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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

vs.

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

Respondents,

Docket No. 266 MD 2014

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

Filed on behalf of Respondent Hilcorp Energy Company

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**

**Statutes**

## I. INTRODUCTION

This action arises from the Application of Hilcorp Energy Company ("Hilcorp") for Well Spacing Units (the "Application"), filed pursuant to the Pennsylvania Oil and Gas Conservation Law, 50 P.S. §§ 401, *et seq.*, which is currently pending before the Department of Environmental Protection (the "Department"). The Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief (the "Petition") with this Court on May 2, 2014. Hilcorp filed Preliminary Objections to the Petition for Review on May 20, 2014, challenging the Commonwealth Court's jurisdiction over the matter due to Petitioners' failure to exhaust administrative remedies. The Petitioners filed an Amended Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief on June 6, 2014 (the "Amended Petition"). The Amended Petition asserts that "[t]he Commonwealth Court has jurisdiction over Petitioners' constitutional challenge to the Conservation Law, because neither the DEP nor the EHB have authority to rule on the constitutionality of statutes...." *Citing St. Joe Minerals Corp. v. Goddard,* 324 A.2d 800, 802 (Pa. Commw. Ct. 1974). The Amended Petition further asserts that "[t]he 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 administrative remedies are inadequate, pursuit of them would be pointless, and a suit in equity would provide a more efficient and thorough global resolution." *Citing Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records*, 50 A.3d 1263, 1277 (Pa. 2012). However, it would be improper for this Court to exercise its original equitable jurisdiction in this case because (a) the matter is not ripe for review, (b) Petitioners have unjustifiably failed to exhaust all statutorily prescribed administrative remedies, and (c) Petitioners would suffer no "direct and immediate" impact as a result of the Department's eventual action on the

Application, rendering the invocation of equitable jurisdiction for pre-enforcement review inappropriate.

## II. FACTS

Hilcorp originally filed its Application with the Department on July 17, 2013. The Department responded by claiming that it lacked jurisdiction to rule on the Application, and that jurisdiction over the matter rested with the Environmental Hearing Board (the "Board"). Subsequently, the Board issued an Opinion and Order on November 20, 2013, dismissing the Application for lack of original jurisdiction, and directing Hilcorp to submit its Application to the Department for consideration and action. In its Opinion and Order, the Board stated, "the Application should be submitted to the Department of Environmental Protection for its consideration and action. Once the Department takes final action on the Application, an Appeal to the Environmental Hearing Board may be filed in accordance with the Environmental Hearing Board Act." *Hilcorp Energy Co. v. Dep't of Envtl. Prot.*, EHB Docket No. 2013-155-SA-R. Hilcorp formally re-filed its Application with the Department on December 2, 2013.

## III. ARGUMENT

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

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

While the right to relief under the Act is broad, and specifically exempted under the provisions of 1 Pa. C.S. § 1504 (relating to statutory remedies as preferred over common law),

there are limitations to a court's ability to issue a declaration of rights. 42 Pa. C.S. § 7541 (b). The doctrine of ripeness is a judicially created principle that requires the presence of an actual controversy in order for a court to exercise jurisdiction. *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.2d 866, 874 (Pa. 2009). The purpose of the doctrine of ripeness, when it comes to administrative law, is to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect state agencies from judicial interference until an administrative decision has been formalized and its efforts felt in a concrete way by the challenging parties." *Id.* Though they are distinct concepts, the doctrines of ripeness and exhaustion of administrative remedies both deal with the timing of judicial review, and the failure to exhaust administrative remedies may render recourse to the courts premature and therefore not ripe for judicial review. *Estate of Merriam v. Phila. Historical Comm'n*, 777 A.2d 1212, 1219 (Pa. Commw. Ct. 2001).

Courts apply a two-pronged test to determine whether a matter is ripe for judicial review. Using this test, the court will examine: (1) whether the issues presented are adequately developed for judicial review, and (2) whether the parties will suffer hardship, if review is delayed. *Alaica v. Ridge*, 784 A.2d 837, 842 (Pa. Commw. Ct. 2001). When evaluating the first prong of the ripeness test, courts have identified two concepts relevant to the inquiry: (1) "whether the asserted deprivation of rights is immediate ... or is hypothetical and contingent upon certain future events," and (2) "whether resolution of the ... dispute will involve substantial factfinding." *Id.* If the dispute is fact intensive, the uncertainty of future events poses a greater challenge to a court's ability to clearly identify the relevant issues for review. *Id.* In this case, both prongs of the ripeness test inexorably lead to the conclusion that no actual controversy is present and the matter is not ripe for review.

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

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

The resolution of this dispute will also involve extensive fact-finding. While Section 7 of the Conservation Law has been applied to traditional vertical wells in the past, Hilcorp's Application is the first instance in which an operator has sought a spacing order for horizontal wells drilled into a tight rock shale formation. In the Amended Petition, Petitioners assert that "[t]he 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." (Amended Petition, ¶ 116). This claim includes the factual allegation

that "a gas drilling company can simply direct its well bore around properties of non-participating owners and there will be minimal, if any, drainage of gas from the shale formations underlying those property owners' lands." (Amended Petition, ¶ 114). In order to determine whether the relevant provisions of the Conservation Law apply in this case, facts about the geology of the Pulaski Accumulation and the engineering practices surrounding horizontal drilling and hydraulic fracturing must necessarily be heard from expert witnesses. Moreover, Petitioners' due process claim is not ripe because the process provided for in the Conservation Law, the Administrative Agency Law, 2 Pa. C.S. § 501 *et seq.*, and Part II of Title I of the Pennsylvania Administrative Code, governing practice and procedure before agencies of the Commonwealth has yet to take place. (*See* Hearing Officer Bangs' Standing Practice Order dated January 17, 2014, attached hereto as Exhibit A).

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

As to the second prong of the ripeness test, Petitioners will suffer no hardship if review is delayed until after the administrative process has been exhausted before having the opportunity to appeal to this Court. The existence of a statutorily prescribed appeals process for any Department action, more thoroughly discussed in the following section, ensures that Petitioners will suffer no hardship resulting from a potential spacing order issued by the Department, until the Board has reviewed the Department's decision, and this Court has had the opportunity to review the decisions of both administrative bodies (and a fully-developed record), so long as Petitioners pursue those appellate avenues.

By way of comparison, this Court held in *Rouse & Assocs.-Ship Rd. Land P'ship v. Pa. Envtl. Quality Bd.,* that a developer's challenge to a change in the designation of water quality standards for a creek was ripe for review, despite the developer's failure to exhaust its

administrative remedy of applying for a new permit to discharge into the creek. 642 A.2d 642 (Pa. Commw. Ct. 1994). In so holding. this Court found that the developer would suffer actual and present harm if review were delayed until the developer sought a permit because of the time and money required to prepare plans for a new treatment plant, when the Department of Environmental Resources (now Department of Environmental Protection) had already determined that the proposed treatment plant's particular discharge would cause an adverse change in the creek. Moreover, this Court expressly noted that the developer would suffer additional hardship because it was unable to proceed with the development, or sell the development due to the uncertainty of its sewer proposal. *Id.* at 645. Under the aforementioned circumstances, it was apparent that the permit application would fail under the new water quality standards, so the developer was not required to pursue a permit under those standards. *Id.*

Unlike the developer in *Rouse & Assocs.-Ship Rd. Land P'ship,* Petitioners in this case face no hardship if review of the Conservation Law by this Court is delayed until the administrative process is complete. The established administrative remedies provide Petitioners with every opportunity to achieve their desired outcome and Petitioners legal rights will not change until they exhaust those remedies and appeal any adverse decision to this Court. Furthermore, the delay will not affect Petitioners' ability to develop or transfer their property as they see fit.

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

**(1) Petitioners must await a decision of the Department on the Application and seek review from the Board before they are entitled to a review by this Court.**

The well-established doctrines of primary jurisdiction and exhaustion of administrative remedies should lead this Court to decline an exercise of equitable jurisdiction in this case.

Under the judicial doctrine of primary jurisdiction, a court tends to favor allowing an agency the opportunity to make an initial determination on an issue before the court will exercise its jurisdiction. *Jackson v. Centennial Sch. Dist.*, 501 A.2d 218, 220 (Pa. 1985). Similarly, the doctrine of exhaustion of administrative remedies, which expressly "precludes a party's challenging administrative decision making from obtaining judicial review ... without first exhausting administrative remedies," acts as a restraint upon the exercise of a court's equitable powers, thus reflecting the recognition that the General Assembly intended strict compliance with statutory remedies. *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 437 (Pa. 1982), *quoting Canonsburg Gen. Hosp. v. Dep't of Health*, 422 A.2d 141 (Pa. 1980). The Pennsylvania Supreme Court has consistently held that "where a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of redress. *Jackson,* 501 A.2d at 220. The Supreme Court has also firmly provided that a court is precluded from hearing a matter in which the Petitioners have failed to exhaust administrative remedies without good cause. *Id.*

Before the Petitioners may invoke the jurisdiction of this Court, they must allow the Department to create a factual record and take action on the Application, and if necessary, pursue an appeal to the Board. Petitioners may initially challenge the application of Section 7 of the Conservation Law, as applied to their interest in oil and gas at the hearing on Hilcorp's Application and before a hearing officer appointed by the Department. 58 Pa. C.S. § 407. If the Department issues an order establishing spacing units, Petitioners may then appeal that decision to the Board pursuant to the Environmental Hearing Board Act, 35 Pa. C.S. § 7514, which states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board..." Should Petitioners'

appeal to the Board fail, they may then appeal that decision to the Commonwealth Court, which has exclusive jurisdiction over appeals from final orders of the Board pursuant to 42 Pa. C.S. § 763.

**(2) This case does not fall within the exception to the doctrine of exhaustion of administrative remedies.**

Although there exists an exception to the requirement of exhaustion of administrative remedies, which provides that "where the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required," *See Tex. Keystone v. DCNR*, 851 A.2d 228 (Pa. Commw. Ct. 2004), the facts of this case do not comport with such exception. The present case does not fall within the exception to the doctrine of exhaustion of administrative remedies as the administrative process is vital to the ultimate outcome. As discussed in Section A (2), *supra,* the resolution of this dispute will involve extensive fact-finding. Moreover, Counts III-V of the Amended Petition challenge the Conservation Law on an "as applied" basis. However, the Department has yet to take action on Hilcorp's Application, so the Conservation Law has not been applied in this case.

Petitioners argue that this Court has jurisdiction over constitutional challenges to the Conservation Law because neither the Department nor the Board has the authority to rule on the constitutionality of a statute, and that this Court has jurisdiction over Petitioners' remaining claims because exhaustion of administrative remedies is not required "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." (Amended Petition, ¶ ¶ 28 & 30, *citing Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records*, 50 A.3d 1263, 1277 (Pa. 2012)). However, Petitioners do not actually allege that the administrative remedies provided for in the

Conservation Law and the Administrative Code are inadequate, nor do they assert any reasoning for perceived inadequacy, aside from the general assertions that the Department's process is *ad hoc* and that notice should be provided more than 15 days prior to the hearing. (Amended Petition, ¶ ¶ 42, 86 & 90).

The Pennsylvania Supreme Court has acknowledged that "[a] party cannot avoid the requirement to exhaust administrative remedies merely by raising a constitutional challenge to the validity of a statute; 'the additional element required to confer equitable jurisdiction is either the absence of a statutorily-prescribed remedy or, if such a remedy exists, then a showing of inadequacy in the circumstances.'" *County of Berks ex rel Baldwin v. Pa. Labor Relations Bd.*, 678 A.2d 355, 360 (Pa. 1996). In *County of Berks*, the party challenging the adequacy of administrative remedies argued that the remedy provided was inadequate because the agency in question did not have the authority to rule on constitutional issues. *Id.* The Court stated:

> In these arguments, Appellants are not focusing on whether they can obtain an adequate remedy from the [agency], but rather focusing on whether they can obtain that adequate remedy via disposition of particular issues. That is not the appropriate inquiry. In determining whether a litigant will be excused from exhausting administrative remedies, we look to whether that litigant has an adequate administrative remedy ... We have not, however, allowed a litigant to circumvent the administrative process where the litigant can achieve full relief in front of the agency but the relief may be granted on bases different from those advocated by the litigant.

*Id.*

Similarly, in *Larry Pitt & Assocs., P.C. v. Butler*, several attorneys whose contingency fee arrangements with clients had not been approved by an administrative law judge (the "WCJ") under a Pennsylvania workers' compensation law sought immediate declaratory and injunctive relief before an administrative agency had acted on their appeals, arguing, inter alia, that the law was unconstitutional and that they were not required to exhaust their administrative remedies

before seeking judicial relief because the agency did not have the authority to rule on the constitutionality of a statute. 785 A.2d 1092 (Pa. Commw. Ct. 2001). In ruling that the administrative remedy was adequate and must be pursued by Petitioners, the Court stated:

> [I]t is clear that Petitioners can pursue further review of attorneys' fees awarded by the WCJs in these cases through appeal to the [agency] and, ultimately, through appeal to this Court. Although the [agency] is not empowered to reverse the WCJs' decisions in this regard on constitutional grounds, the [agency] could award fees that are consonant with the terms of the contingency fee agreements on the basis that the WCJs' findings are not supported by substantial evidence, or that the WCJs erred as a matter of law in determining the amount of the fees that were awarded. Likewise, on further appeal from the [agency's] determination, this Court could reverse the WCJs' decisions on the same grounds.

*Id.* at 1101.

These authorities demonstrate that the key questions in determining whether an administrative remedy is adequate in the face of constitutional challenge to agency action that the agency is not empowered to decide is: (1) whether the relief sought by the Petitioner from the courts, insofar as that relief specifically impacts the Petitioner, is also available through the administrative process, and (2) whether the Petitioner will ultimately have the opportunity to present his constitutional claims to a court competent to rule on those claims, in the event that the relief sought is not achieved on other grounds through the administrative process. A review of cases in which this Court has exercised jurisdiction in the absence of the exhaustion of administrative remedies due to an unavailable or insufficient administrative remedy reveals the circumstances under which the exception is intended to apply. Such circumstances are not present in this case.

In *Ohio Casualty Group of Ins. Cos. v. Argonaut Ins. Co.*, the Supreme Court reviewed a case involving a suit brought in the Commonwealth Court by an insurer seeking recovery for insurance it had paid in a medical malpractice settlement. 525 A.2d 1195 (Pa. 1987). The suit

included a claim against the director of the Medical Professional Liability Catastrophe Loss Fund (the "Fund"), an agency established pursuant to a state statute, for the purposes of providing reasonably priced professional malpractice insurance to health care providers in the Commonwealth and ensuring prompt and fair compensation for claims made by those individuals injured by them in their practices. *Id.* at 432. The Supreme Court affirmed the Commonwealth Court's decision to exercise jurisdiction despite the insurer's failure to exhaust administrative remedies because the administrative agency to which an aggrieved party was directed to seek relief was the Fund, and neither the statute nor the regulations provided the insurer with an administrative procedure for resolving claims against the Fund. *Id.* at 436. In so holding, the court specifically noted that the statute was directed at resolving claims brought by injured patients against health care providers and did not anticipate claims against the Fund. *Id.* The Court ultimately ruled that the administrative remedy at issue was inadequate because it would lead to a situation in which the Fund was both the defendant and the arbiter, where it could not fairly assess its own liability. Thus, recourse to the court was necessary. *Id.*

In *Feingold v. Bell of Pa.*, the appellant brought an action before the Court of Common Pleas, against Bell Telephone Company, alleging that Bell's failure to perform under a service contract led to loss of business for the appellant. The appellants asserted that such failure entitled them to, *inter alia,* injunctive relief and compensatory and punitive damages. 383 A.2d 791 (Pa. 1977). The Supreme Court ultimately reversed the lower court's ruling that the appellant was required to exhaust administrative remedies before seeking relief from the judiciary because the statute establishing the powers of the Public Utility Commission (the "PUC"), the relevant agency, did not include the power to award damages to a private litigant for breach of contract by a public utility. *Id.* at 8. In holding that the appellant's statutory remedies were inadequate, the

court determined that, even if a complaint by the appellant to the PUC seeking damages from Bell were found to be meritorious, it could not have resulted in an award of damages from the PUC, and the administrative remedy was therefore insufficient to adjudicate the appellant's claim. *Id.* at 10.

In this case, it is clear that Petitioners can pursue review of any decision of the Department on Hilcorp's Application through appeal to the Board with the opportunity to receive the same relief that they seek from the Commonwealth Court. Although neither the Department nor the Board is empowered to reach a decision on the Application on constitutional grounds; both entities could determine that entering an order establishing spacing units over the Pulaski Accumulation under the specific circumstances of this case is inappropriate, that the Conservation Law is repealed *sub silentio* in so far as it is inconsistent with the PRPA, or that the Conservation Law's dual purpose of preventing waste and protecting correlative rights does not apply in cases of horizontal drilling. Likewise, on further appeal from the Board's determination, this Court could reverse the Department's decision on the same grounds. Moreover, this Court may address Petitioners' constitutional arguments once Petitioners have exhausted the available administrative remedies. It is irrelevant that the administrative remedies will not, in and of themselves, result in a declaration of the invalidity of the Conservation Law as applied to all circumstances, since the administrative process fully provides Petitioners with the opportunity to show that the Conservation Law should not be applied to their specific circumstances. Should Petitioners' claims before the Department and the Board fail, they will then have the opportunity to bring their constitutional claims to this Court.

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

Petitioners assert that the Commonwealth Court's equitable jurisdiction "allows parties to raise pre-enforcement challenges to the substantive validity of laws when the parties would otherwise be forced to submit to the regulations and incur the cost and burden that the regulations would inevitably impose." *Citing Com., Office of Atty. Gen. ex rel. Corbett v. Locust Twp.*, 968 A.2d 1263, 1272 (Pa. 2009). However, there must be a "direct and immediate" impact on the "industry regulated" in order establish the justiciability of a pre-enforcement challenge to the Commonwealth Court. *Arsenal Coal Co. v. Commonwealth*, 477 A.2d 1333, 1339 (Pa. 1984). Here, the Petitioners baldly assert that they "will be significantly irreparably injured by enforcement of the Conservation Law as it will forever alter their rights in the properties where they live," that "[t]he harm to the Petitioners is immediate, and that the Petitioners have no other lawful means with which to stay the proceedings under the Conservation Law." (Amended Petition, ¶ 120). However, Petitioners fail to recognize the well-established process through which an agency action becomes final and ultimately appealable to the Commonwealth Court. Petitioners are attempting to forgo that process and their appeal to this Court is premature.

While the Pennsylvania Supreme Court has recognized that a party "may invoke the original equitable jurisdiction of the Commonwealth Court in a case seeking pre-enforcement review of a substantial challenge to the validity of regulations promulgated by an administrative agency," the exercise of such jurisdiction is improper "where there exists an adequate statutory remedy." *Arsenal Coal*, 477 A.2d at 1338. This Court has interpreted *Arsenal* as holding that a statutory remedy is inadequate when it provides an agency the power to hold hearings and issue adjudications only after an order or decision has been issued. *Schuylkill Prods. v.*

*Commonwealth Dep't of Transp.*, 962 A.2d 1249, 1256 (Pa. Commw. Ct. 2008). Moreover, the impact is not immediate and direct unless the regulation at issue is self-executing. *Toilet Goods Ass'n. v. Gardner*, 387 U.S. 158 (1967).

In the present case, the existence of a statutorily prescribed appeals process for any action of the Department ensures that no Department order concerning Hilcorp's Application will result in a "direct and immediate" impact on Petitioners. The statutory remedies provided are adequate because the Conservation Law provides for a hearing prior to the Department taking action on a well spacing application, meaning the "regulation" is not self-executing. 58 Pa. C.S. § 407 (3). An example of a self-executing regulation for which a pre-enforcement review by the Commonwealth Court is appropriate is where, in the absence of such review, the party subject to the regulation has only two options: (1) "submit to the regulations and incur the cost and burden which the regulations will inevitably impose;" or (2) "refuse to comply and defend itself in actions imposing sanctions for non-compliance." *Locust Township*, 968 A.2d at 1272. In other words, pre-enforcement review of an agency action is appropriate where an agency promulgates a regulation that will immediately impose duties upon or limit the activity of a given industry absent any further action by the agency, and where the only other avenue for a party to challenge the regulation would be to violate it, incur the penalties associated with the violation, and then challenge the validity of the regulation to which it has already been subjected.

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

In *Arsenal,* the petitioner, Arsenal Coal Company and other anthracite coal mine operators ("Arsenal") sought pre-enforcement review in the Commonwealth Court of a comprehensive recodification of regulations governing the anthracite coal industry, asserting that the promulgation of those regulations was outside the scope of authority granted to the Environmental Quality Board by the General Assembly. 477 A.2d at 1335. Here, the Court acknowledged that the Surface Mining Conservation and Reclamation Act provided the statutory remedy of an appeal to the Board upon any order, permit, license or decision of the Department of Environmental Resources, but further specified that the Board was without the authority to engage in pre-enforcement review. *Id.* at 1339. Therefore, absent a pre-enforcement review by the Commonwealth Court, Arsenal would have needed to seek and be denied a permit or license, or violate the regulations and face sanctions, before it could avail itself of the jurisdiction of the Board to challenge the validity of the regulations. *Id.* at 1340.

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

(2) violate the ordinance and suffer the penalties associated therewith before it could then appeal to the local Zoning Hearing Board to challenge the ordinance's validity.

The petitioners in *Arsenal Coal* and *Locust Twp.* exemplify the type of aggrieved parties that the Commonwealth Court's ability to exercise equitable jurisdiction over pre-enforcement review is intended to protect. The party seeking review must have suffered a grievance immediately upon the effective date of the agency's action, due to the fact that the existing activities of the aggrieved party would otherwise be interrupted without any further government action, or those existing activities would immediately lead to a violation of the challenged regulation, subjecting the aggrieved party to penalties. The aggrieved party must be in the position where it is required to take affirmative action in order to comply with the new regulation before it may be afforded the opportunity to challenge the validity of the new regulation.

In this case, Petitioners do not find themselves in the unfortunate situation of having to affirmatively comply with a regulation or be subject to penalties for non-compliance as a result of the Department's potential order establishing spacing units over the Pulaski Accumulation, before they will have standing to challenge the validity of the Conservation Law. Furthermore, Petitioners are not engaged in any activity regulated by the Conservation Law. Rather, they simply own property rights that *may ultimately* be affected by operation of the Conservation Law. Petitioners may initially challenge the validity of the Conservation Law as applied to their interest in oil and gas at the hearing on Hilcorp's Application before the hearing officer appointed by the Department. If the Department issues an order establishing spacing units, Petitioners may appeal that decision to the Board pursuant to the Environmental Hearing Board Act, 35 Pa. C.S. § 7514, which states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the

action to the board..." If Petitioners' appeal to the Board fails, they may then appeal that decision to the Commonwealth Court, which has exclusive jurisdiction of appeals from final orders of the Environmental Hearing Board pursuant to 42 Pa. C.S. § 763. This process ensures that Petitioners will not suffer any actual injury, nor will they be required to alter an existing activity prior to being afforded multiple opportunities to challenge the validity of the Conservation Law on constitutional and other grounds. Instead, Petitioners seek to bypass a clear and well-established administrative remedy process and jump straight to the Commonwealth Court. However, the outcome of the proceedings before the hearing officer and a potential order establishing spacing units over the Pulaski Accumulation will not affect Petitioners' interests in real property until well after Petitioners have been provided the opportunity to exhaust statutorily prescribed administrative remedies and then appeal the outcome of those remedial actions to the Commonwealth Court. Where a remedy is prescribed by statute, that prescription must be strictly pursued "to the exclusion of other methods of redress." *Jackson*, 501 A.2d at 220.

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

## IV. CONCLUSION

This Court should decline to exercise jurisdiction over this case because the matter is not ripe for review, as the issues presented are inadequately developed and Petitioners will suffer no hardship if review is delayed, Petitioners have unjustifiably failed to exhaust all statutorily prescribed administrative remedies before seeking judicial review, and Petitioners would suffer

no "direct and immediate" impact as a result of the Department's eventual ruling on the Application, rendering the invocation of original equitable jurisdiction for pre-enforcement review improper.

DATED this 18th day of June, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served this 18th day of June, 2014, via first class mail upon the following:

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