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January 23, 2014

**VIA EMAIL AND**  
**FIRST CLASS MAIL**

Glenda Davidson  
Docket Clerk  
Department of Environmental Protection  
400 Market Street  
Rachel Carson State Office Building, 16<sup>th</sup> Floor  
Harrisburg, PA 17101

**RE: In Re: Hilcorp Energy Company**  
**MMS No. 2013-SLAP-000528**  
**Docket No. 2013-1**

Dear Ms. Davidson:

Enclosed for filing in the above-captioned matter are the original and two (2) copies of Hilcorp Energy Company's Pre-Hearing Statement.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads 'Kevin L. Colosimo'. The signature is written in a cursive style with a large initial 'K'. Below the signature is a horizontal line.

Kevin L. Colosimo

Enclosure

cc: Michael L. Bangs (via email and regular mail)  
Donna Duffy, Esquire (via email and regular mail)  
Michael Braymer, Esquire (via email and regular mail)  
Elizabeth Nolan, Esquire (via email and regular mail)

**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                                        )     Docket No. 2013-01  
  )

**APPLICANT HILCORP ENERGY COMPANY’S PRE-HEARING STATEMENT**

Hilcorp Energy Company (“Hilcorp”) filed an Application for Well Spacing Units (the “Application”) with the Department of Environmental Protection (the “DEP”) on December 2, 2013, under the Oil and Gas Conservation Law of 1961, 58 P.S. §§ 401-409 (the “Law”). In accordance with the Law, the DEP must hold a public hearing to determine the area to be included in the well spacing order and the acreage to be embraced within each unit and the shape thereof and the area within which wells may be drilled on such units. Hilcorp, by and through its undersigned counsel, hereby submits the following Pre-Hearing Statement:

1. The issues of law to be determined in this case are as follows:
  - (a) Whether, given the express policy of the Commonwealth of Pennsylvania as stated at the outset of the Law, to promote the production of oil and natural gas resources without waste and in a manner that protects the correlative rights of all oil and gas interest holders, and given the new paradigm of oil and gas development involving horizontal drilling and hydraulic fracturing, Section 407(4) should be construed to require spacing units that represent the maximum area that may be efficiently and economically drained from a single well *pad*.
  - (b) Whether, by electing to accept the Application for filing rather than declining to accept it and returning it as unfiled, and by failing to advise Hilcorp of any deficiency, as required by 1 Pa. Code § 31.5(c), until after the 45 day time period

for issuing an order on the Application had expired, the Department of Environmental Protection (the "DEP") waived its ability to decline to accept the Application, thus entitling Hilcorp to a hearing on the Application as soon as possible given notice requirements.

2. The issues of fact to be determined in this case are as follows:
  - (a) Whether a well has been drilled into the Pulaski Accumulation, establishing a "pool."
  - (b) Whether that well both penetrates the Onandaga horizon and is bottomed at least 3,800 feet below the surface.
  - (c) Whether the "Pulaski Accumulation" is a "pool," which the Oil and Gas Conservation Law defines 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." See 58 P.S. § 402(10).
  - (d) Whether the proposed HEC-110H Unit and HEC-111H Unit represent the maximum area that can be efficiently and economically drained from a single well pad.
  - (e) Whether the proposed HEC-110H Unit and HEC-111H Unit and the existing Pulaski-Kinkela North Unit and Pulaski-Kinkela South Unit encompass the entirety of the Pulaski Accumulation.
  - (f) Whether Exhibit G to Hilcorp's Application for Well Spacing Units satisfies the requirement that such an application include a plat "indicating the latitude and longitude of each well drilled to the pool to be spaced ..." 25 Pa.Code § 79.21(a)(2). (The DEP asserted, in its letter to Hilcorp dated January 22, 2014, that

Hilcorp's application does not contain the required plat, but failed to provide how Exhibit G is deficient).

3. Hilcorp will offer the following exhibits into evidence at the hearing:
  - (a) A map depicting all of the lands overlying the Pulaski Accumulation, including property lines and the existing and proposed units (Exhibit A to the Application).
  - (b) A map depicting the proposed HEC-110H Unit, including property lines and the proposed well site and well bores associated therewith (Exhibit B to the Application).
  - (c) A map depicting the proposed HEC-111H Unit, including property lines and the proposed well site and wellbores associated therewith (Exhibit C to the Application).
  - (d) A map showing the surface topography overlying the Pulaski Accumulation (Exhibit H to the Application).
  - (e) A map depicting the anticipated surface operations and wellbores required to drain the Pulaski Accumulation absent a Well Spacing Order (to be provided).
  - (f) Curriculum Vitae information for all testifying witnesses (to be provided).
4. Upon review of a letter, dated January 22, 2014, from the DEP to Hilcorp, it does not appear that any facts are in dispute. Rather, the DEP has requested that Hilcorp produce the data and information relied upon by Hilcorp's Geologist and Reservoir Engineer to reach their respective conclusions regarding the maximum area that can be efficiently and economically drained from a single well/well pad and the existence of a discovery well establishing the Pulaski Accumulation as a "pool." The requested

information is proprietary in nature; however Hilcorp is willing to produce the information provided that it remains confidential and does not become public record.

5. Hilcorp intends to examine the following witnesses at the public hearing on its Application for Well Spacing Units:

(a) Nina Delano, Geologist for Hilcorp, who will testify that the “discovery well” is drilled to a true vertical depth of 7,514 feet below the surface and penetrates the Onandago horizon, and that the Pulaski Accumulation is an underground reservoir containing a common accumulation of mobile hydrocarbon components that are not in communication laterally or vertically with other accumulations of mobile hydrocarbon components outside of the Pulaski Accumulation.

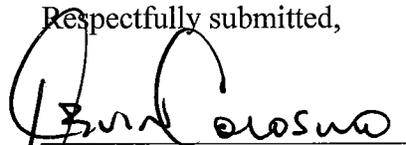
(b) Kyle Koerber, Reservoir and Completion Engineer for Hilcorp, who will testify that the proposed HEC-110H Unit and HEC-111H Unit represent the maximum area that may be efficiently and economically from a single well pad through horizontal drilling and hydraulic fracturing unit operations, and that the drainage areas of wells drilled into the proposed units will be completely within the boundaries of the Pulaski Accumulation, meaning that no drainage would occur from outside of the defined areas, either laterally or vertically.

(c) Richard Winchester, Land Manager – New Ventures for Hilcorp, who will testify as to the acreage and number of separate tracts contained within each unit and within the Pulaski Accumulation as a whole.

(d) Scott R. Perry, Deputy Secretary of the Office of Oil and Gas Management, whose testimony will establish the delivery and filing of the Application with DEP on December 2, 2013.

6. Hilcorp anticipates that it will take a maximum of three (3) hours to present witnesses and evidence at the formal administrative hearing on this matter.
7. Recognizing that the Oil and Gas Conservation Law requires the DEP to provide notice of a hearing at least fifteen (15) days prior to the date fixed for the hearing and that such date will not be fixed until at least January 30, 2014, the date of the pre-hearing conference, Hilcorp is available for a formal administrative hearing on February 17, 2014, February 24 to 28, 2014, and March 3 to 7, 2014.
8. Hilcorp requests that the Hearing Officer take judicial notice of the Opinion and Order of the Environmental Hearing Board dated November 20, 2013, a true and correct copy of which is attached hereto.

Respectfully submitted,



Kevin L. Colosimo

PA ID No. 80191

Daniel P. Craig

PA ID No. 312238

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724-746-6644

**CERTIFICATE OF SERVICE**

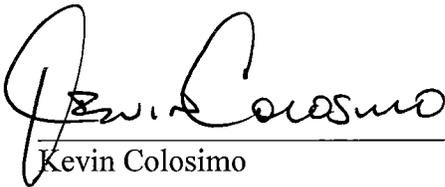
I hereby certify that a true and correct copy of the foregoing was served this 23 day of January, 2014 via first class, U.S. Mail, postage prepaid upon the following:

Michael L. Bangs  
Bangs Law Office, LLC  
429 South 18<sup>th</sup> Street  
Camp Hill, PA 17011  
Hearing Officer

Glenda Davidson  
Department of Environmental Protection  
400 Market Street  
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Donna Duffy, Esquire  
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Harrisburg, PA 17105  
Counsel for the Department of Environmental Protection

  
Kevin Colosimo



**HILCORP ENERGY COMPANY** :  
 :  
 v. : **EHB Docket No. 2013-155-SA-R**  
 :  
 **COMMONWEALTH OF PENNSYLVANIA,** :  
 **DEPARTMENT OF ENVIRONMENTAL** : **Issued: November 20, 2013**  
 **PROTECTION** :

**OPINION AND ORDER DISMISSING  
HILCORP ENERGY'S SPECIAL ACTION FOR LACK OF JURISDICTION**

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

Applications for well spacing Orders in the Utica Formation should be submitted to the Pennsylvania Department of Environmental Protection. After the Department of Environmental Protection takes final action on the Application, an Appeal to the Pennsylvania Environmental Hearing Board may be filed in accordance with the Environmental Hearing Board Act.

**Introduction**

Presently before the Pennsylvania Environmental Hearing Board (Board or EHB) is the Complaint and Application (Application) of Hilcorp Energy Company (Hilcorp) requesting that the Board issue an order establishing well spacing and drilling units<sup>1</sup> covering 3,267 acres of the Utica Formation<sup>2</sup> in Lawrence and Mercer Counties. The Application is filed pursuant to the Oil

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<sup>1</sup> DEP's regulations implementing the Oil and Gas Conservation Act are found at 25 Pa. Code § 79.1 *et. seq.* A "spacing unit" is defined as "a drilling unit." 25 Pa. Code § 79.1. A "drilling unit" is defined as "[t]he term includes spacing unit and means the area designated in a spacing order as a unit and within which all operators have the opportunity to participate in the well or wells drilled thereon on a just and equitable basis." 25 Pa. Code § 79.

<sup>2</sup> The Utica Formation is located below the Marcellus Shale Formation. The Oil and Gas Conservation Law of 1961 applies to the Utica Formation but not to the Marcellus Shale.



and Gas Conservation Law of 1961 (Conservation Law). Alternatively, Hilcorp seeks an order from the Board directing the Pennsylvania Department of Environmental Protection (Department or DEP) to issue an order establishing well spacing and drilling units.

Hilcorp originally filed its Application with the Department on July 17, 2013. *See* Hilcorp's Response to DEP's Proposed Case Management Order, Docket Entry #14, Paragraph 1 (filed on October 17, 2013). In response, the Department advised Hilcorp that "it did not have the authority to act on Hilcorp's application and that an application seeking an order for well spacing or drilling units must be submitted to the Pennsylvania Environmental Hearing Board." Hilcorp's Response, Paragraph 2. Subsequently, on August 26, 2013 Hilcorp filed its Complaint and Application for Well Spacing Units with the Environmental Hearing Board. The Board docketed the Special Action at EHB Docket No. 2013-155-SA-R.

Following the filing of the Application, the Board scheduled and conducted a prehearing conference in Pittsburgh with Counsel for the Department and Hilcorp. Not being convinced that the Board had original jurisdiction in this matter, the Board requested that the parties brief the issue as to whether the Board had original jurisdiction to issue well spacing orders requested by Hilcorp. Both parties have submitted legal memoranda on this interesting and important legal issue.

We conclude, after a careful and detailed review and analysis of the law, that the Pennsylvania Environmental Hearing Board does not have original jurisdiction to issue such well spacing orders. Instead, the Application should be submitted to the Pennsylvania Department of Environmental Protection for its consideration and action. After the Department takes final action on the Application, an Appeal to the Pennsylvania Environmental Hearing Board may be filed in accordance with the Environmental Hearing Board Act.



## Background

The Pennsylvania Department of Environmental Resources (DER) was created by the Act of December 3, 1970, P.L. 834, 71 P.S. § 510-1 *et. seq.* When the Department of Environmental Resources was created the General Assembly abolished several other departments, boards, and commissions, and transferred their powers and duties to the new Department of Environmental Resources.<sup>3</sup> These included, *inter alia*, the Department of Forests and Water, Department of Mines and Mineral Industries, Water and Park Resources Board, Geographic Board, Pennsylvania State Park and Harbor Commission of Erie, Washington Crossing Park Commission, Valley Forge Park Commission, Anthracite Mine Inspectors Examining Board, Mine Inspectors Examining Board for the Bituminous Coal Mines of Pennsylvania, Oil and Gas Inspectors Examining Board, and Oil and Gas Conservation Commission. The creation of the Pennsylvania Department of Environmental Resources established a comprehensive environmental agency which had both a legislative arm—the Environmental Quality Board (EQB)—and a judicial arm—the Environmental Hearing Board. The Environmental Hearing Board, initially comprised of three members, was given the power to hear and decide appeals from actions of the Department of Environmental Resources.

In 1987, the Commonwealth Court affirmed the constitutionality of the legislation creating the DER and found that both the EQB and the EHB were sufficiently independent of the DER. Commonwealth Court also held that there was no commingling of their functions with those of the DER. *See Pennsylvania Independent Petroleum Producers v. Department of Environmental Resources*, 525 A.2d 829 (Pa. Cmwlth. 1987):

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<sup>3</sup> One of the commissions whose powers and duties were transferred to the Department of Environmental Resources was the Oil and Gas Conservation Commission. The parties are silent as to whether the Oil and Gas Conservation Commission ever issued a well spacing order. Our research found that the Oil and Gas Conservation Commission “may have met one time.”



Pennsylvania Independent Petroleum Producers argues that since the Environmental Quality Board and the Environmental Hearing Board are placed under DER in § 202 of the Code, 71 P.S. § 62, impermissible commingling occurs. We disagree. Our review of the statutory composition and authority of each of the three entities reveals that no commingling of legislative, executive and judicial authority exists...The Environmental Hearing Board, composed of three<sup>4</sup> gubernatorial appointees to serve six-year terms is an independent board administratively placed in DER, § 472 of the Code. 71 P.S. 180-2...The structure and composition clearly establishes specific and separate duties for each entity.

525 A.2d at 836 (footnote added).

### **The Environmental Hearing Board Act**

Nevertheless, partly to emphasize the specific and separate duties and responsibilities of the Environmental Hearing Board and the Department, the next year the Legislature enacted the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516, which became effective January 1, 1989. The EHB Act made it clear that the two agencies had separate and distinct missions. The Act established the Pennsylvania Environmental Hearing Board as an *independent quasi-judicial agency*, making the Environmental Hearing Board completely independent of the Department of Environmental Resources. 35 P.S. § 7513(a) (emphasis added). It also increased the size of the Board to five members all of whom were full-time administrative law judges (judges) with a minimum of five years of relevant experience.

The Board's jurisdiction is set forth in Section 7514 of the EHB Act. The Board was given the "the power and duty to hold hearings and issue adjudications...on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). In addition, the Board was given the responsibility to continue "to exercise the power to hold hearings and issue adjudications which powers were vested in agencies... [under] The Administrative Code of 1929." 35 P.S. § 7514(b). The next subsection provides that "the department may take an action initially without

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<sup>4</sup> The Environmental Hearing Board now consists of five appointees. 35 P.S. § 7513(b).



regard to 2 Pa. C.S. Ch. 5, Subch. A<sup>5</sup> but 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 under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person." 35 P.S. § 7514 (c).

Subsection (f) provides that the Board may subpoena witnesses, records and papers. Subsection (g) sets forth that "[h]earings of the board shall be conducted in accordance with the regulations of the Board in effect at the effective date of this Act, *until new regulations are promulgated under section 5.*" 35 P.S. § 7514 (g) (emphasis added). Importantly, the Environmental Hearing Board Act created the Environmental Hearing Board Rules Committee which proposes regulations to the Board. Since the Committee's establishment, detailed Rules of Practice and Procedure have been promulgated. *See* 25 Pa. Code § 1021.1 *et. seq.*

Actions before the Environmental Hearing Board are heard *de novo*. In the oft-cited and seminal case of *Smedley v. DEP*, 2001 EHB 131, 156, the Board succinctly explained what that means.

The Board conducts its trials *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that "*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 Pa. Cmwth. 1991); *O'Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. Department of Environmental Protection*, 1999 EHB 98, 120 n. 19.

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<sup>5</sup> This subchapter of the Administrative Agency Law, Act of April 28, 1978, P.L. 202, *as amended*, 2 Pa. C.S. § 101 *et. seq.*, deals with practice and procedure of Commonwealth Agencies.



The Environmental Hearing Board Act sets forth that no action of the Department is final if appealed to the Board until the Board decides the objections raised by the party. The *de novo* review of the Board affords the Department the ability to establish relatively short time lines to decide many regulatory actions. This allows the Department to issue orders, permits, licenses, and decisions in many instances very promptly.

In practice, the vast majority of the Department's regulatory actions are not appealed to the Board. However, as a matter of law, it is the opportunity to appeal a Department action to the Board that satisfies due process requirements regarding the Department action. *Commonwealth of Pennsylvania v. Derry Township*, 351 A.2d 606 (Pa. 1976). Indeed, due process is provided by the Environmental Hearing Board, not the Department of Environmental Protection. *Einsig v. Pennsylvania Mines Corporation*, 452 A.2d 558 (Pa. Cmwlth. 1982); *Consol Pennsylvania Coal Company, LLC v. Department of Environmental Protection et al.*, 2011 EHB 571, 575.

Importantly, the parties have not provided us with what, if any, rules and regulations governed the practice before the Oil and Gas Conservation Commission (Conservation Commission). Interestingly, Hilcorp is adamant that the Conservation Law requires the scheduling of a hearing within 45 days and then the issuance of a well spacing order after hearing. Hilcorp contends there is no discovery whatsoever provided by the Conservation Law and that neither our case law, appellate case law, nor our Rules of Practice and Procedure have any role in implementing the Conservation Law.

If Hilcorp is correct in its contention, it further supports our ruling that its Application should be submitted to the Department of Environmental Protection rather than to the Board. Otherwise, the process envisioned by Hilcorp would not afford adequate due process safeguards.



The lack of discovery, coupled with the rush to the “public hearing” could act as a severe impediment to any other parties who might be “interested” under the Conservation Law or who might otherwise demonstrate standing to participate in the case. If the next step in the process would be an Appeal to Commonwealth Court then the parties, including Hilcorp, would not be afforded the type of due process guaranteed by the Environmental Hearing Board Act.

Parties before the Environmental Hearing Board are afforded prehearing discovery which is even broader than the discovery provided by federal courts under the Federal Rules of Civil Procedure. 25 Pa. Code § 1021.102. The Board has not only adopted its own Rules of Practice and Procedure specific to the unique environmental litigation matters filed before the Board, but has adopted the Discovery Rules of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102 (a). Therefore, parties before the Board are assured that they will be afforded the right to conduct liberal discovery, partake in a robust motion practice, and participate in a detailed hearing process.

The Board issues Adjudications after a hearing replete with the full panoply of due process guarantees such as the presentation of witnesses who must testify under oath, cross examination, subpoena power, site views, and extensive opportunities for argument and briefing. No other court or tribunal in Pennsylvania, state or federal for that matter, provides the parties with as many opportunities to file briefs setting forth their positions on the law and the facts as the Pennsylvania Environmental Hearing Board. Our Rules of Practice and Procedure not only mandate that the parties file comprehensive Pre-Hearing Memoranda but after the parties obtain the transcript of the trial, they then *must* file Post-Hearing Briefs. *See* 25 Pa. Code §§ 1021.104 and 1021.131. This requires that they cite to the specific testimony or evidence supportive of their legal positions and arguments which in turn assures that the Board’s Adjudication will be



specifically grounded in the official record and not someone's notes or memory of the testimony and evidence. Our Adjudications are required to contain detailed findings of fact and conclusions of law to legally support any decisions of the Board. 25 Pa. Code § 1021.134; *Consol Pennsylvania Coal Company, supra*, at 575-576.

The Pennsylvania Environmental Hearing Board began operations in February 1972. Over the past forty-one years, a rich precedent of Board decisions and Pennsylvania appellate law have discussed the role and jurisdiction of not only the Board but the Department. The vast majority of Board cases involve appeals from Department actions. These actions include permits, decisions, licenses, and orders. In addition, the Department files Complaints before the Board recommending civil penalties for environmental harms. Although under the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 7556, as amended, 35 P.S. §§ 6020.101-6020.1305, a private party can file a "citizen suit" if the Department fails to act within a time frame, that provision has rarely if ever been used. (Even then it involves some action or inaction of the Department).

In the vast majority of these instances, the Board's jurisdiction is invoked to review a final action of the Department. Even in a Complaint seeking a civil penalty the Board's decision is made after the Board conducts a hearing and following review of the Department's recommendation as to what the civil penalty should be.

**The Department's and Hilcorp's Arguments**

In the current matter, the Department and Hilcorp are contending that the Board should in the first instance decide what is basically a highly technical permitting decision pursuant to the Conservation Law. Their argument is based on a very shaky legal foundation.



Both Hilcorp and the Department contend that this was a decision that would have been made by the Conservation Commission after “a public hearing.” They equate the reference to “public hearing” to mean the court hearings that the Board conducts. The parties further contend that the Board has original jurisdiction to decide these highly technical matters since the decision by the Conservation Commission to issue the well spacing orders and drilling units was to be made after a “public hearing” where technical materials such as plats would be used to help the Conservation Commission reach its decision. The Department contends that the Board is the proper entity to issue these well spacing orders since the Department of Environmental Resources was created in 1970 and the Board was part of DER. Both parties currently contend that the duties of the Conservation Commission which were transferred to the Department of Environmental Resources were transferred in fact to the Environmental Hearing Board. Hilcorp contends that when the Board was established as a completely independent agency in 1988 it was given this duty and responsibility. These contentions, as summarized so forcefully and eloquently in Judge Mather’s excellent concurring Opinion, have been made for the first time in this case.

**Discussion**

We respectfully disagree with both of these positions. Although we found in our own research an indication that the Conservation Commission may have held one meeting, neither Hilcorp nor the Department have provided us with any information that the Conservation Commission actually issued well spacing orders. However, whether the Conservation Commission issued such orders or not does not mean that the Board was given this power under the applicable law.



There is nothing in the enabling legislation or in the parties' arguments that leads us to believe that this now abolished entity was in any way similar to the Pennsylvania Environmental Hearing Board. A review of the Conservation Law indicates that the Conservation Commission was a very specialized and technical agency. It was authorized to appoint not only attorneys and hearing officers, but also "additional experts, engineers, geologists, inspectors, investigators...and other employees as may be necessary for the proper conduct of the work of the commission." 58 P.S. § 415.<sup>6</sup> The Board does not employ such "additional experts, engineers, geologists, inspectors or investigators." Instead, the Department of Environmental Protection does. Indeed, the Department specifically employs engineers in various disciplines, geologists, inspectors, investigators and other employees as may be necessary for the proper conduct of its work. This work includes highly technical oil and gas work.

Unlike the Environmental Hearing Board, the Conservation Commission was given no power to review the actions of any other administrative agencies. The Conservation Commission's functions were not judicial, or quasi-judicial. Instead, they were to function as an executive regulatory agency not a quasi-judicial agency which is the Board's role.

The Commission was given a host of executive regulatory duties such as requiring the identification on the premises of ownership of oil and gas wells, making sure drillers logs were kept, filed, and accurate, and overseeing the drilling, casing, operation and plugging of oil and gas wells. The Commission was charged with performing any necessary inspections and investigations to discharge its duties and responsibilities in this regard. *See* 58 P.S. § 403. These are all Executive Branch regulatory functions.

Moreover, the Commission was given the power to file enforcement actions against any person violating the Oil and Gas Conservation Law. 58 P.S. § 414. Likewise, the Department of

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<sup>6</sup> The Legislature authorized an appropriation of \$50,000 to hire all of these professionals!



Environmental Protection is charged with filing enforcement actions or referring criminal violations to either the local district attorney or the Pennsylvania Office of Attorney General. These are all DEP duties and responsibilities rather than Board duties and responsibilities.

Enforcement actions are regulatory actions undertaken by the Executive Branch. Prosecuting actions before courts and administrative bodies is one of the core duties and responsibilities of the Department of Environmental Protection. It has never been a duty or responsibility of the Environmental Hearing Board, nor has the Board ever taken an enforcement action against anyone. The Board functions as Pennsylvania's environmental court and dispenses judicial type relief.

If the Board issued such well spacing orders in the first instance it would be performing basically a permitting function. It could be argued that performing such a function in the first instance and not after the Department had already acted would be an impermissible commingling of the duties of the Department with the Environmental Hearing Board. As set forth in *Pennsylvania Independent Petroleum Producers, supra*, there should not be any commingling of the executive and judicial authority in the administrative law process. A vast mosaic of legislation and regulations have followed this rule of law and have established bright and clear lines setting forth the duties and responsibilities of the Department of Environmental Protection and the Environmental Hearing Board.

Both the Department and Hilcorp focus on the technical information on which the Conservation Commission should make its decision as somehow supporting its argument that the Board has original jurisdiction to issue well spacing orders. But this same type of technical information is considered and reviewed by the Department every day in deciding whether to issue permits and orders under a myriad of statutes including the Oil and Gas Act. *See* 58 Pa.



C.S.A. § 3201 *et. seq.* For example, 58 Pa.C.S.A. § 3211 sets forth detailed technical information the DEP should review when deciding whether to issue permits under the Oil and Gas Act and contains detailed notification procedures not unlike those found in the Conservation Law. Detailed information is required with the permit application including “a plat prepared by a competent” engineer or surveyor. 58 P.S. § 3211 (b)(1). Unless the Department decides that the permit fails to meet the regulatory or other legal requirements, it “shall issue a permit within 45 days of submission of a permit application.”<sup>7</sup> Parties can appeal Department decisions under the Oil and Gas Act by filing an appeal with the Board in accordance with the Environmental Hearing Board Act. *See* 58 Pa. C. S. A. § 3211 (e.1)(5)(i).

There are a host of additional reasons which support our ruling that well spacing orders should be issued by the Department of Environmental Protection rather than the Environmental Hearing Board. In the present case there is no action of the Department currently involved in the review of Hilcorp’s Application for a well spacing order. And what type of process would the Board employ to issue such an order? Hilcorp is insistent that the 45 day time period to issue such an order is a ministerial act and the time frame should be closely followed. Therefore, Hilcorp contends that there would be no discovery and thus no interrogatories or depositions or production of documents. Such a process is not consistent with Board Practice and Procedure not to mention forty one years of court and Board decisions.

Even more problematic is how any party aggrieved by a well spacing order issued by the Board would be able to obtain due process. Appeals from Board orders go directly to the Pennsylvania Commonwealth Court, an appellate court. Commonwealth Court does not review

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<sup>7</sup> Interestingly, the time limitation for issuing oil and gas drilling permits is exactly the same as the time frame contained in the Conservation Law. This is further support that this is a permitting or otherwise a regulatory decision and thus a duty and responsibility of the Department rather than the Environmental Hearing Board.



Board decisions *de novo*. The Commonwealth Court can only reverse Board decisions if they are not supported by substantial evidence, contain an error of law, or violate the Constitution.

Our process is the epitome of both procedural and substantive due process. Hilcorp's proposed process would upend decades of carefully developed law without any legal precedent. Such a position is based on a flawed reading of the Conservation Law and on administrative law jurisprudence "freeze framed" to 1961.<sup>8</sup>

The Department has filed a proposed Case Management Order which provides only minimal due process safeguards. The Department contends that there should be some limited written discovery but no depositions and that the parties should proceed quickly to a hearing. Any interested parties, such as citizens who own property which would be affected by any well spacing orders, or potentially other oil and gas companies, would be at a great disadvantage in either one of these truncated hearing processes proposed by Hilcorp and the Department.

The Board is comprised of Judges, attorneys, and administrative personnel (currently a total of thirteen people down from twenty four in 1995). It functions as a court not a regulatory agency. The Board does not issue permits, licenses, or other regulatory type actions in the first instance. It reviews Department actions in these matters and then dispenses judicial type relief after reviewing the evidence presented to it in a court proceeding. This is what the Environmental Hearing Board Act, the Board's Rules of Practice and Procedure, and numerous statutes provide. No statute or regulation provides the Pennsylvania Environmental Hearing Board with the authority to issue such well spacing orders in the first instance.

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<sup>8</sup> We do not disagree with counsel for Hilcorp's statement that the Oil and Gas Conservation Law of 1961 needs to be updated. "[B]ecause the [Conservation Law] has not been updated since 1961 it doesn't contemplate modern horizontal drilling techniques...Modernization of Pennsylvania's [Conservation Law] is long overdue..." Colosimo, *Modernize Pennsylvania's Oil and Gas Conservation Law*, **Pittsburgh Business Times**, January 11, 2013.



Moreover, the “public hearings” the Board holds are formal court hearings in one of its five court rooms situated across the Commonwealth. Parties present their cases before the Board just as they would in the state and federal trial courts of the Commonwealth. The Board hears the evidence according to the law and the testimony is transcribed by court reporters. As noted earlier, the parties file extensive Pre-Hearing and Post Hearing briefs. The Board then issues written Adjudications which contain detailed findings of fact, discussion, and conclusions of law. Appeals of Board decisions go directly to the Pennsylvania Commonwealth Court which can only reverse Board decisions if its decisions are not supported by substantial evidence, contrary to law, or violative of the Constitution.

We believe the “public hearings” referenced in the Conservation Law are not adversarial court type hearings such as those conducted by the Pennsylvania Environmental Hearing Board or the Courts of Common Pleas. Instead they are public hearings such as the Department of Environmental Protection holds regularly to help it reach decisions on various permits. For example, if a company seeks a permit for a landfill or the operation of a coal mine or for a host of other activities affecting the environment, various statutes and the Department’s own regulations require or allow the Department of Environmental Protection to hold a “public hearing.”<sup>9</sup> These are not court hearings or adversarial hearings although frequently competing views are aired. These public hearings are often held at schools or fire halls where testimony is taken, transcribed, and various technical information is presented. These hearings are advertised in newspapers and by mail which is what the Conservation Law also provides.

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<sup>9</sup> See, e.g., Section 7 of the Air Pollution Control Act, 35 P.S. § 4007, entitled “Public hearings,” which states, “Public hearings shall be held by the board [here, the Environmental Quality Board] or by the department, acting on behalf and at the direction or request of the board. . . .” Other examples of the Department’s authority to hold hearings include Section 5(g) of the Bituminous Mine Subsidence Act, 52 P.S. § 1406.5(g) and Section 508(c) of the Oil and Gas Act, 58 P.S. § 601.508(c).



This should be compared with how the Board gives notice of its court hearings. The Board gives notice to the parties by order, issued either by mail or electronically on its website docket. It does not circulate the notice in newspapers nor is it required to do so. Although at times the Board is required to give notice of certain actions in the *Pennsylvania Bulletin*, there is no process involving the Board which is identical to the process set forth in the Conservation Law. Again, the notice provisions of the Conservation Law are a strong indication that the Department should be performing the functions of the Conservation Commission rather than the Environmental Hearing Board.

Finally, the Department has extensive regulations governing the issuance of well spacing orders under the Conservation Law. *See* 25 Pa. Code § 79.1 *et seq.* These regulations are not new. On the contrary, they have been in effect since 1971. These regulations provide that the well spacing orders will be issued by the Department.

The Department, as pointed out by Judge Mather, surprisingly ignores these regulations in its Legal Memorandum even though they have been in existence for over forty years. Moreover, the regulations have been amended several times during this period but they have never been modified so that Applications for well spacing orders would be submitted to the Board rather than the Department.

The Environmental Quality Board, the Department's legislative arm and drafter of its regulations, is expert at drafting regulations to support the Department's statutory duties and responsibilities. It certainly knows the difference between the Board and the Department and if the Department thought the regulations were wrong, confusing, or misleading, as it evidently does now, we have no doubt that the regulations would have been amended quickly. No regulatory changes have ever been proposed let alone promulgated which would shift this duty



and responsibility to the Environmental Hearing Board. These regulations remain binding on both the Department and the Board.

In addition, these regulations have not only been in place for decades, they have also been followed. The Department is silent as to how many well spacing orders it has issued since 1971, but over the years there have been several cases before the Board involving well spacing orders issued by the Department. In only the first case was the issue of *who* should issue the well spacing order even raised, and the Board quickly resolved it by ruling that the DER should issue the order. *Pennzoil Co. v. DER*, 1974 EHB 252, 254-55. None of the other cases even raised the issue.

The Board has never had any filing fees and the Department's regulations clearly set forth that there is a \$1,000 filing fee that should accompany every Application filed with the Department which seeks the issuance of well spacing orders. The parties cite no authority for the Board to collect this filing fee. The Department's own regulations clearly state that the filing fee should be paid to the Department. This is but another reason which makes it quite clear that the Application for well spacing orders should be filed with the Department of Environmental Protection and not with the Environmental Hearing Board.

As the Utica formation is developed in the years ahead it is imperative that the regulatory framework is clear. Although we disagree with Hilcorp's legal position that the Environmental Hearing Board has original jurisdiction to issue well spacing orders in the first instance, we are aware that it initially filed its Application for well spacing orders with the Department and only filed with the Board after being directed to do so by the Department. We are hopeful that our Opinion will clarify the law in this area and that the process will operate much more smoothly in the future.



Accordingly, we will issue an order dismissing Hilcorp's Application because the Pennsylvania Environmental Hearing Board lacks original jurisdiction to issue well spacing orders under the Conservation Law. Instead, 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.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

HILCORP ENERGY COMPANY :  
 :  
 v. : EHB Docket No. 2013-155-SA-R  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION :

**ORDER**

AND NOW, this 20<sup>th</sup> day of November, 2013, following review of the Complaint and Application and Legal Memoranda, it is ordered as follows:

- 1) The Pennsylvania Environmental Hearing Board does not have Original Jurisdiction to issue well spacing orders pursuant to the Conservation Law, the implementing regulations set forth at 25 Pa. Code Chapter 79, and the Environmental Hearing Board Act.
- 2) Such requests are required to be submitted to the Pennsylvania Department of Environmental Protection for its consideration.
- 3) The Complaint and Application is therefore **dismissed without prejudice**.
- 4) Appellant's check in payment of the filing fee is being returned to its Counsel.

**ENVIRONMENTAL HEARING BOARD**

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**THOMAS W. RENWAND**  
Chief Judge and Chairman

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**MICHELLE A. COLEMAN**  
Judge



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**BERNARD A. LABUSKES, JR.**  
**Judge**

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**RICHARD P. MATHER, SR.**  
**Judge**

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**STEVEN C. BECKMAN**  
**Judge**

**DATED: November 20, 2013**

**c: DEP, Bureau of Litigation:**  
Attention: Priscilla Dawson

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COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

HILCORP ENERGY COMPANY :  
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 v. : EHB Docket No. 2013-155-SA-R  
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 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION :

**CONCURRING OPINION OF  
JUDGE RICHARD P. MATHER, SR.**

I am in full agreement with the majority opinion written by Chief Judge Renwand that correctly decides that the Board lacks original jurisdiction to consider Hilcorp’s Complaint and Application for Well Spacing Units under the 1961 Oil and Gas Conservation Law (“Conservation Law”), 58 P.S. §§ 401-419. I write this concurring opinion to address what I believe is a glaring omission in the Department’s Memorandum of Law to discuss, briefly mention or even cite to the duly promulgated and currently effective and binding regulations in Chapter 79 of Title 25 of the Pennsylvania Code. 25 Pa. Code Chapter 79. At the Board’s direction, the Department filed a nineteen-page Memorandum of Law, that I can only describe as Orwellian, in which the Department attempted to ignore or rewrite the Department’s forty-two year regulatory history of its implementation of the Conservation Law.<sup>1</sup>

In its 2013 Memorandum of Law, the Department announced a new legal argument that is inconsistent with the longstanding and binding regulations in Chapter 79 and the Department’s forty-two year implementation of those regulations and the Conservation Law. In its Memorandum, the Department asserts that the Board, not the Department, has original jurisdiction to issue orders establishing well spacing and drilling units under the Conservation

<sup>1</sup> The Conservation Law is more than fifty years old, but it was administered by a Commission created by the Law until 1971. 58 P.S. § 405(a).



Law. The Department asserts that the 1970 state law that created the Department of Environmental Resources<sup>2</sup> (“DER”) transferred this authority under the Conservation Law to the Board. The Department further asserts in its 2013 Memorandum that in 1988 the General Assembly again “recodified” this transfer of authority to the Board when it enacted the Pennsylvania Environmental Hearing Board Act (“EHBA”), 35 P.S. §§ 7511-7516. Both of these related assertions are inconsistent with the regulatory history of Chapter 79 and the currently effective and binding requirements set forth in Chapter 79.

In 1971, shortly after the General Assembly created the DER, the Environmental Quality Board (“EQB”) adopted the regulations in Chapter 79. 1 Pa. B. 1726 (Aug. 12, 1971). The Department’s regulations in Chapter 79, which were promulgated in 1971, contain binding requirements that are inconsistent with the Department’s newly announced legal position reflected in its 2013 Memorandum. In 1989, shortly after the General Assembly enacted the EHBA, the EQB revised the Department’s regulations in Chapter 79. 19 Pa. B. 3229 (July 29, 1989). The preamble to the 1989 revisions to Chapter 79 states:

Chapter 79. Oil and Gas Conservation

Chapter 79, which governs wells subject to the Oil and Gas Conservation Law, is amended to update the chapter, to make the requirements consistent with the act and to remove provisions which have been made redundant by that act and the regulations in Chapter 78. No significant comments were received on the proposed revisions to Chapter 79. After review, the EQB recognized that Chapter 78 and § 79.12(d) and (e) are not redundant, and therefore, should not be deleted.

19 Pa. B. at 3235. The timing of these historical rulemakings highlights the complete lack of merit for the Department’s new 2013 legal position. Shortly after each of the legislative actions

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<sup>2</sup> In 1995, the Department of Environmental Resources was renamed the Department of Environmental Protection, but the Department has been in continuous existence since 1971. 71 P.S. §§ 1340.101 and 1340.501.



that the Department now asserts transferred authority to the Board, the EQB, the Department's rulemaking body, promulgated and then revised the regulations in Chapter 79 that clearly direct the Department to issue orders establishing well spacing and drilling units, in the first instance, that can then be appealed to the Board. Nowhere in its nineteen-page Memorandum does the Department discuss, briefly mention or even recognize in any manner these applicable rulemaking decisions.

In addition, the Department's newly announced 2013 legal position ignores several longstanding and basic principles of administrative law. It is well-settled that when an agency adopts a regulation pursuant to its legislative rulemaking power as opposed to its interpretive rulemaking power, it "is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable." *Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38, 53 (Pa. 2006) (quoting *Rohrbaugh v. Pa. Pub. Util. Comm'n*, 727 A.2d 1080, 1085 (Pa. 1999)). In addition, it is equally well-settled that

a properly adopted substantive rule establishes a standard of conduct which has the force of law . . . The underlying policy embodied in the rule is not generally subject to challenge before that agency.

*Lopata v. UCBR*, 493 A.2d 657, 660 (Pa. 1985) (quoting *PHRC v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977)). The duly promulgated regulations in Chapter 79 of Title 25 of the Pennsylvania Code therefore establish binding standards of conduct that have the force of law. They are binding on the Department and the Board under the well-established case law cited above.

There is no doubt that the Department's duly promulgated and currently effective regulations in Chapter 79 implement the Conservation Law. *See* 25 Pa. Code §§ 79.1-79.33. The codification of Chapter 79 in the Pennsylvania Code lists the Conservation Law as statutory



authority for these regulations. *Id.* These regulations are clearly applicable to the issues before the Board regarding the Board's original jurisdiction to consider Hilcorp's Complaint and Application for an order establishing well spacing and drilling units. The Department failed to discuss, briefly mention or even cite to these clearly applicable regulations, and its failure to do so does not advance its new legal position. To the contrary, the Department has not given the Board any reason not to apply these duly promulgated and currently effective regulations to deny Hilcorp's Complaint and Application. These regulations remain binding on the Department and the Board, notwithstanding the Department's failure to discuss, briefly mention or even cite to them in its Memorandum.

The authority under the Conservation Law has been rarely used since the General Assembly transferred implementation authority to the Department in 1971 as evidenced by the existence of only a few appeals of Department actions under the Conservation Law to the Board. *See* Department's Memorandum of Law at 15-18. It is apparent that the Department has little or no recent experience with its implementation. The Board also recognizes that the Department has a rather full plate with implementation of its regulatory programs governing Marcellus Shale and Utica Shale development. Rather than re-learning how to apply this longstanding but seldom used regulatory authority to issue orders establishing well spacing and drilling units to the new circumstances involving the development of the Utica Shale, it now appears that the Department has decided to abdicate its authority to the Board.<sup>3</sup> Because the Conservation Law

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<sup>3</sup> The General Assembly enacted the Conservation Law in 1961 to provide authority to address circumstances in 1961, and the EQB promulgated the Department's regulations in Chapter 79 in 1971, which were most recently amended in 1989. The Law and the regulations were enacted or promulgated well before there were plans to develop the Utica Shale in Pennsylvania. If there are concerns with applying this longstanding authority to the recent development of the Utica Shale, which were not anticipated when the authority was created forty to fifty years ago, the Department needs to look to the EQB or the General Assembly for changes to the statutory requirements and the still binding regulatory requirements.



and the regulations promulgated thereunder clearly direct that the Department makes the initial decision regarding well spacing and drilling units, which can be appealed to the Board, I cannot support such an abdication of regulatory authority.

**ENVIRONMENTAL HEARING BOARD**

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**RICHARD P. MATHER, SR.**  
**Judge**

**DATED: November 20, 2013**