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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

Brief of Amici Curiae Delaware Riverkeeper, Delaware Riverkeeper Network, and Mountain Watershed Association, in Opposition to Respondents' Preliminary Objections

Filed on behalf of:
Amici Curiae Delaware Riverkeeper, Delaware Riverkeeper Network, and Mountain Watershed Association

Counsel of Record for Amici Curiae:

Aaron Stemplewicz, Esquire
Delaware Riverkeeper Network
Pa I.D. No. 312371
925 Canal Street, Suite 3701
Bristol, PA 19007
Attorney for Delaware Riverkeeper, and Delaware Riverkeeper Network

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STATEMENT OF INTEREST OF AMICI CURIAE

The Delaware Riverkeeper, the Delaware Riverkeeper Network ("DRN"), and the Mountain Watershed Association ("MWA") respectfully appear as *amici curiae*. *Amici* appear in support of Petitioners' position, opposing the preliminary objections of Respondent Hilcorp.

Maya K. van Rossum, the Delaware Riverkeeper, is a full-time privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates for the protection and restoration of the ecological, recreational, commercial, and aesthetic qualities of the Delaware River, its tributaries, and habitats.

Delaware Riverkeeper Network was established in 1988 to protect and restore the Delaware River, its tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River Watershed- an area which includes portions of New York, New Jersey, Pennsylvania and Delaware. Portions of the Utica Shale underlie the Delaware River Watershed below the Onondaga Horizon. It is this same formation which Hilcorp seeks to force pool. DRN is a membership organization with over 14,400 members. DRN members canoe, birdwatch, hike and

participate in other recreational activities throughout the Delaware River Watershed. Many of *Amici's* members live in areas underlain by Utica Shale, and their communities may be adversely affected by gas development and forced pooling under the Conservation Law.

The Mountain Watershed Association ("MWA") is a nonprofit grassroots organization governed by a volunteer board of directors that was formed in 1994. MWA has worked extensively on issues involving shale gas extraction and is well positioned to comment on the Oil and Gas Conservation Law. A large majority of our over 1,200 members and supporters live in areas overlying the Utica Shale, and therefore are at risk of forced pooling. In 2003, MWA started the Youghiogheny Riverkeeper program, to provide a public advocate for the Youghiogheny River and its tributaries. In 2010, we created the Marcellus Citizen Stewardship Project (MCSP) through which we provide statewide support to Pennsylvanians living in areas where shale gas extraction is occurring. Our efforts as part of the MCSP include trainings, community education and organizing, and advocacy on behalf of individuals impacted by shale gas extraction.

INTRODUCTION

This action arises from Hilcorp Energy Company's ("Hilcorp's" or "Respondents'") July 17, 2013 application to the Department of Environmental Protection ("DEP") for Well Spacing Units ("Application") pursuant to the Oil and Gas Conservation Law, 58

P.S. §§ 401-4I9 ("Conservation Law"). This application seeks to establish well spacing units comprised in part of Petitioners'[1] unleased mineral rights, in an effort to access natural gas in Petitioners' subsurface, despite the fact that Petitioners do not wish to extract the natural gas in their subsurface. Hilcorp intends to use the Conservation Law to force pool Petitioners' mineral rights, which Petitioners do not intend to sell. *See* 58 P.S. § 408 (a). Forced pooling allows drillers to combine land from unleased tracts with adjacent land from leased tracts to extract natural gas from both the leased and unleased tracks.

DEP rejected Hilcorp's application stating that it lacked jurisdiction over the matter and that jurisdiction rested with the Environmental Hearing Board ("EHB"). On November 20, 2013, the EHB issued an Opinion and Order dismissing the Application for lack of original jurisdiction. The EHB asserted that DEP had jurisdiction over the matter. In its opinion the EHB also stated that an appeal from a DEP decision on the Application could be filed with the EHB.

Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition") with this Court on May 2, 2014. Hilcorp filed Preliminary Objections to the Petition for Review on May 20, 2014. On June 6, 2014 the Petitioners filed an Amended Petition for Review in the Nature of a Complaint for Declaratory Judgment and

[1] Petitioners are Martin and Suzanne Matteo, Robert and Carole Valentine, and Steve Emery.

Injunctive Relief. The Amended Petition seeks a review of the constitutionality of the Conservation Law and seeks pre-enforcement review because of the Conservation law's direct and immediate harm imposed on Petitioners. Respondents filed Preliminary Objections to the Amended Petition on June 18, 2014 challenging the Commonwealth Court's jurisdiction over the matter, claiming that Petitioners failed to exhaust administrative remedies and that Petitioners do not face direct and immediate harm.

The Commonwealth Court has jurisdiction over Petitioners' claims because neither the DEP nor the EHB have the authority to rule on the constitutionality of the Conservation Law. Further, the Commonwealth Court has jurisdiction over Petitioners' claims because the Conservation Law inflicts direct and immediate harm on the Petitioners and the administrative remedies provided under the Conservation Law are inadequate to protect Petitioners' rights. For these reasons, Petitioners are not required to exhaust administrative remedies, and pre-enforcement review by the Commonwealth Court is appropriate.

STATEMENT OF FACTS

On July 17, 2013 Hilcorp filed its Application for a spacing order with DEP. DEP responded stating that DEP lacked jurisdiction and that jurisdiction rested with the EHB. On November 20, 2013, the EHB issued an Opinion and Order dismissing the Application for lack of original jurisdiction, claiming that DEP had jurisdiction

over the Application, and stating that once DEP ruled on the Application an appeal could be filed with the EHB. On June 9, 2014, Hilcorp filed a Motion to Schedule a Hearing Date with DEP for their Application. On June 18, 2014, DEP responded to Hilcorp's Motion stating, *inter alia*, that appeal to the EHB does not apply to this matter. *DEP Answer to Hilcorp's Motion to Schedule Hearing* ¶9.

The Conservation Law was enacted in 1961 and generally applies to oil and gas resources below the Onondaga horizon. *See* 58 P.S. *§* 401. The Conservation Law created an Oil and Gas Conservation Commission ("Commission") that was later abolished by the General Assembly. 58 P.S. § 510(a). The regulations created by the Oil and Gas Conservation Commission which govern practice and procedure under the Conservation Law are set forth at 25 Pa. Code §§ 79.1-79.33. Relevant portions of the Conservation Law and the related regulations are outlined below.

The Utica Shale lies below the Onondaga Horizon. Natural gas that is trapped within the Utica Shale is extracted using horizontal hydraulic fracturing. Hilcorp seeks to extract Petitioners' natural gas from the Utica Shale by using the forced pooling provisions of the Conservation Law.

After a well has been drilled establishing a pool[2], an application for a well spacing order may be filed by the operator[3]

[2] Pool is defined as "[a]n underground reservoir containing a common accumulation of oil or gas, or both, not in communication laterally or vertically with another accumulation of oil or gas." §79.1

of the "discovery well". 58 P.S. § 407 (1). Immediately upon filing, the Department is required to provide fifteen (15) days' notice of a spacing hearing in a newspaper of general circulation in each county where any land which may be affected by the order is located. 25 Pa. Code § 79.22 (1), (2). The notice period is extremely short as it allows those affected by a spacing order only fifteen (15) days to familiarize themselves with the issues and rights at stake and to retain counsel. *Id.* at (2).

Within forty-five (45) days of filing the application for spacing, the Conservation law directs the Commission to either issue an order establishing spacing units and specifying the size and shape of the units, "which shall be as such will, in the opinion of the commission, result in the efficient and economic development of the pool as a whole", or to issue an order dismissing the application. 58 P.S. § 407 (4). It is unclear whether the forced pooling provisions of the Conservation Law apply only to subsurface rights or whether both surface and subsurface land rights are affected.

While operators owning an interest in the area covered by a potential spacing order may appear at the spacing unit hearing and oppose the order, or present other plans for formation of the unit, the Conservation Law does not indicate how these actions will be weighed or considered by the Commission when determining the

[3] Operator is defined as "[a]n owner of the right to develop, operate and produce oil and gas from the pool." *Id.* Both landowners and energy companies such as Hilcorp can be operators.

formation of the spacing unit. *See* 25 Pa. Code § 79.24 (c), § 79.23(a)(6),(b).

Once a spacing order is entered[4], a drilling permit application, including an application for integration, is filed in order to force-pool nonparticipating operators. *Id.* at § 79.31 (3). The Commission notifies nonparticipating operators that they have thirty (30) days to file their proportionate share of the estimated costs of drilling and equipping the well. *Id.* Participating operators may choose to advance the nonparticipating operator's share of the cost, and the nonparticipating operator will incur a "fee" which is double his or her proportionate share of the costs. *Id. at (i).* The nonparticipating operator will also be charged for the well's supervision and operation, and a 6% interest rate. *Id.* If participating operators do not advance the nonparticipating owner's costs, an integration hearing will be held. *Id at (ii).* Here as well, no more than fifteen (15) days' notice is required[5], allowing those affected by an integration order only fifteen (15) days to familiarize themselves with the issues and rights at stake and retain counsel if they so choose. 25 Pa. Code § 79.33(b).

[4] Here, again, the process under the Conservation Law is unclear. It is possible that a spacing order and an integration order are filed simultaneously. For example, § 79.28 (a) allows for the issuance of a drilling permit *before* the approval of a spacing order in special circumstances.

[5] It is unclear whether landowners are even entitled to fifteen days' notice; section (b) states "[n]otice of the application…shall be given by certified mail…at least 15 days prior to the date of hearing, *or in the alternative by personal service.*" §79.33 (b) *emphasis added.*

Nonparticipating operators are then given only thirty (30) days to determine which of the three options best suit their interests.

ARGUMENT

Petitioners' pre-enforcement challenge to the Conservation Law presents a ripe claim for judicial review because Petitioners have been directly and immediately impacted by the Conservation Law and neither the DEP nor the EHB can grant the relief sought by Petitioners.

The ripeness doctrine seeks 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference' and until the effects of an administrative decision have been 'felt in a concrete way by the challenging parties.' *Pennsylvania Dental Hygienists' Ass'n, Inc. v. State Bd. of Dentistry,* 672 A.2d 414, 416-417 (Pa. Commw. Ct. 1996) quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). Petitioners' facial challenge to the validity of a statutory provision, a pure question of law, is appropriate for pre-enforcement review in a declaratory judgment action. *See generally Bayada Nurses, Inc. v. Commonwealth*, 8 A.3d 866, 874-76 (Pa. 2010). This Court has "consistently held that the exhaustion of administrative remedies is not required where a statutory scheme's constitutionality or validity is being challenged." *Rouse & Assocs. v. Pa. Envtl Quality Board,* 642 A.2d 642, 647 (Pa. Commw. Ct. 1994), citing *Giffin v. Chronister,* 616 A.2d 1070 (Pa. Commw.

Ct. 1992); *Stone and Edwards Insurance Agency, Inc. v. Department of Insurance,* 616 A.2d 1060 (Pa. Commw. Ct. 1992). When considering ripeness, "[e]qually important is the conservation of administrative and judicial energies." *Nader v. Volpe* 466 F.2d 261,268 (D.C. Cir. 1972). In this case pre-enforcement review would result in the conservation of administrative and judicial energies, as the EHB and the DEP are unable to rule on the constitutionality of the Conservation Law and the Commonwealth Court is the venue which can ultimately rule on the issue.

Pre-enforcement review is appropriate where a regulation causes actual, present harm and other avenues of review are inadequate. *Arsenal Coal Co. v. Commonwealth*, 477 A.2d 1333, 1339 (Pa. 1984). "Present" harm is defined as "direct and immediate". *Bucks County Servs. v. Phila. Parking Auth.,* 71 A.3d 379 (Pa. Commw. Ct. 2011) citing *Arsenal,* 477 A.2d at 1339. A remedy is considered inadequate if the agency involved does not have the authority to determine the relevant issues. *National Home Life Assurance Co. v. Commonwealth, Ins. Dep't*, 483 A.2d 1036, 1038 (Pa. Commw. Ct. 1984). Pre-enforcement review is appropriate in this case because Petitioners are directly and immediately harmed by the application of the Conservation Law and the remedy available to them via the administrative process is inadequate to protect their rights. While Respondents argue that pre-enforcement review is inappropriate because an administrative review process is available, Respondents fail to address the fact that the

administrative review process, through either the EHB or DEP, cannot result in a determination of the constitutionality of a statute. For this reason, review by the EHB or DEP can only offer Petitioners an inadequate remedy. *See Rouse,* 642 A.2d at 647.

1) Petitioners suffer direct and immediate harm.

If this Court does not retain jurisdiction over this matter, Petitioners would suffer direct and immediate harm as they would continue to be subjected to an administrative process that is unable to grant them the relief they seek. Petitioners are also harmed by the Conservation Law as its application decreases their wealth and property values, usurps their ability to keep toxic chemicals out of their land, and creates uncertainty regarding the status of their property rights.

In *Robinson Twp.*, the Pennsylvania Supreme Court stated that pre-enforcement review of statutory provisions is permitted when petitioners must choose between "equally unappealing options". *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 924 (Pa. 2013). Upon the entering of a spacing order, Petitioners will be subject to an integration order, and will be forced to decide in a very short period of time between three unsatisfactory "options" provided to nonparticipating operators under section 408 (c). 58 P.S. § 408 (c). These "options" are unsatisfactory because they do not protect the rights of landowners like Petitioners who do not wish to lease

their mineral rights. A nonparticipating operator's options under the Conservation Law are as follows:

> 1) to participate in the spacing unit and have their subsurface hydraulically fractured and natural gas therein removed, by paying their share of the "reasonable actual cost" plus a "reasonable charge for supervision and for interest on past due accounts" of the drilling and extraction process;
>
> 2) to sell their leasehold interests, for reasonable consideration, to the participating operators, thus losing their subsurface mineral rights, or
>
> 3) to participate on a limited or carried basis upon terms determined by the commission to be just and reasonable.

Jeffrey A. Schlegel, *Forced Pooling in the Marcellus Shale; Where is Pennsylvania Headed?,* Jones Day (January 2011). "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." *Id.* These nonparticipating operators are also charged twice as much as participating operators, and charged a 6% interest rate. 25 Pa. Code §79.31 (3)(i). These charges are essentially sanctions for non-participation and amount to an unconstitutional taking. *See In re Opening Private Rd. for Benefit of O'Reilly,* 5 A.3d 246, 258 (Pa. 2010). The reduced income

provided to landowners who are forced to become nonparticipating operators magnifies the economic sanctions they suffer.

If subjected to the terms of the Conservation Law, Petitioners' wealth and land value will decrease because their land would be subject to a spacing order application and with that, forced pooling. Even in the event that DEP or EHB denies the application at this juncture, Petitioners and subsequent landowners, can be subject to spacing order and forced pooling applications at any given time, as there is nothing preventing Respondents or other operators from re-filing these applications. *See generally* 25 Pa. Code § 79.1 *et seq.*

It is well-established that land is valued more highly when the subsurface estate is intact, particularly if the subsurface estate contains gas. *See* John Baen, *Oil and Gas Mineral Rights in Land Appraisal,* The Appraisal Journal, 205, 206 (April 1988). It is also well recognized that the level of economic benefit a landowner can receive from their mineral rights is diminished if subjected to forced pooling. A 1986 analysis of the economic impact of forced pooling in Oklahoma found that the wealth of mineral owners subject to forced pooling would likely decrease because they may be force-pooled at a price below the minimum they would accept if forced pooling were not used. Eubanks and Mueller, *An Economic Analysis of Oklahoma's Oil and Gas Forced Pooling Law,* 26 Natural Resources

Journal 491 (Summer 1986).[6] The same analysis found a decrease in bargaining power for those subject to forced pooling. *Id.* The Court in *Arsenal* found that mere *allegations* of financial harm stemming from the challenged regulations were sufficient to show direct and immediate harm. Petitioner's land value and wealth will likely decrease if they are subject to a spacing order under the Conservation Law.

In addition to the financial harm Petitioners face, Petitioners are harmed by the Conservation Law as it forces Petitioners to "allow" toxic chemicals in their land and would lead to an expansion of the harms associated with natural gas drilling in the vicinity of their private property. An increase in natural gas drilling leads to more harmful emissions of volatile organic compounds, methane, and sulfur dioxide. Earthworks, *Breaking all the Rules* 30 (Sept. 2013). It also means increased truck traffic, open flames, and increased risks of water contamination via the accumulation of toxic and/or radioactive materials in the soil, spills, leaks, and migration of fugitive hydrocarbons. Vengosh et al., *A Critical Review of the Risks to Water Resources from Unconventional Shale Gas Development and Hydraulic Fracturing in the United States*, Environmental Science & Technology (Mar. 2014). These increased risks of water contamination are recognized in the Clean Streams Law, which effectively defines hydraulic fracturing

[6] *Available at http://lawlibrary.unm.edu/nrj/26/3/02_eubanks_economic.pdf.*

as pollution, because it is injecting toxic chemicals into underground waters of the Commonwealth. 35 P.S. §§ 691.1.

Air quality samples from hydraulic fracturing sites have found the presence of non-methane hydrocarbons, ozone precursors which also affect the endocrine system. Colborn, et al., *An Exploratory Study of Air Quality near Natural Gas Operations*, Human and Ecological Risk Assessment: An International Journal (Nov. 2012). Methylene chloride, a toxic solvent, and benzene, a known carcinogen, were also found. *Id.* In addition to air pollutants at the well site and surrounding area, natural gas extraction creates air pollution via truck traffic and infrastructure such as pipelines and compressor stations. These elements also contribute to an overall industrialization of residential areas.

Hydraulic fracturing has been linked to methane contamination of drinking water aquifers in Northern Pennsylvania and Upstate New York. Osborn et al., *Methane contamination of drinking water accompanying gas-well drilling and hydraulic fracturing,* 108 Proceedings of the National Academy of Sciences 20, 8172. Shallow aquifers can be contaminated by stray gases and via salinization from leaking natural gas wells. Vengosh et al. Hydraulic fracturing has also been linked to the accumulation of toxic and radioactive elements in the soil or stream sediments near disposal and spill sites. *Id.* In addition to water contamination issues, hydraulic

fracturing leads to the over-extraction of water that may induce water shortages. *Id.*

Plaintiffs have made a deliberate decision not to lease their land because they did not want their land polluted in any way by toxic chemicals. They understood what the Commonwealth has not -- that science has not kept up with hydraulic fracturing. Council on Canadian Academies, *Environmental Impacts of Shale Gas Extraction in Canada* (2014). The Commonwealth simply does not know what the long-term implications of injecting these toxins into the ground will be. Indeed, the Commonwealth does not even examine the site-specific geology in the path of the wellbores.

Application of the Conservation Law to Petitioners would force them to allow these harms onto their property, in the immediate vicinity of their property, and to contribute to such harms in their community and more broadly. Because the Utica Shale underlies most of the Commonwealth, application of the Conservation Law to hydraulic fracturing would have sweeping environmental effects.

A significant, though less tangible harm is created by the fact that Petitioners must wait for an agency to determine the status of their property rights. When ruling on the application, DEP will determine whether Petitioners themselves, or an energy company, control the mineral rights that Petitioners currently own. This uncertainty itself is a direct and immediate harm to Petitioners' fundamental liberty interest in their property. Additionally, and perhaps most alarmingly, the Conservation Law is

unclear regarding whether Hilcorp's trespass and taking would be limited to the subsurface; the law does not explicitly prevent drillers from developing infrastructure such as roads, pipelines, or even well pads, on a force-pooled property. If Hilcorp were allowed to trespass upon the surface of Petitioners' property in order to support their drilling activities, not only would the immediate and direct impacts of drilling mentioned above be increased and brought in even closer proximity to Petitioners' home, but it would result in increased adverse impacts including increased stormwater runoff, potential flooding from stormwater, lost vegetation, and diminished property aesthetics. These all result in decreased use and enjoyment of the land by virtue of the new development footprint, including obstructions, noise, lights other resulting intrusions.

Petitioners are further harmed by the administrative process because the Conservation Law is unconstitutionally vague and infringes on their procedural due process rights. In addition to the uncertainty surrounding which property rights are at stake, Petitioners are subject to an elusive administrative process, through which they must defend undefined rights, with no clear path to appeal. *See DEP Answer to Hilcorp's Motion to Schedule Hearing*, ¶9 (stating that, contrary to the EHB's prior assertions, appeal of DEP's decision would be to the Commonwealth Court and not the EHB). It *is* clear from the Conservation Law that Petitioners have only

fifteen (15) days to determine which of the three abovementioned "unappealing options" best suit their interests and secure counsel.

Respondents rely on *Toilet Goods* and *Locust Twp.* to support their statement that a regulation must be self-executing in order to cause direct and immediate harm. *Respondents' Preliminary Objection Memo* at 14. This Court has held that a regulation need not be self-executing in order to have a direct and immediate harm. *See Rouse,* 642 A.2d 642, 647 (allowing pre-enforcement review when developer's project was affected by stream reclassification). Further differentiating *Toilet Goods*, the Court in that case found that "no irremediable adverse consequences flow[ed] from requiring a later challenge to this regulation..." 387 U.S. 158, 164 (1967). Requiring a later challenge in this case will result in irremediable adverse consequences for Petitioners as they will be subject to an administrative process which cannot grant them the relief they seek.

2) The remedy available under the Conservation Law is inadequate.

This Court must retain jurisdiction because the relief sought by Petitioners cannot be granted by the EHB or the DEP, and can only be granted by this Court. Pre-enforcement review may be granted and exhaustion of administrative remedies is unnecessary if the statutory remedy is unavailable or inadequate. *See Arsenal,* 477 A.2d 1333. A remedy is considered "inadequate" if the agency involved does not have the authority to determine the relevant

issues. *National Home Life Assurance Co.* 483 A.2d at 1038. Both the EHB and Pennsylvania Courts have consistently recognized that the Board lacks the authority to decide the constitutionality or validity of a statutory scheme. *See EHB Practice and Procedure Manual*, 2006-2007 Edition, III. F. 2 (stating "…the Board cannot decide the constitutionality or validity of a statutory scheme"), citing *Babich v. DER*, 1994 EHB 1281. *See also St. Joe Minerals Corp. v. Goddard*, 324 A.2d 800, 802 (Pa. Commw. Ct. 1974) (stating "…EHB would not have the authority to pass upon the constitutionality of a statute…"). Despite Hilcorp's assertions to the contrary, pre-enforcement review is available even when post-enforcement remedies are available. *See generally, Arsenal,* 477 A.2d 1333.

Pre-enforcement review is allowed in instances where an attack is made to the constitutionality of the statute or regulation as a whole. *Giffin,* 616 A.2d 1073 (stating "[i]n order to qualify for the exception to exhaustion of administrative remedies, 'the attack must be made to the constitutionality of the statute or regulation as a whole and not merely to how the statute or regulation has been applied in a particular case.'" quoting *Barr v. State Real Estate Commission*, 532 A.2d 1236 (Pa. Commw. Ct. 1987), citing *St. Clair v. Pennsylvania Board of Probation and Parole*, 493 A.2d 146, 153 (Pa. Commw. Ct. 1985)). *See also Blount v. Philadelphia Parking Authority,* 265 M.D. 2006, 2009 WL 9101516 (Pa. Commw. Ct. 2009) aff'd, 997 A.2d 337 (Pa. 2010) (where a challenge to the validity

of a body of regulations as a matter of law, requiring multiple simultaneous challenges by individuals, is burdensome and contrary to the interests). Here, Petitioners question the validity of the Conservation Law as a whole and not as applied to them in particular.

Further, pre-enforcement review is appropriate when in its absence; hardship, uncertainty, ambiguity, and piecemeal litigation ensue. The Court in *DRB, Inc.* allowed for pre-enforcement review where Petitioners contended that they lacked an adequate remedy and would suffer immediate hardship because of the ambiguity of the regulations. *DRB, Inc. v. Pa. Dep't of Labor & Indus.*, 853 A.2d 8 (Pa. Commw. Ct. 2004). There, the Court found that an actual controversy was present as the parties were "clearly at odds regarding the validity and application of the challenged regulations". *Id.* at 14. This is similar to the dilemma Petitioners face, as the DEP, EHB, Petitioners, and Respondents are at odds regarding the validity and the application of the Conservation Law.

CONCLUSION

Like those granted pre-enforcement review in *Rouse* and *Arsenal*, Petitioners here are stuck between a rock and a hard place. Petitioners are not required to exhaust administrative remedies which are incapable of granting them the relief they seek. Because the EHB and DEP cannot rule on the constitutionality of statutes, these issues sit squarely in the jurisdiction of this

Court. Additionally, pre-enforcement review is appropriate because Petitioners face direct and immediate harm and the Conservation Law's remedies are inadequate. Accordingly, this Court should retain jurisdiction over this case.

DATED this 18th day of July 2014.

Respectfully submitted,

/s/ Aaron Stemplewicz
Aaron Stemplewicz, Esquire
Pa I.D. No. 312371
Attorney for Delaware Riverkeeper, and Delaware Riverkeeper Network
Corinne Bell, Research Associate
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007

/s/ Nicholas Kennedy
Nicholas Kennedy, Esquire
Pa I.D. No. 317386
Community Advocate for Mountain Watershed Association
1414B Indian Creek Valley Road
Melcroft, PA 15462

PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 18th day of July, 2014, via electronic filing upon the following:

Kevin L. Colosimo
Daniel P. Craig
Burleson LLP
Southpointe Town Center
1900 Main Street, Suite 201
Canonsburg, PA 15317
724-746-6644
Counsel for Respondents Hilcorp

Omar K. Abuhejleh
Attorney at Law
429 Forbes Avenue, Suite 450
Pittsburgh, Pennsylvania 15219
ohejleh@gmail.com
Counsel for Petitioners

Jonathan D. Koltash
Deputy Attorney General
Office of Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120
jkoltash@attorneygeneral.gov
Counsel for Commonwealth of Pennsylvania,
Office of Attorney General of Pennsylvania,
Kathleen Kane, Department of Environmental
Protection and E. Christopher Abruzzo

Michael L. Harvey
Gregory R. Neuhauser
Office of Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120
mharvey(&attorneygeneral.gov
Counsel for Commonwealth of Pennsylvania,
Office of Attorney General of Pennsylvania,
Kathleen Kane, Department of Environmental
Protection and E. Christopher Abruzzo

Courtesy copy served upon the following via e-mail:
Donna Duffy, Esquire
Michael Braymer, Esquire

Department of Environmental Protection
230 Chestnut Street
Meadeville, PA 16335
doduffy@pa.gov
mbraymer@pa.gov
Counsel for the Department of Environmental Protection

Elizabeth Nolan, Esquire
Department of Environmental Protection
400 Market Street, 9th Floor
Harrisburg, PA 17105
elnolan@pa.gov
Counsel for the Department of Environmental Protection

/s/ Aaron Stemplewicz
Aaron Stemplewicz