROVERSY EXISTS, OR, ALTERNATIVELY, THAT THEY HAVE EXHAUSTED THE ADMINISTRATIVE REMEDIES AVAILABLE TO THEM, THE AMENDED PETITION FOR REVIEW SHOULD BE DISMISSED.

Finally, Petitioners contend that the Conservation Law violates their constitutional rights because the statute amounts to a taking that is not for public purpose and that the law has otherwise been preempted by subsequent statutory enactments. Notwithstanding their contention, Petitioners have failed to establish that they are entitled to declaratory judgment.

Before this Court has jurisdiction over a matter, an actual controversy must exist. B*ayada Nurses, Inc. v. Dep't of Labor & Indus*, 8 A.2d 866, 874 (Pa. 2009). If no controversy exists, the case is not ripe for judicial review. *Id.* In administrative law, the purpose behind the doctrine of ripeness is to "prevent the courts, through the avoidance of premature adjudications, from entangling themselves in abstract disagreements over administrative policies." *Id.* Moreover, the doctrine protects "state agencies from judicial interference until an administrative decision has been formalized and its efforts felt in a concrete way by the challenging party." *Id.* In determining whether a matter is ripe for judicial review, the courts must determine whether the issues presented have been

adequately developed and whether the parties will suffer any hardship if delayed. *Alaica v. Ridge*, 784 A.2d 837 (Pa. Cmwlth. 2001).

Here, this matter has not been sufficiently developed to permit judicial review. A hearing has been scheduled before the Department to determine whether a spacing permit should be issued. One of the issues before the hearing examiner is to determine what properties should be included in the spacing unit. At this junction, it is possible that a spacing order will not be issued or that Petitioners property will not be included in that spacing unit. Because of the various hypothetical issues unanswered at this point, this matter has not been adequately developed for judicial review.

As established above, Petitioners have intervened and have been provided sufficient process to ensure that their rights are protected. If a spacing order is issued that is adverse to Petitioners interests, they will be able to challenge the Department's decision to this Court. Additionally, before Respondent Hilcorp is permitted to drill, it will still be required to submit an application for and obtain a drilling permit. At that point, any landowners whose property Respondent Hilcorp wants to compulsorily incorporate into the pool will have an opportunity to, again, appear before the Department.

At either of the aforementioned hearings, the arguments made to this Court in the Amended Petition for Review, such as whether this statute should apply to horizontal drilling or whether it has otherwise been preempted by another law, can and should be made to and determined by the Department. Further, should Petitioners lose at either of those hearings, they would have the opportunity to appeal to this Court; not once, but twice. Because the various layers of process afforded to Petitioners, they will not be harmed by this Court refusing to take jurisdiction over this case will after the administrative process is complete.

Alternatively, Petitioners are seeking relief from this Court before they have exhausted the administrative remedies available to them. *See Lehman v. Pennsylvania State Police*, 839 A.2d 265, 275 (Pa. 2009); *Funk v. Dep't of Environmental Protection*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013). "The doctrine of exhaustion of administrative remedies requires that a person challenging an administrative decision must first exhaust all adequate and available administrative remedies before seeking relief from the courts." *Funk v. Dep't of Environmental Protection*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013) (citation omitted). *See also Cherry v. City of Philadelphia*, 692 A.2d 1082, 1084 (Pa. 1997) (stating that "the mere allegation or characterization of one's claim as a constitutional claim does not automatically allow a party to bypass administrative remedies").

"What is required to confer jurisdiction on an equity court is the existence of a *substantial* question of constitutionality (and not a mere allegation) and the absence of an adequate statutory remedy." *Cherry*, 692 A.2d at 1084 (quoting *Rochester & Pittsburgh Coal Company v. Board of Assessment & Revision*, 266 A.2d 78 (Pa. 1970)). The Courts have defined a substantial constitutional challenge as "a challenge to the validity of the statute as a whole and not simply a challenge to the application of the statute to a particular party." *Id.* When a party is challenging the application of a statute, as Petitioners are here, "the 'administrative body which has responsibility for applying the statute on a day-to-day basis should have the first opportunity of studying the ruling on any new application.'" *Id.*

This Court has long recognized that declaratory judgments are not obtainable as a matter of right. *Larry Pitt & Associates, P.C. v. Butler*, 785 A.2d 1092, 1096 (Pa. Cmwlth. 2001). "It is appropriate to defer judicial review where the question presented is one within **an agency specialization** and where the **administrative remedy is likely to produce the desired result**." *Id.* (quoting *National Solid Wastes Management Association v. Casey*, 580 A.2d 893 (Pa. Cmwlth. 1990)).

In *Larry Pitt*, this Court held that the fact that the petitioners raised constitutional claims regarding the validity of the Workers' Compensation Act was not dispositive. The ultimate question was whether the petitioners had an adequate statutory remedy that could provide them the relief sought, even if the relief obtained was based on a different legal reason than that of their constitutional challenge. 785 A.2d at 1099-1100.

Just as in *Larry Pitt*, Petitioners in this case have an adequate administrative remedy before the Department that they have failed to exhaust. Ultimately, the Department could determine, as Petitioners contend, that the Conservation Law does not apply to horizontal drilling, that their land is not necessary for Respondent Hilcorp to efficiently and economically extract the gas and oil at issue, or that this law has been preempted by another law and is no longer in effect. The Department is well-equipped to address these issues, as well as the numerous other issues raised by Petitioners.

More importantly, however, Petitioners have an adequate administrative remedy that could result in the outcome they desire, albeit on different legal grounds. Therefore, they have failed to exhaust all of the administrative remedies

available to them under the Conservation Law and, for those reasons, the amended petition for review should be dismissed.[7]

[7] Counts VI and VII have not been addressed because they seek a preliminary and permanent junction respectively. If the Commonwealth Respondents are successful on the preliminary objections presented hereto, Counts VI and VII would be moot.

CONCLUSION

WHEREFORE, for the reasons stated above, Petitioners' amended petition for review should be dismissed. Moreover, because Petitioners cannot cure the defects contained in their amended petition for review, it should be dismissed with prejudice.

Respectfully submitted,

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Date: August 13, 2014

CERTIFICATE OF SERVICE

I, Jonathan D. Koltash, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on August 13, 2014, I caused to be served a true and correct copy of the foregoing document titled **BRIEF IN SUPPORT OF COMMONWEALTH RESPONDENTS' PRELIMINARY OBJECTIONS TO THE AMENDED PETITION FOR REVIEW** addressed to the following:

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EXHIBIT A

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266 MD 2014

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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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARTIN AND SUZANNE MATTEO, HUSBAND AND WIFE, et al.	)	Docket No. 266 MD 2014
Petitioners,	)	TYPE OF PLEADING:
vs.	)	**AMENDED PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**
HILCORP ENERGY COMPANY, et al.	)	
Respondents.	)	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complain or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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HILCORP ENERGY COMPANY, et al.	)	
Respondents.	)	

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

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: _____

Omar K. Abuhejleh, Esquire
Pa. I.D. No. 84048

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF OIL AND GAS MANAGEMENT

In re the Matter of the Application of
Hilcorp Energy Company for
Well Spacing Units

Pulaski Accumulation
HSC 110-H Unit
HSC 111-H Unit

Application Date: July 15, 2013

APPLICATION OF HILCORP ENERGY COMPANY FOR WELL SPACING UNITS

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF OIL AND GAS MANAGEMENT

In re the Matter of the Application of Hilcorp Energy Company for Well Spacing Units	:	Application Date: July 15, 2013
Pulaski Accumulation *HEC 110-H Unit* *HEC 111-H Unit*	:	

APPLICATION

Pursuant to 58 Pa. Consol. Statutes Oil & Gas § 407, Hilcorp Energy Company ("Hilcorp") hereby respectfully requests that the Pennsylvania Department of Environmental Protection ("DEP")[1] issue an order establishing spacing units covering an underground reservoir underlying approximately 3,267 acres containing a common accumulation of natural gas in the Utica-Point Pleasant formation, approximately 7,400 feet below the surface and 3,800 feet below the Onondaga horizon, located in the Northwest corner of Lawrence County and the Southwest corner of Mercer County in Pulaski Township (hereinafter referred to as the "Pulaski Accumulation"). It is comprised of the existing Kinkela North Unit and Kinkela South Unit, together with the proposed HEC 110-H Unit and HEC 111-H Unit, which as a whole possess substantially similar thickness, porosity and organic content, including mobile hydrocarbon components, in contrast with surrounding portions of the Utica-Point Pleasant formation, which

[1] The Pennsylvania General Assembly initially authorized the Oil and Gas Conservation Commission to execute and carry out the provisions of The Oil and Gas Conservation Law, 58 Pa. Consol. Statutes Oil & Gas § 401-419 (West 2010). The Commission was abolished and its powers and duties were transferred to the Department of Environmental Resources in 1971, 51 P.S. § 510-105(a), and to the Department of Environmental Protection by the Conservation and Natural Resources Act of 1995, 71 P.S. § 1340.503(a).

do not contain mobile hydrocarbon components in similar concentrations and do not communicate vertically or horizontally with the Pulaski Accumulation.

Hilcorp makes this request for the purpose of substantially increasing the ultimate recovery of oil and natural gas from the Pulaski Accumulation, consistent with the declared policy of the Commonwealth of Pennsylvania to encourage the development of oil and gas resources in the Commonwealth in such a manner that will prevent waste of oil and gas or loss in the ultimate recovery thereof and protect the correlative rights of all interest owners in the Pulaski Accumulation.

I. APPLICANT INFORMATION

Hilcorp Energy Company is a privately held oil and gas company that was established in 1989 and is based in Houston, Texas, and owns leasehold in the Commonwealth of Pennsylvania through its affiliate, Hilcorp Energy I, L.P., of which Hilcorp Energy Company is the General Partner.

Hilcorp has significant operations in Louisiana, Texas, Pennsylvania, Ohio and Alaska and operates more than 4,500 wells in the United States. From 2009 to 2010, Hilcorp acquired approximately 141,000 net acres in the Eagle Ford Shale trend in South Texas and drilled 90 wells establishing 32,000 BOE per day. To date, Hilcorp has leased more than 160,000 acres in the Utica and has drilled and completed 6 wells.

Both Hilcorp Energy Company and Hilcorp Energy I, L.P. are Texas companies with an address of 1201 Louisiana Ste. 1400, Houston, TX 77002. For the purposes of this application, the applicant is Hilcorp Energy Company.

II. PROJECT DESCRIPTION

The Pulaski Accumulation is located in Pulaski Township, Lawrence and Mercer Counties, Pennsylvania, and underlays 258 tracts of land.[2] The total land area overlying the Pulaski Accumulation is approximately 3,267 acres. At the time of this application, Hilcorp has acquired the right to drill on and produce from 3,232.5833 acres in the Pulaski Accumulation.[3]

A discovery well, the Pulaski-Kinkela 1H Well, has been drilled into the Pulaski Accumulation (the "Discovery Well"), establishing it as a "pool" as required by 58 P.S. § 407.[4] Hilcorp seeks an order establishing a total of four (4) spacing units over the Pulaski Accumulation, which would include the existing voluntarily pooled units (the Kinkela North Unit and the Kinkela South Unit) on which existing wells, including the Discovery Well, are located, and two proposed units, the HEC 110-H Unit (containing 1,234.74 acres)[5] and HEC 111-H Unit (containing 1177.899 acres),[6] each of which represent the maximum area that can be efficiently and economically drained from a single well pad located on the unit.[7]

III. AFFIDAVITS

The following testimony has been attached to this application supporting the establishment of spacing units over the Pulaski Accumulation: (1) Affidavit of Nina Delano, Geologist for Hilcorp Energy Company, establishing that the Pulaski Accumulation is a "pool," as required by 58 P.S. § 407;[8] (2) Affidavit of Kyle Koerber, Reservoir and Completion Engineer for Hilcorp Energy Company, establishing that the Pulaski Accumulation would be most efficiently drained from four well pads, one located on each the HEC 110-H Unit, the HEC 111-

[2] See Exhibit A.
[3] See Affidavit of Richard Winchester, attached as Exhibit D.
[4] Id.
[5] See Exhibit B.
[6] See Exhibit C.
[7] See Affidavit of Kyle Koerber, attached as Exhibit E.
[8] See Affidavit of Nina Delano, attached as Exhibit F.

H Unit, the Kinkela North Unit, and the Kinkela South Unit;[9] and (3) Affidavit of Richard Winchester, Land Manager-New Ventures for Hilcorp, who exercises over-sight responsibility for land acquisitions in the Pulaski Accumulation, describing the project generally and the leasing efforts undertaken to acquire the oil and gas rights in the Pulaski Accumulation.[10]

IV. BACKGROUND: THE PROBLEM WITH THE RULE OF CAPTURE

The general purpose of forced pooling laws is to conserve oil and gas and to protect correlative rights by avoiding the harsh results and wasteful drilling practices that result from the application of the rule of capture. Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization § 1.02 (3d 2008). The Supreme Court of Pennsylvania first recognized the rule of capture as it applies to natural gas in 1889 when it stated:

> [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, 130 Pa. 235, 249-50 (1889).

In *Barnard v. Monongahela Natural Gas. Co.*, 216 Pa. 362 (1907), the Court addressed a hypothetical landowner who drills a well near his neighbor's property from which he extracts gas underlying that neighbor's property. The Court recognized that the rule leads to waste, stating, "This may not be the best rule, but neither the Legislature nor our highest court has given us any better. No doubt many thousands of dollars have been expended 'in protecting lines' in oil and gas territory that would not have been expended if some rule had existed by which it could have

[9] See Affidavit of Kyle Koerber, attached as Exhibit E.
[10] See Affidavit of Richard Winchester, attached as Exhibit D.

been avoided." *Id.* The rule of capture still applies in Pennsylvania with reference to wells drilled only as deep as the Marcellus Shale.

V. THE OIL AND GAS CONSERVATION LAW

The Pennsylvania legislature enacted The Oil and Gas Conservation Law, 58 Pa. Consol. Statutes Oil & Gas §§ 401-419 (West 2010) (hereinafter, the "Law"), in 1961 in order to address the problems arising from the application of the rule of capture. The Law, which applies only to wells that either penetrate the Onondaga horizon or are bottomed at least 3,800 feet below the surface, whichever is deeper, declares as an expressed policy of the Commonwealth of Pennsylvania that

> [It is] in the public interest to foster, encourage, and promote the development, production, and utilization of the natural oil and gas resources in this Commonwealth, and especially those which may exist ... below the Onondaga horizon, in such manner as will encourage discovery, exploration, and development 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 ...

The Law's Declaration of Policy explains that it would be "impeded and detrimental to development" to impose new regulations to operations on formations lying above the Onondaga horizon since operations in shallower formations have been carried on continuously since the discovery of oil in 1859, current operations in shallow formations are being carried on "without appreciable waste," and that methods for producing oil and gas from shallower formations differ from production methods for deeper formations "in cost, methods, operating problems, and other important characteristics." Section 404 of the Law specifically prohibits waste in oil and gas operations carried out by wells penetrating the Onondaga horizon. 58 P.S. § 404.

The Law's regulations, promulgated in Chapter 79 of the Pennsylvania Code, define "correlative rights" as follows:

> The rights of each owner of oil and gas interest 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 the pool or sources of supply without being required to drill unnecessary wells or incur other unnecessary expense to recover or receive the oil or gas or its equivalent.

79 Pa. Code § 1.

The regulations define "waste" as follows:

> (i) Physical waste as the term is generally understood in the oil and gas industry which includes the following:
>
> > (A) Permitting the migration of oil, gas or water from the stratum in which it is found to other strata if the migration would result in the loss of recoverable oil or gas, or both.
> >
> > (B) The drowning with water of a 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.
> >
> > (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.

79 Pa. Code § 1.

In order to achieve its purpose, the Law first requires a well to be drilled into the Onondaga horizon, which requires a permit. 58 P.S. § 406 (a). Then, that well's operator or any other operator of lands "directly and immediately affected" by the drilling of the well, or subsequent wells in the common oil or gas pool, may file a well spacing application. 58 P.S. § 407(1). The term "operator" as defined by the Law includes both oil and gas lessees and any

unleased owner of oil and gas rights in a pool, as to a 7/8 interest. 58 P.S. § 402 (7). An unleased owner of oil and gas rights in the pool is a royalty owner as to a 1/8 interest. *Id.*

VI. THE DEP SHOULD ESTABLISH WELL SPACING UNITS OVER THE PULASKI ACCUMULATION

A. Legal Standard

The Law requires the DEP, in order to carry out the Law's purpose, to enter an order establishing well spacing and drilling units upon proper application, notice to interest holders in the units, and after a hearing. 58 P.S. § 407. Before the DEP may enter an order establishing spacing units, a well must be drilled into a formation covered by the Law, establishing a "pool." *Id.* The Law defines a "pool" as "an underground reservoir containing a common accumulation of oil or gas, or both, not in communication laterally or vertically with any other accumulation of oil or gas." 58 P.S. § 402 (16). The operator of the well establishing the pool, or any operator of lands "directly and immediately affected by the drilling" of that well, or subsequent wells in the pool, may file an application for well spacing units with the DEP. 58 P.S. § 407 (1).

The application must (1) specify the producing horizon in the pool sought to be spaced, including the depth of the discovery well drilled into the pool, (2) include a plat "indicating the longitude and latitude of each well drilled to the pool sought to be spaced, and the area proposed to be included within the spacing order on a scale of 1,320 feet to an inch," (3) specify the size of the spacing unit recommended, and (4) indicate whether wells in the field are producing oil, gas or both, and the ratio of oil to gas produced if wells are producing both. 79 Pa. Code § 21 (a). The applicant has the option to include (1) a mapping showing the area to be included in each spacing unit in the area covered by the spacing order, (2) information regarding surface topography in the area to be covered by the spacing order, and (3) information regarding reservoir characteristics. 79 Pa. Code § 21 (a). No more than 10 square miles may be included in

any single application for a spacing order. *Id.* In addition, the DEP has the power to require the applicant to attach any additional information it deems relevant to the application. *Id.*

The order establishing spacing units must establish and specify the size and shape of the spacing units. 58 P.S. § 407 (4). The units must not be smaller than the maximum area that can be efficiently and economically drained by one well. *Id.* If the maximum drainable area cannot be determined at the time of the hearing, temporary units for orderly development of the pool must be created pending the determination of the most efficient and economic drainable area. *Id.* Generally, units must be of uniform size and shape for the entire pool. 58 P.S. § 407 (5). The DEP has the power to vary the size and shape of any individual unit in order to (1) take in to account wells already completed at the time the application is filed, or (2) to make a unit conform to oil and gas property lines, provided that units formed by the DEP conform to the area which will be drained by the well located within the area permitted by the order, and the acreage included in each unit is contiguous. *Id.*

The order must also specify the minimum distance from the nearest boundary of the spacing unit at which a well may be drilled. 58 P.S. § 407 (6). This distance provided must be the same for all units established by the order with necessary exceptions for wells drilled or drilling at the time of the filing of the application. *Id.*

After proper notice and a hearing, the DEP must either enter an order establishing spacing units covering all lands "determined or believed to be underlaid by" the common pool or enter an order dismissing the application within forty five days of the filing of this application. 58 P.S. § 407 (4) & (7). The well spacing order must cover all lands determined or believed to be underlain by the pool, and may be modified from time-to-time in order to fully and accurately

encompass the pool and to permit the drilling of additional wells in a uniform pattern at a uniform minimum distance from the nearest unit boundary. *Id.*

After the date of the notice of the hearing for a well spacing order, no additional well may be commenced in the pool until the spacing order is issued, unless authorized by the DEP. 58 P.S. § 407 (8). If a permit to drill is refused because of a pending spacing order application, and a well on property adjoining a leased tract in the proposed spacing unit is draining the oil and/or gas from the leased tract, the DEP has the power to shut-in the well, after notice and a hearing, if necessary to protect correlative rights, until the applicant has the opportunity to obtain a spacing order. 58 P.S. § 407 (9).

B. Hilcorp's Application Meets This Standard

i. *The Pulaski Accumulation is a "Pool"*

The Pulaski Accumulation is an underground reservoir underlying approximately 3,267 acres containing a common accumulation of natural gas in the Utica-Point Pleasant formation, approximately 7,400 feet below the surface and 3,800 feet below the Onondaga horizon, located in the Northwest corner of Lawrence County and the Southwest corner of Mercer County in Pulaski Township. It is comprised of the existing Kinkella North Unit and Kinkella South Unit, together with the proposed HBC 110-H Unit and HBC 111-H Unit, which as a whole possesses substantially similar thickness, porosity and organic content, including mobile hydrocarbon components, in contrast with surrounding portions of the Utica-Point Pleasant formation, which do not contain mobile hydrocarbon components in similar concentrations and do not communicate vertically or horizontally with the Pulaski Accumulation.

ii. *Existing Wells in the Pulaski Accumulation are Drilled to Such a Depth as to Bring It Under the Jurisdiction of the Law*

The Pulaski Accumulation is located at a depth of 7,400 feet below the surface and 3,800 feet below the Onondaga horizon.[11] The Discovery Well producing from the Pulaski Accumulation is drilled to a maximum true vertical depth of 7,514 feet below the surface and 3,880 feet below the Onondaga horizon.[12]

iii. *The Existing Wells "Directly and Immediately" Affect Hilcorp*

Hilcorp is the operator of the existing wells in the Pulaski Accumulation and has acquired the oil and gas rights as to 99% of the acreage contained in the Pulaski Accumulation (3,232.5833 acres out of 3,267.4778 acres).[13] Hilcorp's extensive interest in the oil and gas contained in the Pulaski Accumulation, along with the assets expended to obtain those interests and to drill the existing wells render Hilcorp a party that is directly and immediately affected by those wells. Therefore, Hilcorp is a proper party to apply to the DEP for a well spacing order.

iv. *The Proposed Units Represent the Maximum Area that Can Be Efficiently and Economically Drained from a Single Well Pad*

The Utica-Point Pleasant formation lacks sufficient permeability to be drained using a conventional vertical well.[14] Any drainage area that could be accessed by a conventional vertical well would not be large enough to achieve production in economically feasible quantities.[15] Using horizontal well technology coupled with hydraulic stimulation drastically improves production relative to vertical wells or horizontal unstimulated wells.[16] The oil and gas within the two proposed units, the HEC 110-H Unit and the HEC 111-H Unit, could not be drained from a

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[11] See Affidavit of Nina Delano, attached as Exhibit E.
[12] *Id.*
[13] See Affidavit of Richard Winchester, attached as Exhibit D.
[14] See Affidavit of Kyle Koerber, attached as Exhibit F.
[15] *Id.*
[16] *Id.*

single well pad.[17] The distance across the two combined units makes it mechanically impossible to drain from a single well pad.[18] Accordingly, the HEC 110-H Unit and the HEC 111-H Unit each represent the maximum area that can be efficiently and economically drained from a single well pad.

v. *This Application Meets All Requirements of 58 P.S. § 407*

This application establishes that a Discovery Well has been drilled into the Pulaski Accumulation, which is located at a depth of 7,460 feet below the surface and 3,800 feet below the Onondaga horizon, establishing it as a "pool" for the purposes of the Law.[19] The two well spacing units proposed in this application are of approximately uniform size and shape, and represent the maximum area that can be efficiently and economically drained from a single well pad. The proposed units, together with the existing, voluntarily formed units in the Pulaski Accumulation, encompass the entirety of the Pulaski Accumulation.[20]

This application includes a plat indicating the longitude and latitude of the Pulaski Accumulation and of each well drilled into it, on a scale of 1,320 feet to an inch.[21] This application also includes a land map of the Pulaski Accumulation,[22] and of the proposed HEC 110-H Unit[23] and the HEC 111-H Unit,[24] showing the recommended size and shape of each unit, which is based on the maximum area that may be efficiently and economically drained from a single well pad. The Discovery Well drilled into the Pulaski Accumulation is producing both gas and oil, at a ratio of 55,800 SCF/BBL.[25]

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[17] *Id.*
[18] *Id.*
[19] See the Affidavit of Nina Delano, attached as Exhibit F.
[20] See the Affidavit of Kyle Koerber, attached as Exhibit E.
[21] See Exhibit G.
[22] See Exhibit A.
[23] See Exhibit B.
[24] See Exhibit C.
[25] See the Affidavit of Kyle Koerber, attached as Exhibit E.

In addition, this application includes a map showing the surface topography overlying the Pulaski Accumulation.[36] It also includes information regarding reservoir characteristics for the Pulaski Accumulation.[37] Finally, this application is accompanied by a fee of $1000, as required by 79 Pa. Code § 21 (d).

vi. *A Well Spacing Order for the Pulaski Accumulation Would Further the Purpose of the Law.*

A well spacing order for the Pulaski Accumulation would protect the correlative rights of all of the interest holders in the "pool" and prevent waste. By establishing spacing units over the Pulaski Accumulation that represent the maximum area that can be efficiently and economically drained from a single well pad, each owner of oil and gas interests in the Pulaski Accumulation will have a fair and reasonable opportunity to obtain his or her just and equitable share of the proceeds from oil and gas production without drilling unnecessary wells or incurring other unnecessary expenses. Due to the existence of non-consenting landowners at the center of each proposed unit, the possibility of over drilling exists in the absence of a well spacing order. Over drilling leads to waste, in the form of unnecessary surface loss and the inefficient use and unnecessary dissipation of reservoir energy.

VII. HEARING

Within forty five days of the filing of this application, the DEP must set a date for a hearing on the application, provide notice of the application and hearing to anyone with an interest in land which may be affected by the proposed well spacing order, and either enter an order establishing spacing units or entering an order dismissing the application. 58 P.S. § 407(4). The Law requires the DEP to provide notice of the hearing for two successive weeks in a newspaper of general circulation in the county where any land which may be affected by the

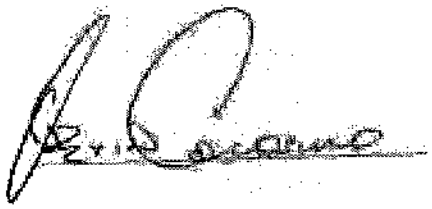
[36] See Exhibit H.
[37] See the Affidavit of Nina Delano, attached as Exhibit F.

order is located, and requires the DEP to mail notice to the persons specified in Exhibit I. 58 P.S. § 407(2). The publication and mailing of notice must be carried out at least 15 days prior to the date fixed for the hearing. *Id.*

VIII. CONCLUSION

The Law requires the DEP, in order to carry out the Law's purpose, to enter an order establishing well spacing and drilling units upon proper application, notice to interest holders in the units, and after a hearing. 58 P.S. § 407(4). Hilcorp respectfully submits that this application meets this standard. Hilcorp therefore asks the DEP to issue an order establishing spacing units as proposed above over the Pulaski Accumulation.

Respectfully submitted,



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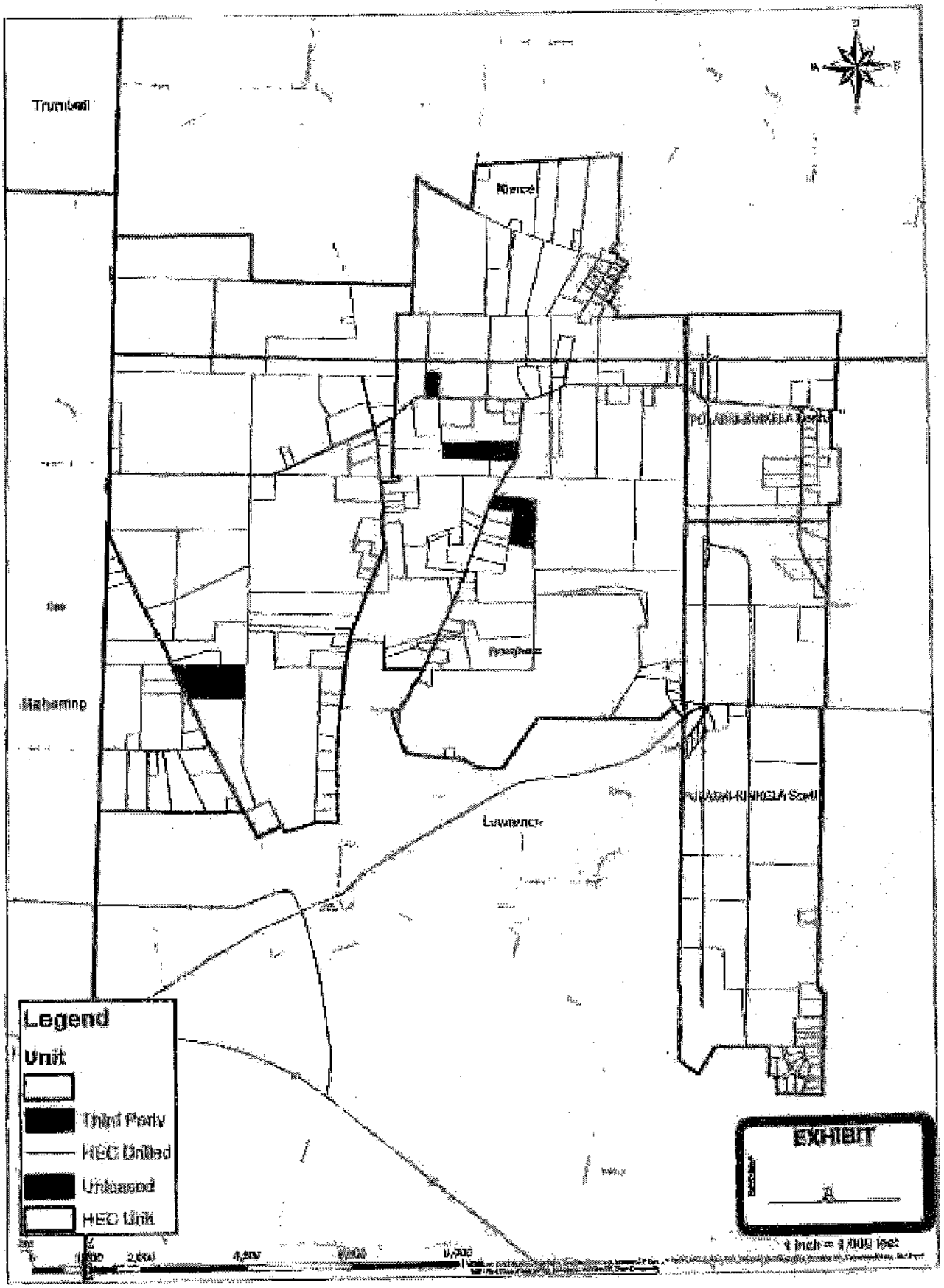

Trumbull
Reno
Habersham
Lawrence
Legend
Unit
Third Party
HEC Drilled
Unleased
HEC Unit
EXHIBIT
1 Inch = 1,000 feet

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF OIL AND GAS MANAGEMENT

In Re:	The Matter of the Application of Ellicorp Energy Company for Well Spacing Units	))))	Docket No. 2013-06

PETITION TO INTERVENE

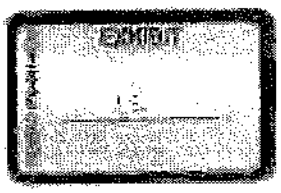
Pursuant to 1 Pa. Code § 35.28, Martin and Suzanne Marien, husband and wife, Robert and Carol Valentine, husband and wife, and Steve Emery (hereinafter collectively referred to as the "Property Owners"), by and through their counsel, Omar K. Abuhejleh, Esq., hereby petition to intervene in the above-captioned matter and in support thereof aver the following:

1) Suzanne and Martin Marien are the owners of property located at 1230 New Bedford-Sharon Road, West Middlesex, PA 16159.

2) Bob and Carol Valentine are the owners of property located at 1251 Deer Creek Road, West Middlesex, PA 16159.

3) Steve Emery is the owner of property located at 745 Sharon Bedford Road, West Middlesex, PA 16159.

4) Pursuant to 58 P.S. §§ 401–419 (Oil & Gas Conservation Law), Ellicorp Energy Company has filed an application for an order establishing spacing units covering an area of approximately 3,267 acres ("the parcel"). The application avers that a common accumulation of natural gas underlies the parcel and that such accumulation constitutes a pool as it is "not in



communication laterally or vertically with any other accumulation of oil or gas." 58 P.S. § 402(10).

5) The Property Owners' properties are among those included in the parcel.

6) The Pennsylvania Department of Environmental Protection (DEP) has appointed Michael L. Bangs, Esquire, as the hearing officer in this matter. Hearing Officer Bangs has scheduled a hearing for May 7-8, 2014.

7) The Property Owners own their mineral rights and have not leased any of these rights to Hilcorp or a third party.

8) The Property Owners' rights to their minerals and to prevent trespass upon their underground estates are guaranteed by Article I of the Pennsylvania Constitution, which states, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of **acquiring, possessing and protecting property** and reputation, and of pursuing their own happiness." PA. CONST. art. 1, § 1 (emphasis added).

9) Additionally, Property Owners will be asserting their right, pursuant to 25 Pa. Code § 79.23(b), to oppose the spacing plan sought by Hilcorp.

10) Pursuant to 58 P.S. § 408, Hearing Officer Bangs, "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). Hilcorp's application is premised upon the integration of the Property Owners' interests, as demonstrated by the plat indicating the location of the proposed wells. *See* Hilcorp's February 28, 2014 Supplemental Documents, Exhibit C-1. Therefore, if

Hearing Officer Range grants Hilcorp's application, it will result in the integration of the Property Owners' interests, which would allow Hilcorp to take their interests without their "voluntary agreement." *Id.*

11) The Property Owners' interests are not represented by the existing parties because the only other party, the DEP, has staked out an amorphous position with a vague pre-trial statement from which it is impossible to discern what it attempts to prove or disprove at the upcoming hearing. Furthermore, to the extent that the DEP will represent the Property Owners' interests, there is nothing of record to demonstrate that such representation will be adequate, as their filings are devoid of any documents or statements that would establish that Hilcorp's attempt to avail itself of the Oil and Gas Conservation Law is improper and unfounded in the instant case or in any case involving horizontal drilling.

12) The Property Owners seek to intervene and if permitted to do so, shall introduce evidence to demonstrate that:

a. The identified accumulation of gas is not a "pool" within the meaning of 52 P.S. § 410(2).

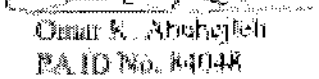
b. Hilcorp's application is facially deficient, in that it does not include a plat "indicating the latitude and longitude of each well drilled to the pool sought to be spaced." 25 Pa. Code § 79.21(2). Although the DEP sent Hilcorp a deficiency letter requesting that it remedy this deficiency, Hilcorp's February 26, 2014 filing of supplemental documents contains the same plat with the same X and Y coordinates, which are not latitude and longitude coordinates. *See* Hilcorp's February 26, 2014 Supplemental Documents, Exhibit C. *See also* Hilcorp's February 28, 2014 Supplemental Documents, Exhibit C-1.

c. Hilcorp's application is facially deficient in that it fails to identify "each well drilled to the pool." 25 Pa. Code § 79.31(2). In particular, Hilcorp has filed documents with the DEP indicating the existence of well 3H (No. 073-20398) in the Pulaski-Kinkela South Unit, which Hilcorp did not identify in the plat supporting its application.

d. Hilcorp has not recommended spacing units based on "the maximum area which may be drained efficiently and economically by one well." 25 Pa. Code § 79.21. Rather, its spacing units are based on well pads for more than one horizontal drilling run. For instance, the Pulaski-Kinkela North Unit indicates a lateral (4H, No. 073-20384) extending from the well pad on the Pulaski-Kinkela South Unit.

e. The Oil and Gas Conservation Law's purpose of protecting correlative rights is inapplicable in instances of horizontal drilling for natural gas in shale formations.

Respectfully submitted,



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abejleh@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition to Intervene was sent April 25, 2014 by U.S. First Class Mail:

Deana Duffy, Esquire
Department of Environmental Protection
230 Chestnut Street,
Meadville, PA 16335

Elizabeth Nolan, Esquire
Department of Environmental Protection
400 Market Street, 9th Floor
Harrisburg, PA 17109

Michael Braymer, Esquire
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Kevin L. Colosimo, Esquire
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Barngs Law Office, LLC
439 South 18th Street
Camp Hill, PA 17011

Omar K. Abuhejleh

pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BUREAU OF OIL AND GAS PLANNING AND PROGRAM MANAGEMENT

4/2/14 (Wednesday's Mail)

March 31, 2014

Scanned letter

Dear Property Owner:

You are receiving this notice because you have been identified as a property owner located within the area proposed for a well spacing order in Hilcorp's Application for Gas Well Spacing Units (Application). In the Application, Hilcorp requests that the Department of Environmental Protection (DEP) issue a well drilling and spacing unit order that establishes four gas well drilling units on approximately 5,267 acres in the Utica Shale Formation in Pulaski Township, Lawrence County, and Slippery Rock Township, Butler County.

DEP previously mailed you notice of an upcoming public hearing on this Application scheduled for March 25 and March 26, 2014, and the Hearing Officer's March 17, 2014, Order outlining the public participation process for this hearing.

DEP is writing today to notify you that the Hearing Officer issued an Order on March 25, 2014, rescheduling the hearing for May 7 and May 8, 2014. Please find the March 25, 2014, Order enclosed for your review. Please note the information regarding the time and location of the hearing. The Order also includes information concerning how you can participate if you choose to do so. This hearing is an administrative hearing conducted in accordance with the Oil and Gas Conservation Law, 58 P.S. § 601 *et seq.*, the Administrative Agency Law, 2 Pa.C.S. §§ 501 et seq., *25 Pa. Code Chapter 79* and the General Rules of Administrative Practice and Procedure, *1 Pa. Code Part II*.

For more information about the Oil and Gas Conservation Law and Hilcorp's Application, visit www.dep.state.pa.us and click on "Oil and Gas," "Office of Oil and Gas Management" and then "Conservation Law." If you have additional questions or concerns, please contact me by e-mail at kklapkowski@pa.gov or by telephone at 717-772-2199.

Sincerely,

Kurt Klapkowski
Director
Oil and Gas Planning and Program Management

Enclosure

EXHIBIT

83 Pa. B.A.Q. 47

Pennsylvania Bar Association Quarterly
April, 2012

COMPULSORY POOLING AND UNITIZATION IN THE MARCELLUS SHALE: PENNSYLVANIA'S CHALLENGES AND OPPORTUNITIES

Kevin L. Colosimo/Daniel P. Craig
Washington County
Members of the Pennsylvania Bar

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ABSTRACT

Pennsylvania is the birthplace of the oil and gas industry. In Titusville, as the black gold sprang from the ground, the rule of capture took hold and quickly became a fundamental tenet of oil and gas law. Those who did not drill a well on their own land risked losing their oil to their neighbors' wells. When the boom turned to bust and the industry moved southward, it left behind a legacy of rusting derricks and pumpjacks, not to mention a wealth of oil rendered unrecoverable because of waste and inefficiency.

In modern times, technology and ecology challenge the rule of capture. Horizontal drilling techniques and hydraulic fracturing of the Marcellus and Utica shale formations allow recovery of hydrocarbon deposits beyond the wildest expectations of Colonel Drake. Yet, despite 150 years of industry advances, a critical step remains elusive—compulsory

pooling--held hostage by the rule of capture. Compulsory pooling offers conservation, efficiency, and environmental *48 *protection. By abrogating the 19th century rule of capture, and instead recognizing the correlative rights of all interest holders, Pennsylvania could greatly advance the cause of American energy independence. The Commonwealth should not further forestall the energy revolution upon it by clinging to the vestiges of antediluvian legal doctrine. It is time to move oil and gas law into the 21st century and release the rule of capture.*

This article discusses compulsory pooling and unitization in Pennsylvania, Ohio, West Virginia and New York. The authors believe that Pennsylvania should move to adopt a comprehensive scheme of compulsory pooling posthaste.

INTRODUCTION

The development of horizontal drilling and hydraulic fracturing in the Barnett Shale in Texas has brought Pennsylvania's energy economy full circle. The "Drake" discovery well, drilled in Titusville, Pennsylvania in 1859, launched an international search for oil that resulted in an enormous worldwide demand for fossil fuels. However, at the inception of this new oil market in the late 1800s, the source of supply was generally greater than the demand for oil. Oddly enough, oil production from Pennsylvania lands peaked in 1891, not long before the market imbalance shifted and demand began to outpace supply.

Coal became the engine of Pennsylvania's energy industry. Pennsylvania relies on coal to produce nearly one-half of its net electricity, making it one of the largest coal-consuming states in the country. Nonetheless, more than half of the coal produced in Pennsylvania is transported to other states throughout the Northeast and Midwest. However, coal has generally fallen into disfavor as of late due to the high levels of pollutants that coal-fired power plants emit into the air. The Marcellus Shale Formation underlying the lands of Pennsylvania represents an opportunity for the Commonwealth to redefine itself as a leader in natural gas production.

The Marcellus Shale is the world's largest unconventional natural gas reserve. As conventional natural gas reserves are depleted and the energy sector continues to come under pressure to find cleaner alternatives to power generation, the demand for natural gas, which has significantly lower carbon content than coal or petroleum, will increase substantially. However, because the current price of natural gas is relatively *49 low, much like oil prices were low in the heyday of Pennsylvania's oil production, producers are heavily focused on drilling activities. Therefore, the concepts of pooling and unitization are of supreme importance in the present state of natural gas production from Pennsylvania's Marcellus Shale.

The purposes of pooling and unitization are to conserve oil and gas and to protect correlative rights by avoiding the harsh results and wasteful drilling practices that result from the application of the rule of capture. Under current Pennsylvania law, pooling and unitization in the Marcellus can only be accomplished through voluntary agreements between producers and land owners. This voluntary approach to pooling and unitization is problematic because a single non-consenting interest holder can potentially interfere with the cooperative production of a reservoir, resulting in decreased production and increased costs for all parties involved, and in greater negative impact to the surface estate. In order to address the problems related to the rule of capture, many major gas producing states have enacted compulsory pooling and unitization legislation in conjunction with well-spacing requirements. In order to take full advantage of the Commonwealth's natural gas reserve, Pennsylvania's General Assembly should take swift action to pass compulsory pooling and unitization legislation that is applicable to drilling in the Marcellus Shale.

BACKGROUND: THE PROBLEM WITH THE RULE OF CAPTURE

The renowned oil and gas attorney Robert E. Hardwicke concisely defined the rule of capture as it applies to oil and gas drilling in 1935 when he stated, "The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may prove that part of such oil and gas migrated from adjoining lands." The Supreme Court of Pennsylvania first recognized the rule of capture as it applies to natural gas in 1889 when it stated:

> [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."[1]

The problem with the rule of capture is that an owner of land under which lies oil or gas, which is being extracted by another from a well situated on adjacent property, has but one remedy: to drill a well of his own. In *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362 (1907), the Court addressed a hypothetical landowner who drills a well near his neighbor's property from which he extracts gas underlying that neighbor's property. The Court stated, "What then can the neighbor do? Nothing, only go and do likewise. He must protect his own oil and gas. He knows it is gold and will run away if it finds an opening, and it is his business to keep it at home."[2] The Court recognized that the rule leads to waste, stating, "This may not be the best rule; but neither the Legislature nor our highest court has given us any better. No doubt many thousands of dollars have been expended in protecting lines in oil and gas territory that would not have been expended if some rule had existed by which it could have been avoided."[3] This opinion was written by the lower appellate court and was merely recited and affirmed by the Supreme Court.

The rule of capture still applies in Pennsylvania with reference to wells drilled only as deep as the Marcellus Shale. The Pennsylvania legislature enacted the Oil and Gas Conservation Law in 1961 in order to address the problems arising from the application of the rule of capture.[4] The law, however, only applies to wells drilled at least into the Onondaga Group, which underlies the Marcellus Shale formation.[5] Therefore, operators drilling wells only as deep as the Marcellus Shale cannot take advantage of the law's beneficial provisions. West Virginia's compulsory pooling statute is also inapplicable to wells that are bottomed above the Onondaga Shale.[6]

However, there may be a loophole available for well operators developing natural gas from the Marcellus Shale in both states that would allow them take advantage of the otherwise inapplicable statutory pooling provisions. In 2008, the West Virginia Supreme Court refused to issue a writ of prohibition against the Oil and Gas Conservation Commission, who sought to exercise authority over a well drilled more than twenty feet into the Onondaga Group, but that was completed in the Marcellus Shale.[7] The applicable statute granted authority to the Commission over "deep wells," which are defined as wells drilled more than twenty feet into the Onondaga Group.[8] The Court granted leave for the petitioners to file an appeal to the Commissioner's orders in the Circuit Court.[9] In September, 2010, the Circuit Court issued an order in which it interpreted the applicable statute to mean that all wells drilled more than twenty feet into the Onondaga Group but completed in the Marcellus Shale are statutory deep wells not subject to the regulatory authority of the Oil and Gas Conservation Commission.[10] This order suggests that an operator could take advantage of West Virginia's compulsory pooling statute that would otherwise be inapplicable to developing natural gas from the Marcellus Shale by drilling the well at least twenty feet into the Onondaga Group and filing the well as to complete it at the desired depth in the Marcellus Shale.

Some well operators in Pennsylvania are taking advantage of a similar loophole in order to avoid restrictions imposed upon gas producers by the Coal and Gas Resource Coordination Act.[11] The Act requires wells drilled in areas with mineable coal seams to be spaced a minimum of 1,000 feet apart.[12] However, this requirement is waived if the well is drilled into the Onondaga Group.[13] Therefore, producers drilling through coal seams frequently drill a "rat hole" through the Marcellus Shale into the Onondaga Group, and then fill the hole with cement back up into the Marcellus Formation and way of avoiding the 1,000 feet spacing restriction.[14] However, producers in both Pennsylvania and West Virginia have yet to attempt to exploit these putative loopholes in order to avail themselves of potentially beneficial compulsory pooling provisions.[15]

The only valid Pennsylvania statutory provisions that currently alter the rule of capture as applied to natural gas operations in the Marcellus Shale are found in the Oil and Gas Act.[16] However, these provisions only require operators to obtain a permit before drilling and provide that a well be drilled at a minimum distance from existing buildings and water sources.[17] There are no minimum spacing requirements between wells drilled into the Marcellus Shale.[18] The statute does allow the owner of a surface estate on which the gas owner or lessee plans to drill a gas well or the owner or operator of a coal mine that will be impacted by the drilling of a planned gas well to object to the issuance of a drilling permit.[19]

Besides the above restrictions and a few other enumerated reasons for denying a drilling permit, the DEP must issue a drilling permit if the applicant has complied with all permitting requirements. Therefore, there is no impediment to a landowner who refuses to enter into a lease from drilling an oil or gas well on his property. It is, however, in the best interest of both the landowner and the operator to cooperate in the gas production. Cooperation ensures maximum production at a minimum cost

for the benefit of both parties and with a minimum impact to the surface estate. Currently, the only method for cooperative production in the Marcellus Shale in Pennsylvania is through voluntary pooling and unitization agreements.

DISTINGUISHING POOLING AND UNITIZATION

The terms "pooling" and "unitization," while often used interchangeably, have separate and distinct meanings. A leading treatise on the subject provides the following concise definition of the terms and description of their relation to one another:

> Pooling, or a pooled unit, will describe 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 laws and regulations, and for the purpose of sharing production by interest owners in such a pooled unit. Without minimum well spacing requirements, pooling, as such, would not have developed. Unitization or unit operations, on the other hand, refer to the consolidation of mineral or leasehold interests covering all or part of a common source of supply. The primary function of unit operations is to maximize production by efficiently draining the reservoir, utilizing the best engineering techniques that are economically feasible."

In other words, pooling is the consolidation of separate oil and gas interests for the production of oil and gas through a single well to be operated by a single entity [52] for the benefit of all of the interest owners. The area established through the pooling of separate interests for production through a single well is referred to in this article as the "pooled unit." Unitization is the coordination of multiple, separately operated wells for the purpose of efficiently achieving maximum production from a single reservoir of natural gas or oil. The area encompassing the separately owned, coordinated wells is referred to in this article as the "unit area." A "unit area" may encompass many "pooled units." The processes are somewhat similar, but they operate on a different scale. Pooling typically involves a single drilling company attempting to gain control of the interests of several owners of smaller tracts of land or other companies that have leased the oil and gas rights from such land owners. Unitization typically involves more than one drilling company, each of which have already pooled the interests of the separate landowners or who simply own the interests in their own right. Generally, the company that has pooled the largest interest in an entire reservoir of gas will initiate the unitization process and thereafter take the lead in coordinating the separate drilling operations."

POOLING THROUGH VOLUNTARY AGREEMENTS

The typical manner in which well and unit operators pool and utilize separately owned tracts of land into a piece of property of sufficient size to employ the most efficient drilling practices is through voluntary lease agreements. Since the focus of this article is on pooling, the pertinent provisions of such a lease relate to how the owners of the individual tracts of land are compensated for conveying their interests in the natural gas underlying their properties to the well operators and how that compensation is effected by the operation of the lease's pooling clause. Generally, this compensation consists of a lease payment or delay rental payment, a bonus payment, and a royalty interest in the well's production."

A lease payment or delay rental payment holds the lease for the operator until drilling and production occur. The lease agreement may also provide for a bonus payment to the landowner as consideration for signing." However, sometimes there is simply a large bonus payment that operates as the delay rental payment and holds the lease until drilling commences. The term covered by these payments is typically between 3 and 5 years." Once production begins, the lease is held until production ceases.

Once a well begins to produce, the lessor receives a royalty interest in the production." In most states, including Pennsylvania, the statutory minimum for royalty payments is one-eighth (1/8) of the entire interest in the oil and gas produced, or "$3 12.5%." Landowners will sometimes have the negotiating power to bargain for greater than a one-eighth (1/8) interest in production.

Oil and gas leases generally contain a pooling provision, which allows the drilling company to combine the lessor's land with adjoining leased land to form a drilling unit." The effect of such a provision is that when gas is produced from any part of the unit, the landowners receive their royalty interest as a proportion of the proceeds as measured by the amount of property they

own in the unit.

The problem with the voluntary approach to pooling occurs when a landowner does not want to give up his working interest in the oil or gas for a mere royalty interest. His working interest allows him to retain the full benefit of production of gas that he produces from a well that he drills on his own land. Compulsory pooling legislation attempts to address the problem of the uncontrolled landowner unwilling to sacrifice his working interest for a royalty interest and the benefit of the operator's production and risk-taking.

WELL SPACING, POOLING, AND UNITIZATION: INTERRELATED CONCEPTS

State well spacing requirements are achieved through the issuance of spacing orders, which establish drilling units. The interests of separate tract owners within a single drilling unit must be pooled in order to compensate each owner from the production of the single well located on the drilling unit. Most states address well spacing and pooling in separate administrative proceedings.[54] For example, New York law requires an applicant for a drilling permit to demonstrate control of at least sixty percent of the acreage within a proposed spacing unit through "fee ownership, voluntary agreements, or integration (either voluntary or compulsory)."[55] However, if the applicant does not control the requisite oil and gas rights in the unit, the department must provide him with a conditional permit, subject to the completion of the integration (pooling) process.[56] The applicant may exercise the right to drill granted by the permit once the acquisition process governed by N.Y. Environmental Conservation Law § 23-0901 is complete.

Ohio's Oil and Gas Conservation Law establishes a similar relationship between well spacing requirements and pooling.[57] In order to obtain a drilling permit, an applicant must propose a drilling unit that meets the minimum acreage and distance requirements established by agency rule.[58] If the applicant's tract of land is not large enough to establish a drilling unit that meets the spacing requirements and he fails to form an appropriate drilling unit through a voluntary pooling agreement as provided in §1509.26, he may apply for a mandatory pooling order.[59] In Ohio, the administrative agency issues the drilling permit and mandatory pooling order *34 simultaneously, unlike in New York, where an applicant may be granted a drilling permit conditioned on the completion of the compulsory pooling process.[60] This distinction is merely one of form rather than substance.

In both New York[61] and Ohio, the administrative agency must exercise discretion in determining whether the issuance of a compulsory pooling order is necessary to carry out the policies of preventing waste, maximizing recovery of oil or gas, and protecting correlative rights.[62]

Oil and gas conservation statutes in both Pennsylvania and West Virginia have compulsory pooling provisions that are inapplicable to drilling into the Marcellus Shale.[63] These provisions do not provide the state agency[64] with the same type of discretion as the Ohio and New York provisions discussed above, in that the agency must issue the pooling order in the absence of voluntary pooling if an operator files an application to establish drilling units and/or to pool all interests within a drilling unit if the application conforms with all statutory requirements.[65]

West Virginia's approach to compulsory pooling, which only applies to "deep wells,"[66] is peculiar in relation to the other three states discussed in this article. The well operator must obtain a permit to drill a discovery well,[67] which typically requires that the well be spaced at least 3,000 feet from any other deep well.[68] Once a discovery well is drilled that establishes a pool (in the sense of a gas reservoir), the operator of that well or an operator "of any lands directly and immediately affected by the drilling of such a discovery deep well, or subsequent deep wells in said pool" may apply to the agency to establish drilling units.[69] The agency is then tasked with partitioning "all lands determined or believed to be underlaid by such a pool" into drilling units and issuing an order establishing those drilling units.[70] The agency is required to issue both types of orders if the application for each complies with all applicable rules and regulations,[71] but it may exercise limited discretion in determining the size and shape of the units established in its order.[72] West Virginia's approach to establishing drilling units and pooling interests within a unit both acts loosely as a coordinated unit operation in its own right and, at least in the context of oil production, sets the stage for compulsory unitization over a common pool in connection with a program of secondary recovery of oil.[73]

*55 New York's well spacing provisions also attempt to provide the best possible conditions for successful future unitization. The agency is only required to issue a drilling permit if the proposed spacing unit, in addition to complying with all other

applicable laws and regulations, "is of approximately uniform shape of other spacing units within the same field or pool, and abuts other spacing units in the same pool, unless sufficient distance remains between units for another unit to be developed."[1] The agency may issue a permit if these requirements are not met, but only if it determines that the proposed spacing unit achieves the stated policy objectives of reducing waste, increase overall recovery of resources, and protecting the correlative rights of all persons."[2] In this manner, New York's system of issuing well spacing orders ensures that the agency may eventually issue a fair compulsory unitization order with ease.

COMPULSORY POOLING AND THE NON-CONSENTING TRACTOWNER

Consider the following scenario: Operator Co., a natural gas drilling company, acquires control of natural gas underlying 70% of the land located in an area of adequate size to establish a drilling unit and obtain a permit to drill a discovery well. Operator Co. acquired this control by entering into typical oil and gas leases, which included voluntary pooling agreements, with the separate owners of tracts located within the potential drilling unit. The leases provide that in exchange for leasing their mineral interests to the company, each landowner will receive rental payments until a well is drilled on the unit, a bonus payment for signing the lease, and a one-eighth (1/8) royalty interest in their *pro rata* share of all gas produced from the well located on the spacing unit.

A majority of the remaining unleased land located within the potential spacing unit is controlled by a single landowner, Landowner X. Landowner X has neither the capital nor the expertise to extract natural gas from beneath his own property, but refuses to give up his working interest in his share of the natural gas underlying the proposed spacing unit to Operator Co. to develop in exchange for a mere royalty interest. Moreover, due to the state's well spacing requirements, Landowner X would be incapable of obtaining a permit to conduct his own drilling operation. His refusal to cooperate with Operator Co. also precludes Operator Co. from obtaining the required permit. For this reason, any well spacing law must be accompanied by a compulsory pooling law.

Thus, upon application by Operator Co., the state exercises its police power to force pool Landowner X's interest with the other tract owners' interests in the spacing unit. However, since the state cannot take private property without just compensation, it may not be able to require Landowner X to accept a mere royalty interest as a result of the pooling order. Therefore, it must allow Landowner X to retain a working interest in his *pro rata* share of the gas produced from the well drilled on the spacing unit.

However, the reason that it was beneficial for the other landowners to voluntarily lease their interests to Operator Co. for a mere one-eighth (1/8) interest is two-fold: "[1] the small tract owners would have otherwise been incapable of producing the natural gas, and [2] there is no guarantee that expending the resources to drill a well would even produce natural gas. The risk of drilling a dry well is ever-present. However, by leasing their interests to Operator Co., the small tract owners receive a guaranteed return in the form of the bonus and delay rental payment along with the risk-free opportunity to further profit from the exploits of Operator Co. if it successfully produces gas from the spacing unit. If Operator Co. drills a dry well, the lessors are no worse off than if no well had been drilled at all (except for possible impact to the surface estate). Operator Co. carries the risk of drilling a dry well because it stands to benefit the most from drilling a productive well.

Landowner X, on the other hand, has taken on no risk, given up no interest in his share of gas in the common pool, and after being force pooled would stand to benefit greatly from a productive well. Even if his share of the costs associated with drilling a productive well were taken from his share of production from the well, he remains in the best position amongst all of the players since at no point did he put up any of his own assets against the risk of drilling a dry well. He finds himself in this superb position for doing nothing more than refusing to cooperate. Were this scenario to result from forced pooling provisions, there would be no incentive for landowners to enter into voluntary pooling agreements or lease agreements of any kind. A shrewd investor-landowner would in fact not lease, but simply wait to be forced pooled and reap the risk-free benefits of production. Therefore, many states have taken steps to impose the costs associated with the risk of drilling a dry well against the working interests of non-consenting landowners.

Generally, compulsory pooling statutes take one of four approaches to address the problem of the non-consenting or non-participating landowner: (1) give the non-participating tract owner a "free-ride," (2) impose a risk-penalty on the non-participating tract owner, (3) provide the non-participating tract owner with options, or (4) allow the authorized administrative agency to determine what to do with the non-participating owner's interest.

Compulsory pooling statutes in six states impose all of the risk associated with drilling a dry well on the operator, essentially giving the non-consenting owner a "free ride."[5] This approach condones the foregoing hypothetical scenario. The "free-ride" approach would allow Landowner X to reap all of the benefits of a productive well without taking on any risk. He would be entitled to a full *pro rata* working interest share of production from Operator Co.'s well. Operator Co. would incur all of the risk of drilling a dry or marginally productive well, recovering only Landowner X's share of actual costs of production, and only if the well is productive. Since the "free-ride" approach provides no incentive to enter into voluntary pooling agreements, it has largely fallen out of favor. Five states that had utilized this approach, at least as recently as 1966, have since amended their pooling provisions to impose a risk penalty on non-consenting land owners that are carried by the well-operator.[6]

*57 Imposing a risk-penalty on a non-participating working interest owner is a method of avoiding the problem described in the above hypothetical. The risk-penalty acts as an incentive for working interest owners to enter into a voluntary agreement with the proposed well operator rather than waiting for the government to intervene and force pool the spacing unit.

Ohio's forced pooling statute is a risk penalty statute. It states that a pooling order issued by the responsible agency must, *inter alia*, "[s]pecify the basis upon which each owner of a tract pooled by the order shall share all reasonable costs and expenses of drilling and producing if the owner elects to participate in the drilling and operation of the well."[7] Therefore, if Landowner X refuses to lease his working interest to Operator Co. but owns royalty interests he then has the opportunity to participate in the risk and cost of drilling as a working interest owner, and the manner in which he may elect to participate is determined by the agency chief. However, if Landowner X does not elect to participate in the risk and cost of drilling and operation of the well, he will be designated as a "nonparticipating owner on a limited or carried basis" and thereafter the effect of the pooling order on his working interest "is subject to terms and conditions determined by the [agency] chief to be just and reasonable."[8] Landowner X is not, however, liable for "actions or conditions" that result from the drilling or operation of the well.[9]

However, Operator Co. is entitled to the nonparticipating working interest owner's entire *pro rata* share of production from the drilling unit, minus the owner's share of the royalty interest, until the operator has recouped "the total of costs charged to that nonparticipating owner plus such additional percentage of the share of costs as the chief shall determine."[10] The "additional percentage" determined by the chief represents the risk-penalty imposed on Landowner X that compensates Operator Co. for taking on Landowner X's share of the risk involved in drilling a dry or marginally productive well and penalizes Landowner X for refusing to take on the portion of the risk related to his working interest. While Ohio gives the agency chief discretion in determining the extent of the risk-penalty to be imposed, it sets the upper limit of that discretion by capping the total amount that the operator may receive from the non-participating tract owner at "two hundred per cent of the share of costs charged to that nonparticipating owner."[11] By giving the agency chief discretion in determining the percentage of costs that will determine the risk penalty, the Ohio statute allows for an accurate assessment of the risk associated with drilling a particular well. Some wells are more likely to produce in paying quantities than others,[12] and the Ohio scheme allows the risk penalty imposed on a carried participant to reflect that reality. The other three states that are the focus of this article do not allow the responsible agency such flexibility, but rather fix the percentage of the risk penalty as a matter of law.

Some compulsory pooling statutes provide that a working interest owner who elects not to participate in the drilling and operation of the well be provided with *58 enumerated options or with options that are established by the agency before his interest may be integrated with the interests of other owners in the drilling unit. Compulsory pooling statutes in Pennsylvania, New York, and West Virginia all utilize this option approach.

Pennsylvania's compulsory pooling statute provides that a working interest owner who elects not to participate in the risk and cost of the drilling and operation of a well may request that the commission's integration order provide "just and equitable alternatives whereby [the nonparticipating landowner] ... may elect to surrender his leasehold interest to the participating operators on some reasonable basis and for reasonable consideration."[13] The Pennsylvania statute also allows the nonparticipating owner to retain his working interest and "elect to participate in the drilling and operation, or operations, of the well on a limited or carried basis."[14] In our hypothetical, under Pennsylvania law if Landowner X elects to participate on a carried basis, Operator Co. is entitled to collect his share of production minus a one-eighth (1/8) royalty interest until the market value of Landowner X's share of the production equals double the share of such costs attributed to his interest.[15] Thus,

the risk-penalty imposed on the carried working interest owner is 300% of his *pro rata* share of the costs of drilling and operation of the well.

New York's compulsory pooling statute also provides a non-leasing owner with the opportunity to choose among three options when forced to pool.[xxxvi] Such owner may "elect to be integrated into the spacing unit as an integrated participating owner, an integrated non-participating owner or an integrated royalty owner."[xxxvii] The statute defines a participating owner as "an owner who elects to participate in the initial well in a spacing unit, pays all costs associated with participation and complies with all of the requirements for participation."[xxxviii] An integrated non-participating owner is defined as "an owner who elects to reimburse the well operator, out of production proceeds, for such owner's proportionate share of the actual well costs of the initial well in a spacing unit and be subject to a risk penalty" of 200% of his share of well costs.[xxxix] An integrated royalty owner is one who elects to "receive a royalty equal to the lowest royalty in an existing lease in the spacing unit, but no less than one-eighth," and who has no obligation to pay any costs associated with the operation of the well and is insulated from liabilities arising out of operation of the well.[xl] If a nonparticipating owner fails to make an election within the prescribed time period after receiving notice of the integration hearing, he becomes an integrated as a royalty owner.[xli]

The West Virginia compulsory pooling statute effectively provides the same options as the New York statute, but imposes a smaller risk penalty on a working interest owner who participates on a carried basis. It provides that the owner of a working interest who does not elect to participate in the risk and cost of the drilling "of a deep well may elect either to surrender such interest or a portion thereof to the participating owners on a reasonable basis and for a reasonable consideration, or to participate in the drilling on a limited or carried basis."[xlii] If the nonparticipating owner elects the second option, the operator is entitled to that owner's share of production less a one-eighth (1/8) royalty interest until the market value of that share amounts to double the owner's portion of the drilling costs (a 200% risk penalty).[xliii]

Generally, a pooling order must contain the costs associated with the drilling and operation of a well. Determining the costs associated with the drilling and operation of a well is a vital aspect of any compulsory pooling scheme. The compulsory pooling statutes in Ohio, Pennsylvania, and West Virginia simply provide that if there is a dispute between the parties regarding the costs associated with the drilling and operation of a well, the responsible agency will determine such costs.[xliv] None of these three statutes are accompanied by regulations that enumerate the aspects of drilling and operation of a well that should be considered in determining the costs attributable to a participating owner's share of production or to assessing a risk penalty on a carried participant. Therefore, it appears that these agencies have broad discretion in determining such costs if a dispute arises between the parties.

New York's compulsory pooling statute provides a laundry list of activities that the operator is entitled to conduct on behalf of an owner for which the owner will be responsible for his share of the costs related thereto.[xlv] A landowner may object to the inclusion or calculation of costs in an order proposed by the operator at the integration hearing, and the responsible agency will schedule a hearing to resolve the dispute.[xlvi]

COMPULSORY POOLING, HORIZONTAL DRILLING, AND SUBSURFACE TRESPASS

Horizontal drilling presents unique issues related to compulsory pooling. One major issue that arises from horizontal drilling and compulsory pooling is whether a pooling order allows horizontal wells to physically pass through the subsurface of unleased land.

Consider a hypothetical scenario where a drilling company, Operator Co., has obtained leases to the mineral rights underlying Blackacre and Whiteacre. Landowner X owns Greyacre, which is located between Blackacre and Whiteacre. Landowner X refuses to lease Greyacre's mineral rights to Operator Co. Therefore, Operator Co. applied to the state for a force pooling order that would include Greyacre, and the state issued the permit. Operator Co. then proceeds to drill a horizontal well that physically traverses the subsurface of all three tracts of land. Landowner X realizes that a portion of the horizontal well physically traverses the subsurface of Greyacre and brings an action for common law subsurface trespass against Operator Co.

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.[xlvii] 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.

The Supreme Court of North Dakota addressed this issue in *Continental Resources, Inc. v. Farrar Oil Co.* during the relatively early years of horizontal drilling technology.[7] The court defined a subsurface trespass as "[t]he bottoming of a well on the land of another without his consent."[8] It went on to state, "Subsurface trespass results from the drilling of a 'slant' or directional well, which may be intentional or inadvertent. Since subsurface trespass is as wrongful as surface trespass, the same liability attaches."[9] This rule is a clarification of the rule of capture. However, the court held that the state, through its police powers, has the authority to issue spacing and pooling orders that supersede the law of trespass.[10]

Applied to the hypothetical, Landowner X would be able to bring an action for subsurface trespass under the pure rule of capture. However, compulsory pooling laws alter the rule of capture. Therefore, when the state issues a pooling order to Operator Co. that includes Landowner X's tract, the order supersedes the law of subsurface trespass and precludes Landowner X from maintaining an action for trespass against Operator Co.

UNITIZATION SCHEMES IN THE MARCELLUS STATES

New York, Ohio, Pennsylvania, and West Virginia all have statutes that address unitization in some form. The New York and Ohio statutes are both applicable to the Marcellus Shale and provide the applicable state agency with substantial control over the compulsory unitization scheme. The Pennsylvania and West Virginia statutes are not applicable to wells drilled into the Marcellus Shale, and provide the applicable state agency with little to no control over the unitization scheme.

New York's compulsory unitization provisions are the latter portion of the same statutory section as its compulsory pooling provisions.[11] The unitization process begins when either the department or any interested party calls for a hearing "to consider the need for the operation as a unit as an entire pool or part thereof."[12] If, after the hearing, the department determines that unit operation of the pool in question is "reasonably necessary to increase substantially the ultimate recovery of oil and gas" in a cost effective manner, it must make such an order "upon terms and conditions that are just and reasonable."[13] The order must contain: (1) a description of the area to be unitized (the "unit area"); (2) a "statement of the nature of the operations contemplated;" (3) an allocation of gas produced from the unit area that is "saved," meaning that it is not "unavoidably lost," nor is it "used in the conduct of operations;" to each separate tract owner encompassed by the unit area; (4) the manner in which land owners investing in the unit operation will be compensated; (5) the manner in which the "expenses of unit operations" will be charged to separate tract owners; (6) the manner in which owners who cannot afford an upfront investment in the unit operation will be carried by other owners; (7) a "provision for the supervision and conduct of the unit operations," wherein each interested person has a vote weighted in proportion to the percentage of expenses of unit operation chargeable to that individual; (8) the time of commencement, and the manner and circumstances under which unit operations shall terminate; and (9) other appropriate provisions directed toward the "carrying on of unit operations, and for the protection and adjustment of correlative rights."[14]

A unitization order in New York does not become effective unless persons who will pay at least 60% of the cost of unit operations under the order and 60% of the royalty interest owners within the unit area approve the plan for unit operations.[15] An order may be amended in the same manner that it is initially issued, and will not require the consent of royalty owners so long as their interests remain unaffected.[16] Unanimous consent is required if the amendment changes the allocation of gas produced from the unit area.[17] The department may not issue an order that abrogates contracts or prior orders affecting the rights of interested parties.[18]

Ohio's statutory provisions for compulsory unitization are almost identical to those in the New York statute. One difference is that in Ohio, only owners of at least 65% of the land overlying the pool, along with the applicable state agency, may apply for a unitization hearing,[19] rather than "any interested person," as provided for in the New York statute. The only other significant difference is that an order must be approved by owners that will be required to pay at least 65% of the cost of unit production and by the royalty or fee owners of at least 65% of the acreage within the unit area.[20]

West Virginia's compulsory unitization scheme is an inalienable part of its compulsory pooling process. As described above,

once a discovery well penetrates a pool of gas, the operator of that well or any operator or lands "directly and immediately affected by the drilling" of the well may file an application with the state agency to establish drilling units over the entire pool, not just a single drilling unit.[1] However, filing this application is merely discretionary.[2] If the agency decides that it *62 should establish drilling units over the pool, those units must typically be of "approximately uniform size and shape."[3] When determining whether to establish drilling units over a pool, the agency must consider: (1) the "surface topography and property lines" of lands overlying the pool, (2) any existing or proposed well spacing plan for the pool, (3) the depth of production, (4) the "nature and character of the producing formation," and whether it is producing gas, oil, or both, (5) the "maximum area that may be drained efficiently and economically by one deep well," and (6) any other data of "probative value" to determine the proper dimensions of drilling units overlying the pool.[4] The order establishing drilling units must cover "all lands determined or believed to be underlaid by such pool," and the agency may amend its order if it subsequently determines that certain lands should be included in or excluded from the order.[5]

Pennsylvania does not have a statute that provides for compulsory unitization. It does, however, have a statute that insulates voluntary agreements between "lessees or other owners of oil and gas rights" entered into for the purpose of "bringing about the unitized development or operation of such properties" from challenges based on Pennsylvania statutes prohibiting agreements "in restraint of trade or commerce."[6]

COMPULSORY POOLING AND UNITIZATION, THE PENNSYLVANIA CONSTITUTION—*KELLEY V. CITY OF NEW LONDON*, AND THE PROPERTY RIGHTS PROTECTION ACT

Some barriers may exist to enforcing compulsory pooling and unitization legislation in Pennsylvania if it is not drafted carefully. Compulsory 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. On its face, such action appears to violate the takings clauses of both the federal and the Pennsylvania Constitution. Nonetheless, state courts have uniformly upheld the constitutionality of these types of laws.[7]

The Pennsylvania Supreme Court has relied in part on Article I, Section 27 of the Pennsylvania Constitution as authority for government regulation in deciding whether such regulation effectuates an unconstitutional taking. This constitutional amendment, adopted by the Pennsylvania General Assembly and ratified by Pennsylvania voters in 1971, states:

> The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.[8]

In *United Artists Theater Circuit, Inc. v. City of Philadelphia*, the Court reversed itself in a case regarding the City of Philadelphia's enactment of an historic preservation ordinance that would have restricted a movie picture theater owner's ability to *63 alter both the interior and exterior of the historic theater.[9] The Court initially held that the ordinance constituted a regulatory taking on the grounds that the Pennsylvania Constitution may provide greater protection for the rights of its citizens than the minimum levels established by the federal constitution.[10] It distinguished the case from the U.S. Supreme Court's *Penn Central*[11] analysis on the grounds that, under its own constitution, Pennsylvania had never recognized mere "aesthetic reasons or the stabilization of economic values" as valid exercises of the police power.[12]

Prior to granting an appeal to the City of Philadelphia on the case, the Supreme Court decided *Commonwealth v. Edmunds*, in which Justice Cappy, writing for the majority, developed a four-part framework to be applied when a court decides whether the Pennsylvania Constitution provides broader protection for the rights of its citizens than the minimum standard set by the U.S. Constitution.[13] Litigants asserting greater rights under the Pennsylvania Constitution must brief and analyze at least the following factors: (1) the text of the Pennsylvania constitutional provision, (2) the history of the provision, including Pennsylvania case law, (3) related case law from other states, and (4) *policy considerations*, including unique issues of state and local concern, and applicability within Pennsylvania jurisprudence.[14]

A mere nine months after its decision in *Edmunds*, the Supreme Court reversed its earlier decision in *United Artists*, in part finding that Article I, Section 27 "reflects a state policy encouraging the preservation of historic and aesthetic resources."[15] The Court concluded that "the designation of a privately owned building as historic without the consent of the owner is not a

[illegible]

taking under the constitution of this Commonwealth."[64]

The fourth prong of the *Edmunds* analysis would provide an even stronger argument that Article I, Section 27 gets an authority for compulsory pooling and unitization legislation against a claim that such legislation is the equivalent of an unconstitutional taking under the Pennsylvania Constitution than in *Oneok/Dynegy*. In the context of natural gas drilling in the Marcellus Shale, not only does Article I, Section 27 declare an explicit state policy of conservation of natural resources and establish the right to, *inter alia*, clean water, but the sheer volume of natural gas underlying the lands of the Commonwealth and the widespread drilling taking place to produce it are "unique issues of state and local concern."

However, a series of developments subsequent to the Supreme Court's decision in *United Artists* pose further problems for the validity of potential compulsory pooling and unitization legislation. In *Kelo v. City of New London*,[65] the U.S. Supreme Court upheld the constitutionality of the condemnation of private property (blighted neighborhood) that was then conveyed to another private owner for the stated purpose of "economic development" within the confines of a city's integrated development plan. The Court justified its ruling by asserting that the economic development "satisfies [the] public use requirement of the Fifth Amendment" if "future use by the public" is the purpose of the taking.[66] It also stated that economic development "will often benefit individual private parties,"[67] but that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."[68]

The Court, however, qualified the effect of its decision. It added a statement of particular relevance to subsequent events in Pennsylvania. In the final paragraph of the majority opinion, the Court noted:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.[69]

In response to this decision, the Pennsylvania General Assembly passed the Property Rights Protection Act (PRPA) in 2006.[70] The statute prohibits "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise."[71] Section 204(b)(2) provides exceptions to the general rule, where the taken property is "transferred or leased to: (i) [a] public utility or railroad as defined in 66 Pa.C.S. §102 (relating to definitions), (ii) [a] common carrier, (iii) [a] private enterprise that occupies an incidental area within a public project, such as retail space, office space, restaurant and food service facility or similar incidental area." Pursuant to 66 U.S. §102, the term "public utility does not include ... [a]ny producer of natural gas not engaged in distributing such gas directly to the public for compensation." Therefore, most applications of any future compulsory pooling and unitization legislation in Pennsylvania would be subject to the restrictions imposed by the PRPA.

The General Assembly must address the PRPA when it passes compulsory pooling and unitization legislation. It need not completely include private natural gas producers in the definition of "public utilities," which are exempt from the Act. It must only amend the Act to the extent necessary to carve out an exemption for the specific provisions of compulsory pooling legislation that would otherwise be inconsistent with the PRPA.

Generally, compulsory pooling and unitization legislation should expressly state its purpose to implement Article I, Section 27. Such a stated purpose will assist courts interpreting the statute and provide constitutional authority for agency decisions under the statute if those decisions are challenged on other constitutional grounds, such as a takings claim.[72] If it takes the form of an amendment to the Oil and Gas Act, that purpose will attach to the new provisions since the Oil and Gas Act expresses that purpose in its existing form.[73]

*65 Moreover, to alleviate the concerns of landowners that they will be forced to lease their land to drilling companies, compulsory pooling legislation can be drafted to require that a substantial majority of land within a proposed pooled unit be voluntarily leased before the state will issue a pooling order. It can also, if necessary, require that drilling companies make a "good faith effort" to enter into voluntary pooling agreements with landowners before their interests can be forced pooled.[74] Finally, the statute can provide that no surface operations may occur on a unit pooled by an order absent the consent of the owner of that tract.[75]

CONCLUSION

Adopting a compulsory pooling and unitization scheme applicable to the Marcellus Shale is not currently at the forefront of Pennsylvania's legislative agenda. Yet, compulsory pooling and unitization represents an opportunity for the General Assembly to effectively provide well operators with the ability to efficiently produce natural gas from a common source of supply absent voluntary agreements with all affected landowners while protecting the correlative rights of all landowners.

Effective compulsory pooling legislation should allow for predictable outcomes resulting from pooling orders. Therefore, it should limit agency discretion by requiring the responsible agency to issue a pooling order if all statutory application requirements are met.[*] It should also enumerate a list of activities that the well operator is entitled to conduct on behalf of an unleased, working interest owner for which the owner will be responsible for paying his share of the costs related thereto, as New York has done.[*]

Pennsylvania's compulsory pooling statute must also address the problem of the non-consenting, non-participating landowner and ensure that a well operator is compensated for the risk and cost of drilling. Whether the legislature adopts a pure risk-penalty approach or an option approach to determine the costs owed by the non-participating working interest owner to the well operator, it should look to Ohio's approach, which allows for an assessment of the actual risk involved in a given drilling operation, rather than imposing a risk-penalty that is set as a matter of law.[*]

Any compulsory pooling legislation in Pennsylvania must amend the Property Rights Protection Act to exempt compulsory pooling from its prohibition on the exercise of "eminent domain to take private property in order to use it for private enterprise."[*] It should also expressly state its purpose to implement Article I, Section 27 of the Pennsylvania Constitution. Such a stated purpose will assist courts interpreting the statute and provide constitutional authority for agency decisions under the statute if those decisions are challenged on other constitutional grounds, such as a takings claim.

*68 Finally, Pennsylvania's compulsory pooling law must necessarily address the concerns of landowners who fear that they will be forced to lease their land against their will. To achieve this objective, the law may require that a substantial majority of land within a proposed pooled unit be voluntarily leased before the state will issue a pooling order. It can also, if necessary, require that drilling companies make a "good faith effort" to enter into voluntary pooling agreements with landowners before their interests can be forced pooled.[*] Finally, the statute can provide that no surface operations may occur on a tract pooled by an order absent the consent of the owner of that tract.[*]

While compulsory pooling and unitization has struggled to gain traction in the Pennsylvania General Assembly, it is important that proponents of enacting such a scheme into law continue to inform legislators and their constituents on the benefits that effective pooling legislation could provide to all involved parties. Pooling opponents deride the concept with conjectural arguments about encroaching on private property rights. However, compulsory pooling has consistently proven to be the best mechanism for protecting the interests of all landowners and the energy industry alike, as well as a means of addressing certain environmental concerns related to oil and gas drilling. By revealing the successes of other states to the citizens of Pennsylvania and their representatives, pooling advocates can succeed in bringing the benefits of compulsory pooling to the Commonwealth.

Footnotes

[*] Kevin L. Colosimo is the Managing Partner at Burleson LLP's Pittsburgh office. He concentrates his practice in oil and gas law and litigation. He received his J.D. from Duquesne Law School in 1997 and his B.A. in 1994 from Indiana University of Pennsylvania.

[*] Daniel P. Craig is an Associate at Burleson LLP. He received a B.A. in English from The Ohio State University in 2008 and a J.D. from Duquesne Law School in 2011. He concentrates his practice in the areas of oil and gas title and environmental law.

Thomas A. Mitchell, The Future of Oil and Gas Conservation Jurisprudence, 49 Washburn L.J. 379, 380 (2010).

Id.

Id. at 385.

U.S. Energy Information Administration, Pennsylvania State Energy Profile Analysis, [illegible] (last visited Feb. 28, 2011).

Id.

Timothy Considine et al., An Emerging Giant: Prospects and Economic Impacts of Developing the Marcellus Shale Natural Gas Play, Pennsylvania State University Department of Energy and Mineral Engineering, [illegible] www.alleghenyconference.org/PDFs/PELMisc/PSUStudyMarcellusShale072409.pdf (2009).

Id.

Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization § 1.02 (3d 2008).

Robert E. Hardwicke, The Rule of Capture and Its Implications as Applied to Oil and Gas, 13 Tex. L. Rev. 391, 393 (1935).

Westmoreland & Cambria Natural Gas Co. v. DeWitt, 130 Pa. 235, 249-50 (1889).

Barnard v. Monongahela Natural Gas Co., 216 Pa. 362 (1907).

Id.

58 Pa. Consol. Statutes Oil & Gas §§ 401-419 (West 2010).

58 P.S. § 403.10(f)(1).

W. Va. Code § 22C-9-2(a)(12) (2010); W. Va. Code § 22C-9-7.

State ex rel. Blue Eagle Land, LLC v. Oil & Gas Conservation Comm'n, 222 W. Va. 342, 664 S.E.2d 683 (2008).

W. Va. Code § 22-9-8.

Id.

Blue Eagle, LLC v. W. Va. Oil & Gas Conservation Comm'n, Civil Action No. 08-C-AP-171, Kanawha Co. Cir. Ct. (Sept. 10, 2010).

58 P.S. § 401.01 et seq. (1984).

58 P.S. § 407.

58 P.S. § 503(b)(1).

[illegible] A. Mitchell, The Future of Oil and Gas Jurisprudence: [illegible] to Pittsburgh, 49 Washburn L.J. 379, 386 (2010).

Id.

58 P.S. § 601.101-601.607.

Id.

Id.

58 P.S. § 601.202.

58 P.S. § 601.204.

Bruce M. Kramer, supra note 8 at 1-[illegible] (internal citation omitted).

It should be noted that certain pooling statutes refer to a reservoir of oil or gas as a "pool." So, in the parlance of oil and gas jurisprudence, the term "pool" can refer to either a pool of interests in mineral rights or a physical pool of oil or gas.

Kramer, supra note 8, at §17.02[4].

D. Robert Davidson, Esq., "Negotiating Oil and Gas Leases on Pennsylvania Farmland," PENNSYLVANIA DEPARTMENT OF AGRICULTURE 1, 13 (July 2008), http://agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_75292_10297_0_43/AgWebsite/Files/Publications/Negotiating%20Oil%20and%20Gas%20Leases%20on%20Pennsylvania%20Farmland%20.pdf.

Id. at 11.

Id. at 11.

Id. at 11.

Id.

Id. at 14.

58 P.S. § 35

Davidson, *supra* note 33, at 15.

Id.

N.Y. Envtl. Conserv. Law § 23-0501 (McKinney 2010) [hereinafter "N.Y. ECL"]

N.Y. ECL § 23-0501(2)

The Department of Natural Resources Division of Oil and Gas is the regulatory authority for Ohio's forced pooling law.

N.Y. ECL § 23-0501(2)(b)

Ohio Rev. Code Ch. 1509 (Baldwin 2010)

Ohio R.C. §1509.24

ORC §1509.27.

N.Y. ECL §23-0501(2)(b)

The Department of Environmental Conservation is the regulatory authority for New York's forced pooling law.

N.Y. ECL §23-0901(2); Ohio Rev. Code §1509.27

58 P.S. §408; W.Va. Code §22C-9-7.

The Oil and Gas Conservation Commission is the regulatory authority for West Virginia's forced pooling law. The Department of Environmental Protection Office of Oil and Gas Management is the regulatory authority for Pennsylvania's forced pooling law.

58 P.S. §408(a) (Pooling order encompassed in order establishing spacing units); W.Va. Code §22C-9-7(a)(1) (Pooling order issued separately and upon separate application after order establishing drilling units has been entered).

See discussion of distinction between statutory deep and shallow wells *infra*.

58 W. Va. Code § 22-6-6.

59 W. Va. Code R. § 39-1-4.7 (2010).

60 § 22C-9-7 (a)(1).

61 W. Va. Code § 22C-9-7 (b)(7).

62 W. Va. Code R. § 39-1-4.4; W. Va. Code § 22C-9-7(b)(1).

63 W. Va. Code § 22C-9-7(a)(1) & (7); W. Va. Code R. § 39-1-4.2.

64 W. Va. Code § 22C-9-8.

65 N.Y. ECL § 23-0501(2).

66 N.Y. ECL § 23-0501(3) & § 23-0901.

67 Alaska Stat. § 31.05.100(e) (West 2010); Ariz. Rev. Stat. Ann. § 27-505(A) (West 2010); Ind. Code Ann. § 14-37-9-3 (West 2010); Iowa Code Ann. § 458A.8 (West 2010); Mo. Ann. Stat. § 259.120 (Vernon 2010); N.C. Gen. Stat. § 113-393 (West 2010).

68 Ala. Code § 9-17-13 (2010); Fla. Stat. Ann. § 377.27 (West 2010), § 377.241; Mont. Code Ann. § 82-11-202(2) (West 2009); Nev. Rev. Stat. § 522.060(1) (West 2009); N.D. Cent. Code § 38-08-08 (West 2009).

69 Ohio R.C. § 1509.27.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 Bruce M. Kramer, Compulsory Pooling and Unitization: State Options in Dealing with Uncooperative Owners, 7 J. Energy L. & Pol'y 255 (1986).

75 58 P.S. § 408(c).

76 *Id.*

[illegible] *Id.*

[illegible] N.Y. ECL § 23-0901(3) (Amended in 2005 to provide options rather than taking a strict risk-penalty approach.)

[illegible] *Id.*

[illegible] *Id.*

[illegible] *Id.*

[illegible] *Id.*

[illegible] *Id.*

[illegible] W. Va. Code § 22C-9-7(b)(5).

[illegible] Ohio R.C. § 1509.27; 58 P.S. § 408(c); W. Va. Code § 22C-9-7(b)(7).

[illegible] N.Y. ECL § 23-0901(3)(c)(1) ("conducting title examination and curative work on the tracts included in the spacing unit; arranging for contract services or employees of the well operator, at the customary salaries, wages and benefits of such employees, to oversee the operation and maintenance of the well and the facilities in the production unit associated with the well; arranging for and maintaining required financial security for well bonds and insurance; discharging [illegible] claims of third parties and disputing tax assessments; developing and implementing emergency responses and dealing with catastrophic events; and arranging for the storage, transporting and disposal of produced water, by-products or [illegible] associated with production and maintenance facilities.")

[illegible] N.Y. Envtl. Conserv. Law § 23-0901(3)(d).

[illegible] *See* Ohio R.C. § 1509.27(F).

[illegible] 569 N.W.2d 844 (N.D. 1997).

[illegible] *Id.* at 844.

[illegible] *Id.*

[illegible] *Id.* at 846.

[illegible] N.Y. ECL § 23-0901(3)(c)(2).

[illegible] N.Y. ECL § 23-0901(4).

N.Y. ECL § 23-0901(5).

Id.

N.Y. ECL § 23-0901(6).

N.Y. ECL § 23-0901(9).

Id.

N.Y. ECL § 23-0901(11).

Ohio R.C. § 1509.28(A).

Ohio R.C. § 1509.28(B).

W. Va. Code § 22C-9-7(a)(1).

Powers v. Union Drilling, Inc., 194 W. Va. 782 (1995).

W. Va. Code § 22C-9-7(a)(3)(F).

W. Va. Code § 22C-9-7(a)(4).

W. Va. Code § 22C-9-7(a)(7).

58 P.S. § 408.

Patterson v. Stanolind Oil & Gas Co., 182 Okla. 155, 77 P.2d 83 (1938), [illegible] (1952).

Pa. Const. art. I, § 27.

555 Pa. 370, 635 A.2d 613 (1991).

Id.

Regulatory takings challenges are governed by the standards established in *Penn Central Transp. Co. v. New York City*, 438 U.S.

104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Id. at 612.

526 Pa. 371, 586 A.2d 887 (1991).

Id. at 390-91, 893 (emphasis added).

United Artists, 635 A.2d at 620.

Id.

Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

Id. at 477.

Id. at 487.

Id. at 480 (quoting Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954)).

Id. at 489.

Pa. Consol. Stat. Ann. Eminent Domain, 26 §§ 201-207 (West 2006).

26 Pa. C.S.A. § 204(a).

See John C. Dernbach, Taking the Constitution Seriously When It Protects the Environment, 104 Dick. L. Rev. 97, 151, 157-58 (1999).

58 P.S. § 401.102(1).

See Tex. Nat. Res. Code § 102.013.

See Ohio R.C. § 1509.27(E).

Pennsylvania and West Virginia's current pooling statutes, which are inapplicable to the Marcellus Shale, contain this type of anti-discriminatory provision.

W. Va. Code § 22C-9-7(b)(4)(B).

Ohio R.C. §1509.21.

58 P.S. § 20(a).

See Dornbach, supra note 124, at 148, 157-58.

See Tex. Nat. Res. Code § 102.011.

See Ohio R.C. § 1509.27(F).

End of Document

Received 06/05/2014 Commonwealth Court of Pennsylvania

Filed 06/05/2014 Commonwealth Court of Pennsylvania
266 MD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matteo et al v. Hilcorp Energy Co et al	:	266 MD 2014
	:	
	:	

PROOF OF SERVICE

I hereby certify that this 5th day of June, 2014, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Colosimo, Kevin L.
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Service Method:	First Class Mail
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Representing:	Respondent Hilcorp Energy Company

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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	Respondent	Commonwealth of Pennsylvania Department of Environmental Protection
	Respondent	E. Christopher Abruzzo in his Official Capacity as the Secretary of the Department of Environmental
	Respondent	Kathleen Kane in her Official Capacity as Attorney General of the Commonwealth
	Respondent	Office of the Attorney General of Pennsylvania

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	Respondent	Commonwealth of Pennsylvania Department of Environmental Protection
	Respondent	E. Christopher Abruzzo in his Official Capacity as the Secretary of the Department of Environmental
	Respondent	Kathleen Kane in her Official Capacity as Attorney General of the Commonwealth
	Respondent	Office of the Attorney General of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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	Respondent	Commonwealth of Pennsylvania Department of Environmental Protection
	Respondent	E. Christopher Abruzzo in his Official Capacity as the Secretary of the Department of Environmental
	Respondent	Kathleen Kane in her Official Capacity as Attorney General of the Commonwealth
	Respondent	Office of the Attorney General of Pennsylvania

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	Respondent	Commonwealth of Pennsylvania Department of Environmental Protection
	Respondent	E. Christopher Abruzzo in his Official Capacity as the Secretary of the Department of Environmental
	Respondent	Kathleen Kane in her Official Capacity as Attorney General of the Commonwealth
	Respondent	Office of the Attorney General of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Omar Kasem Abuhejleh

(Signature of Person Serving)

Person Serving:	Abuhejleh, Omar Kasem	
Attorney Registration No:	084048	
Law Firm:		
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	Pittsburgh, PA 15219	
Representing:	Petitioner	Emery, Steve
	Petitioner	Matteo, Martin and Suzanne
	Petitioner	Valentine, Robert and Carole

EXHIBIT B

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.	:	**Docket No. 266 MD 2014**
HILCORP ENERGY COMPANY, *et al.*,	:	
Respondents	:	

NOTICE TO PLEAD

To:

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You are hereby notified to file a written response to the enclosed Preliminary Objections to the Petition for Review within thirty (30) days from service hereof or judgment maybe entered against you.

By: ***s/Jonathan D. Koltash***
JONATHAN D. KOLTASH
Deputy Attorney General

DATE: August 13, 2014

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.	:	**Docket No. 266 MD 2014**
HILCORP ENERGY COMPANY, *et al.*,	:	
Respondents	:	

COMMONWEALTH RESPONDENTS' PRELIMINARY OBJECTIONS TO THE AMENDED PETITION FOR REVIEW

Pursuant to Pennsylvania Rule of Civil Procedure 1028, Respondents the Commonwealth of Pennsylvania; the Office of Attorney General; Kathleen Kane, Attorney General of the Commonwealth of Pennsylvania; Pennsylvania Department of Environmental Protection; and Christopher Abruzzo, the Secretary of the Department (hereinafter collectively "Commonwealth Respondents"), by and through their counsel, Michael L. Harvey, Senior Deputy Attorney General and Jonathan D. Koltash, Deputy Attorney General, submits the following Preliminary Objections.

PRELIMINARY OBJECTION I – DEMURRER
THE COMMONWEALTH OF PENNSYLVANIA, KATHLEEN KANE, ATTORNEY GENERAL, AND THE OFFICE OF ATTORNEY GENERAL ARE NOT PROPER PARTIES

1. Petitioners have named the Commonwealth of Pennsylvania, the Office of the Attorney General, and Kathleen Kane, Attorney General for the Commonwealth of Pennsylvania, as Respondents in this matter. (Amended Petition for Review, ¶¶ 36, 37, 38).

2. The Commonwealth, Attorney General Kane, and the Office of Attorney General are not proper parties in this matter.

3. None of these parties are charged with the enforcement or administration of the Conservation Law. *See generally* 58 P.S. ¶ 701 *et seq.*

4. The interest in enforcing and defending a statute belongs to the governmental official who implements the law. *Wagman v. Attorney General of Com.*, 872 A.2d 244 (Pa. Cmwlth. 2005).

5. Moreover, judgment against the Commonwealth, Attorney General Kane, or the Office of Attorney General would not provide Petitioners any relief.

WHEREFORE, the Commonwealth of Pennsylvania, Attorney General Kane, and the Office of Attorney General are not proper parties to this matter. Thus, the Amended Petition for Review should be dismissed with regards to these parties.

PRELIMINARY OBJECTION II –
DEMURRER TO COUNT III
PETITIONERS' ARE AFFORDED SUFFICIENT DUE PROCESS

6. In Count III of the Amended Petition for Review, Petitioners allege that the Conservation Law is unconstitutional because it violates their procedural due process rights. (Amended Petition for Review, Count III). Specifically, Petitioners assert that Department's process is "ad hoc," that the Conservation Law is ambiguous as to whether the Petitioners are entitled to a hearing, and that the Conservation Law is similarly ambiguous as to the nature and extent of the pleadings permitted in the underlying administrative case. (Amended Petition for Review, ¶¶ 86, 89, 94).

7. A hearings held under the Conservation Law is before the Department. *See* 2 Pa. C.S. § 501(a)

8. Any hearing before a Department must be in accordance with the Administrative Agency Law and the General Rules of Administrative Practice and Procedure. *See* 2 Pa. C.S. § 501(a); *Texas Keystone Inc. v. Pennsylvania Dep't of Conservation & Natural Res.*, 851 A.2d 228, 235 (Pa. Cmwlth. 2004) (citing *Turner v. Pennsylvania Public Utility Commission,* 683 A.2d 942, 946 (Pa.Cmwlth.1996))("When there are no specific provisions regarding adjudicatory actions of an agency, the Administrative Agency Law . . . provides a default

mechanism for the provision of hearings and for appeals from administrative adjudications, which comport with due process requirements").

9. The Administrative Agency Law provides Petitioners with sufficient guidance as to the procedures to be used in the matter currently before the Department.

WHEREFORE, because the Administrative Agency Law establishes the procedures for the adjudication currently pending before the Department, sufficient process has been provided. Therefore, Count III of the Amended Petition for Review should be dismissed.

PRELIMINARY OBJECTION III
DEMURRER REGARDING COUNT IV
CONSERVATION LAW IS NOT UNCONSTITUTIONALLY VAGUE

10. In Count IV of the Amended Petition for Review, Petitioners allege that the Conservation Law is unconstitutionally vague. (Amended Petition for Review, ¶ 102). Specifically, Petitioners assert that the statute is vague because the rules and procedure for how a hearing before the Department will proceed are unclear. In addition, they claim that the Conservation Law does not 1) specify how their surface rights could be affected, 2) whether Hilcorp would be permitted to enter onto their subsurface estates, and 3) what mineral rights they may lose if Hilcorp is eventually granted a drilling permit. Finally, Petitioners assert that the law provides no minimum threshold of controlling interest is required before one can apply for a

spacing order is set forth in the Conservation Law. (Amended Petition for Review, ¶¶ 86, 89, 94).

11. Notwithstanding their allegations, Petitioners' assertions in Count IV do not establish that the Conservation Law is unconstitutionally vague.

12. Generally, the doctrine of void for vagueness applies only to statutes effecting conduct either in criminal law or constitutional law. *See Pennsylvania State Ass'n of Jury Com'rs v. Commonwealth*, 53 A.3d 109, 120-21 (Pa. Cmwlth. 2012).

13. As previously stated, the Administrative Agency Law clearly establishes without ambiguity the process for the current adjudication pending before the Department. Moreover, the Conservation Law sets forth detailed provisions regarding how parties are to be notified of impending hearings regarding their property rights.

14. As such, the Conservation Law is not vague regarding what process the Department is to provide to potentially interested parties.

15. Additionally, the Conservation Law is also sufficiently specific to provide the Department with guidance on how and when it is to be applied.

WHEREFORE, because Petitioner's have failed to establish that the Conservation Law is unconstitutionally vague, Count IV of the Amended Petition for Review should be dismissed.

PRELIMINARY OBJECTION IV
LACK OF JURISDICTION

16. Petitioners contend that the Conservation Law violates their constitutional rights because the statute amounts to a taking that is not for public purpose. Additionally, they assert that the Conservation Law has been otherwise preempted.

17. An actual controversy must exist before a court has jurisdiction over a matter. *Bayada Nurses, Inc. v. Dep't of Labor & Indus*, 8 A.2d 866, 874 (Pa. 2009). If no controversy exists, the case is not ripe for judicial review. *Id.*

18. In determining whether a matter is ripe for judicial review, the courts must determine whether the issues presented have been adequately developed and whether the parties will suffer any hardship if delayed. *Alaica v. Ridge*, 784 A.2d 837 (Pa. Cmwlth. 2001).

19. Here, this matter has not been sufficiently developed to permit judicial review.

20. A hearing has been scheduled before the Department to determine whether a spacing permit should be issued. One of the issues before the hearing examiner is to determine what properties should be included in spacing unit.

21. At this juncture, it is possible that a spacing order will not be issued or that Petitioners' property will not be included in that spacing unit.

22. Alternatively, Petitioners are seeking relief from this Court before they have exhausted the administrative remedies available to them. *See Lehman v.*

Pennsylvania State Police, 839 A.2d 265, 275 (Pa. 2009); *Funk v. Dep't of Environmental Protection*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013).

23. "The doctrine of exhaustion of administrative remedies requires that a person challenging an administrative decision must first exhaust all adequate and available administrative remedies before seeking relief from the courts." *Funk v. Dep't of Environmental Protection*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013)(citation omitted). *See also Cherry v. City of Philadelphia*, 692 A.2d 1082, 1084 (Pa. 1997) (stating that "the mere allegation or characterization of one's claim as a constitutional claim does not automatically allow a party to bypass administrative remedies").

24. A hearing has been scheduled at which all Petitioners' issues can and will be addressed, save their facial challenges to the Conservation Law.

25. Because Petitioners can receive the relief they seek from the administrative body, they have failed to exhaust the administrative remedies available to them.

WHEREFORE, because this matter is not ripe for judicial review, the Amended Petition for Review should be dismissed.[1]

Respectfully submitted,

KATHLEEN G. KANE
Attorney General

By: *s/Jonathan D. Koltash*
JONATHAN D. KOLTASH
Deputy Attorney General
Attorney ID #206234

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Date: August 13, 2014

[1] Counts VI and VII have not been addressed because they seek a preliminary and permanent junction respectively. If the Commonwealth Respondents are successful on the preliminary objections presented hereto, Counts VI and VII would be moot.

CERTIFICATE OF SERVICE

I, Jonathan D. Koltash, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on August 13, 2014, I caused to be served a true and correct copy of the foregoing document titled **COMMONWEALTH RESPONDENTS' PRELIMINARY OBJECTIONS TO THE AMENDED PETITION FOR REVIEW** addressed to the following:

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