

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**

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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

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COMMONWEALTH RESPONDENTS' PRELIMINARY OBJECTIONS TO  
THE AMENDED PETITION FOR REVIEW

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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.<sup>1</sup>

**Respectfully submitted,**

**KATHLEEN G. KANE**  
**Attorney General**

**By:** *s/Jonathan D. Koltash*

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**GREGORY R. NEUHAUSER**  
**Chief Deputy Attorney General**  
**Chief, Civil Litigation Section**

**Date: August 13, 2014**

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<sup>1</sup> 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:

Omar K. Abuhejleh, Esquire  
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*s/Jonathan D. Koltash*  
**JONATHAN D. KOLTASH**  
**Deputy Attorney General**