IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

BLUE EAGLE LAND, LLC, a West Virginia limited liability company, **COALQUEST DEVELOPMENT, LLC**, a foreign limited liability company, **CONSOLIDATION COAL COMPANY**, a foreign corporation, **HORSE CREEK LAND AND MINING COMPANY**, a West Virginia corporation, **NATIONAL COUNCIL OF COAL LESSORS, INC.**, a West Virginia corporation, **PENN VIRGINIA OPERATING COMPANY, LLC**, a foreign limited liability company, **POCAHONTAS LAND CORPORATION**, a foreign corporation, **WEST VIRGINIA COAL ASSOCIATION**, a West Virginia non-profit corporation, **WPP LLC**, a foreign limited liability company, and **WOLF RUN MINING COMPANY**, a West Virginia corporation,	)	**Case No.:**_____
Petitioners,	)	
v.	)	
WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, a state agency, **CHESAPEAKE APPALACHIA, LLC**, a foreign limited liability company, **EASTERN AMERICAN ENERGY CORPORATION**, a West Virginia corporation, and **PETROEDGE RESOURCES (WV), LLC**, a foreign limited liability company,	)	
Respondents.	)	

PETITION FOR APPEAL FROM THE WEST VIRGINIA CONSERVATION COMMISSION AND THE WEST VIRGINIA SUPREME COURT

A. Introduction

This Petition for Appeal is necessitated by the unwarranted exercise of jurisdiction by the West Virginia Oil & Gas Conservation Commission ("Commission") over certain wells completed in (but not below) the Marcellus Shale geologic formation. Specifically, the Marcellus Shale geologic formation is one of several formations that overly the "Onondaga Group". Furthermore, the Onondaga geologic group is a pervasive geological feature that has

been used as the boundary between "shallow wells" (those wells drilled and completed above the Onondaga) and "deep wells" (i.e. those drilled and completed below the Onondaga). As explained below, the Commission is improperly classifying those wells as deep wells as defined in the West Virginia Code. The Marcellus Shale wells in question are in fact "shallow wells" subject to the jurisdiction of the Department of Environmental Protection, Office of Oil and Gas ("OOG") and the Shallow Gas Well Review Board.

B. Nature of Proceeding and Ruling of State Agency

Three agencies currently exercise jurisdiction over certain aspects of drilling natural gas wells. The Department of Environmental Protection, Office of Oil and Gas ("OOG"), has general jurisdiction over gas wells. See generally, W. Va. Code § 22-6-1, *et seq.* The OOG oversees the permitting, drilling, operation and abandonment of all natural gas wells (both shallow and deep) and exercises enforcement powers over well operators.

Because there are significantly more shallow wells drilled in the State and because the drilling of such wells sometimes involves competing interests between oil and gas and coal operations, the Legislature established a separate Shallow Gas Well Board for the primary purpose of exercising jurisdiction over the drilling and spacing requirements for "shallow gas wells." Significantly, the Shallow Gas Well Review Board Statute, W. Va. Code § 22C-8-1, *et seq.* ("Shallow Gas Well Review Board Statute"), provides that if a coal seam owner, lessee, or operator (collectively "coal owner") objects to the drilling of a shallow gas well, there are minimum distance limitations between the proposed well and the nearest existing well. The statute sets forth a minimum distance of one thousand feet (1,000') for shallow wells to be drilled to depths less than three thousand feet (3,000') and a minimum distance of two thousand feet (2,000') for shallow wells to be drilled to depths of three thousand feet (3,000') or more,

which may be reduced to a statutory minimum of one thousand five hundred feet (1,500') upon a showing of need on a well-by-well basis.

The Legislature created the respondent Commission to have jurisdiction over "the exploration for or production of oil and gas from deep wells," including the drilling and spacing of "deep wells," under the Oil and Gas Conservation Statute, W. Va. Code § 22C-9-1, *et seq.* ("Deep Well Statute"). The Commission has established through regulation a distance limitation of three thousand feet (3,000') with respect to how close deep wells may be drilled to one another, although that spacing limitation may be lowered significantly by the establishment of "special field rules" by the Commission. Special field rules may only be established by the Commission for deep wells.

Under the statutory definitions, the Onondaga Group formation is an important dividing line for distinguishing between shallow wells and deep wells. The Marcellus Shale formation is the geologic formation immediately above the Onondaga Group formation. In recent years, oil and gas producers determined that they could drill commercially feasible wells into the Marcellus Shale formation. However, for practical operating reasons, producers now need to drill the borehole more than 20 feet into the Onondaga formation (a "deep" formation) even though the wells are only being completed into and produced from the Marcellus Shale formation (a "shallow" formation). For example, the logging tools used to gauge whether a well should be completed and produced is over 40 feet long, which is difficult to fit into a 20-feet hole. Further, producers have difficulty judging when they hit the top of the Onondaga Group formation and sometimes accidentally drill more than 20 feet into the Onondaga Group.

Certain oil and gas producers filed applications with the Commission under the Deep Well Statute for special field rules wherein they requested a one thousand foot (1,000') spacing

limitation for wells that they intend to drill and produce from the Marcellus Shale formation. The applications also sought authorization to drill seventy-five feet (75') into the Onondaga Group formation in order to accommodate current operating needs. The wells would not, however, be completed below the Marcellus Shale formation.

Importantly, under the Deep Well Statute there is no statutory requirement that coal owners affected by the special field rules be given written notice of the special field rule applications. Therefore, most coal owners were not provided written notice of the applications for special field rules or the Commission's hearings on those special field rule applications even though the applications in reality involved shallow wells, not deep wells.

The Commission has now granted all four (4) of the applications for special field rules that have been brought on for hearing. In each of those applications, the oil and gas operator was authorized to drill its shallow gas wells within one thousand feet (1,000') of each other, although in each of the last three the oil and gas operator has indicated its willingness to abide by the Shallow Gas Well Review Board Statute. [1] There are five (5) additional applications for special field rules currently pending before the Commission. Those five applications also seek a waiver of the three thousand feet (3,000) spacing requirements for Marcellus Shale wells to be drilled 75 feet into (but not completed in) the Onondaga Group formation.

The Petitioners challenged the Commission's jurisdiction to grant the special field rules before the West Virginia Supreme Court of Appeals. The Court rendered its decision in *Blue Eagle Land, LLC, et al. v. West Virginia Conservation Commission, et al.*, Case No.: 33705 on May 27, 2008. In its order, the Court determined that it did not have a sufficient record to rule on the merits. Thus, it granted the Petitioners thirty (30) days, or until June 26, 2008 to file

[1] Even though coal and natural gas operators are trying to cooperate in this regard, even such cooperation raises issues about conferring jurisdiction on a regulatory agency if Marcellus Shale wells are in fact deep wells (although Petitioners herein firmly believe that the Marcellus Shale wells are shallow wells).

further appeal the matter to circuit court. A copy of the West Virginia Supreme Court of Appeals' May 27, 2008 Order is attached hereto as "Exhibit A".

C. Errors Committed by the Shallow Gas Well Review Board

The Commission committed the following errors in issuing the Order's granting the Applications for Special Field Rules:

1. The Commission did not have jurisdiction to grant special field rules for wells drilled more than twenty feet (20") into the underlying Onondaga group formation but completed only in the Marcellus Shale formation because such wells are shallow wells regulated by the Shallow Gas Well Review Board.

2. The Commission violated the Due Process Clause of the United States Constitution and the West Virginia Constitution when it granted the special field rules lowering the spacing between wells without notice being given to the coal owners and operators whose coal seams would be intersected by the respective gas wells.

3. The Commission was clearly erroneous in its findings that the seventy-five foot (75') rat hole was necessary to effectively log, complete, and produce the wells in the Marcellus formation and that without the seventy-five foot (75') rat hole natural gas reserves within the Marcellus formation would be lost.

4. The Commission was clearly erroneous in its findings that recoverable gas reserves would be left in place if the Marcellus formation was developed under the three thousand foot (3,000') spacing requirement imposed on deep wells.

5. The Commission was clearly erroneous in its findings that recoverable gas reserves would be left in place within the Marcellus formation unless the three thousand foot (3,000') spacing requirement imposed on deep wells was lowered to one thousand feet (1,000').

D. Statement of Facts

6. The Commission has jurisdiction only over the drilling and spacing of deep wells in West Virginia. W.Va. §22C-9-1, *et seq*. A "deep well" means any well other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group." W.Va. §22-6-1.

7. By law, a deep well may not be drilled within three thousand feet (3,000') of another deep well. CSR §39-1-4.2. However, a gas operator may apply for "special field rules" which allow the operator to ignore the spacing requirements for deep wells within the designated field. CSR §39-1-4.3.

8. When a gas operator applies for special field rules, it must provide individual notice to other gas operators with interests within the field. CSR §39-1-6.1. The gas operator is not required to provide individual notice of its application for special field rules to coal operators or owners with real property interests within the field.

9. The Shallow Gas Well Review Board has jurisdiction over the drilling and spacing of "shallow wells" in West Virginia. W.Va. Code §22C-8-1, *et seq*. "A 'shallow well' means any gas well drilled and completed in a formation above the top of the uppermost member of the 'Onondaga Group.' Provided, that in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the 'Onondaga Group' formation be otherwise produced, perforated or stimulated in any manner." W.Va. Code §22-6-1(r).

10. If a coal owner objects, a shallow well cannot be drilled within two thousand feet (2,000') of an existing shallow well unless the gas operator can show that operational, environmental, or other factors require the drilling of the well within the 2,000' radius. W.Va.

Code §22C-8-8. However, under no circumstances may a shallow well be drilled within one thousand five hundred feet (1,500') of another shallow well if the coal owner or operator so objects. Id.

11. The coal operator or owner is provided with individual notice of every permit application where the gas operator desires to drill a shallow well under the spacing requirements. Gas operators may not apply for special field rules for shallow wells.

12. The Marcellus formation is a shallow formation. (Conservation Commission Order No.1, Docket No. 175; Cause No. 160, December 1, 2006). As such, it lies above the uppermost member of the Onondaga.

13. On December 1, 2006, the Commission granted EAEC'S application for special field rules. In its order, the Commission lowered the spacing for EAEC'S wells drilled into the Marcellus formation to one thousand feet (1,000'). The "special field" covered approximately 30,000 acres in Boone, Lincoln, and Logan Counties.

14. EAEC did not provide individual notice of its application for special field rules to the coal owners and operators with coal interests within the special field that would be affected by the lowered spacing requirements.

15. PLC owns coal reserves within the field subject to EAEC'S special field rules. However, PLC did not receive notice of EAEC'S application. In fact, PLC did not become aware of EAEC'S application until several months after the application had already been approved by the Commission. EAEC subsequently agreed to abide by the shallow well spacing requirements on approximately three hundred (300) acres owned by PLC that are subject to EAEC'S special field rules.

16. Chesapeake Appalachia, LLC ("Chesapeake") filed three separate applications for special field rules with the Commission related to its drilling of the Marcellus "shallow" formation. It has asked the Commission for special field rules to allow it to drill over 1,800 wells within one thousand feet (1,000') of each other.

17. Chesapeake presented its first application for special field rules before the Commission on May 17, 2007. The application covers an astonishing 520,000 acres in Boone, Kanawha, Lincoln, Logan and Mingo Counties.

18. Several Petitioners own substantial coal interests within the 520,000 acres included in the special field. Despite this, none of the Petitioners received individual notice of Chesapeake's application. The Petitioners learned of the application only two days before the hearing, and several of the Petitioners were able to object to the application.

19. At the hearing upon Chesapeake's first application, counsel for Petitioners objected to the granting of the application on the grounds that the proposed wells were shallow wells, not deep wells. The Commission ruled that while the Marcellus formation is a shallow formation, it was categorizing Chesapeake's wells as deep wells because they were "drilled *or* completed" in the Onondaga.

20. Chesapeake submitted a second application for special field rules covering portions of McDowell, Mingo, and Wyoming Counties. That application was granted by the Commission.

21. Chesapeake filed a third application covering portions of Boone, Lincoln and Logan Counties. The Commission granted Chesapeake's application.

22. Chesapeake and PetroEdge filed five (5) additional applications for special field rules in which they request that the spacing limitation be lowered to one thousand feet (1,000').

The first application sought special field rules for an area located in Barbour, Harrison, and Taylor Counties, West Virginia. The hearing on this application was set for August 9, 2007.

23. The second application sought special field rules for an area located in Marshall and Wetzel Counties, West Virginia. The hearing on this application was set for August 9, 2007.

24. The third application sought special field rules for an area located in Marion, Monongalia, Preston and Taylor Counties, West Virginia. The hearing on this application was set for August 9, 2007.

25. The fourth application sought special field rules for an area located in Braxton, Gilmer, Lewis, Randolph, Upshur, and Webster Counties, West Virginia. The hearing on this application was set for August 9, 2007.

26. The fifth application sought special field rules for an area located in Braxton, Calhoun, Clay, Fayette, Gilmer, Jackson, Kanawha, Nicholas, and Roane Counties, West Virginia. The hearing on this application was set for August 9, 2007.

27. By granting the above mentioned applications for special field rules, the Commission has deprived the Petitioners of their statutory right to object to the spacing of these shallow wells pursuant to W.Va. Code §22C-8-8.

28. The lowering of the spacing requirements to one thousand feet (1,000') could be catastrophic for the Petitioners. Without need, the gas operators could not drill these Marcellus shallow wells within two thousand feet (2,000') of each other. By lowering the distance to one thousand feet (1,000'), the Commission will be allowing the gas operators to drill more than three (3) times the number of Marcellus shallow wells than they would otherwise be able to drill.

29. In an eight thousand foot by six thousand foot (8,000' x 6,000') field only twenty (20) wells can be properly spaced and drilled using the two thousand foot (2,000') spacing

requirement. However, when using the one thousand foot (1,000') spacing requirement, as proposed by the gas operators, sixty-three (63) wells can be drilled within the same field. That is a two hundred and fifteen percent (215%) increase in the number of wells that may be drilled within the same field.

30. The Mine Safety and Health Administration ("MSHA") requires that underground coal operators leave at least one hundred and fifty feet (150') of protective barrier around each individual gas well (equivalent to an area with a diameter of 300') 30 CFR §75.1700 providing that, however, the operator first seek approval from the West Virginia Office of Mine Health and Safety Training ("WVOMHST") to mine closer that two hundred feet from the well W. Va. Code §22A-2-75 . That federal standard notwithstanding, MSHA may require a greater barrier where the depth of the mine, other geologic conditions, or other factors warrants such a greater barrier. These mining regulations have two significant impacts. First, it causes substantial amounts of coal to be left in the ground, or "sterilized." Secondly, it creates such narrow spaces between wells that coal operators will be unable to mine between the wells.

31. By applying the MSHA regulation that prohibits mining within a one hundred and fifty foot (150') radius of a gas well, the mineable area between the wells would decrease to seventeen hundred feet (1,700'). If the special field rules are granted, there will only be one thousand feet (1,000') between each well in the field. Despite cutting the distance between each well in half, the mine operator still has to abide by the one hundred and fifty foot (150') radius mandated by MSHA. Therefore, the mineable area between each well in the field would decrease from seventeen hundred feet (1,700'), to seven hundred feet (700'). Thus, the distance a coal operator may mine between wells is shortened by one thousand feet (1,000'), or fifty-nine percent (59%), resulting in a loss of a major portion of the coal reserve, if not all of the reserve

due to the economic impact created by the field rule promulgated as a consequence of requests for permission to drill a shallow well more than twenty feet (20') into the Onondaga group for well-bore logging operations. These requests were based upon the shallow well operators need to log the entire section of the geological formations exposed within the well-bore to insure that their proposed shallow wells were indeed completed and rendered productive within formations above the Onondaga group.

32. The application of the Special Field Rules and the one thousand foot (1,000') spacing limitation will have a significant impact on the Petitioners' coal reserves and will result in the loss of tens, if not hundreds, of millions of dollars in sterilized coal. There will also be significant safety and environmental issues associated with the increased number of wells drilled pursuant to the Special Field Rules.

33. The Petitioners attended the August 9, 2007 hearing on Chesapeake and PetroEdge's five (5) applications for special field rules. The Petitioners informed the Commission, Chesapeake, and PetroEdge that they would be filing the Writ of Prohibition challenging the Commission's assertion of jurisdiction. The Commission, Chesapeake and PetroEdge agreed to indefinitely continue the hearing on the applications for special field rules so that the Writ of Prohibition could be filed. Now that the West Virginia Supreme Court of Appeals has sent this case to the Circuit Court, the Petitioners have filed the instant appeal.

LEGAL ANALYSIS

A. The Commission Lacks Jurisdiction to Grant Special Field Rules for Wells Drilled and Completed Solely in the Marcellus Formation.

When an inferior tribunal is attempting to proceed in a cause without jurisdiction, the aggrieved party is entitled to injunctive relief. Norfolk & Western Railway v. Pinnacle Coal Co.,

44 W. Va. 574, 30 S.E. 196 (1898); Weil v. Black, 76 W. Va. 685, 86 S.E. 666 (1915); Jennings v. McDougle, 83 W. Va. 186, 98 S.E. 162 (1919).

Furthermore, where it appears that the court in which a suit or action has been instituted has no jurisdiction to enter any decree or judgment therein, the reviewing court shall prohibit the entity from conducting any further proceedings. State ex rel. West Va. Truck Stops v. McHugh, 160 W. Va. 294, 233 S.E.2d 729 (1977). Finally, where an inferior court has rendered a judgment without jurisdiction, its action is coram non judice; and relief will lie to prevent the enforcement thereof as soon as the judgment has been rendered. Willis v. Warth, 108 W. Va. 517, 151 S.E. 707 (1930).

In Mangus v. McCarty, 188 W.Va. 563; 425 S.E.2d 239 (1992), the defendant was convicted of manufacturing a controlled substance and placed on three years probation. During his term of probation, the defendant received another drug charge that caused him to be in violation of his terms of probation. The prosecution waited until his term of probation had expired before it filed a motion to revoke the defendant's probation in circuit court.

The defendant challenged the motion to revoke his probation by filing a writ of prohibition against the circuit court. In his writ the defendant argued that the circuit court lacked jurisdiction to revoke his probation because the motion was filed after his term of probation had expired. This Court agreed with the defendant and ruled that a circuit court only has jurisdiction to revoke a defendant's probation when the motion to revoke is filed before the expiration of the term of probation. Since the prosecution's motion to revoke was not timely filed, this Court held that the circuit court did not have proper jurisdiction to rule upon the motion. As such, this Court declared:

> Accordingly, we *grant* Mr. Mangus' request for a *writ of prohibition* based upon the lower court's *lack of jurisdiction* to entertain this revocation issue.

(emphasis added).

In this case, the Commission clearly lacks jurisdiction to address the Respondents' applications for special field rules. The Commission's jurisdiction was conferred by the Legislature in W.Va. §22C-9-1, *et seq*. Pursuant to legislative enactment, the Commission has jurisdiction to regulate the spacing of deep wells. W.Va. Code §22C-9-4(f)(1). The Commission does not have jurisdiction to regulate the spacing of shallow wells. That is because the Legislature delegated that authority to the Shallow Gas Well Review Board. W.Va. Code §22C-8-1(b).

Therefore, the lone question for review is whether the proposed Marcellus wells described in the respective applications for special field rules are deep wells or shallow wells. If they are deep wells, the Commission has jurisdiction. If they are shallow wells, the Commission does not have jurisdiction. Importantly, the resolution of this issue relies solely upon this Court's interpretation of the statutory definition of "shallow well" and "deep well." This is not a question of fact, and there are no relevant facts in dispute between the parties.

Shallow Wells

The general provisions governing the West Virginia Office of Oil and Gas define a shallow gas well as:

> Any gas well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group." Provided, that in drilling a shallow well the operator may penetrate into the 'Onondaga Group' to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the 'Onondaga Group' formation be otherwise produced, perforated or stimulated in any manner.

W.Va. Code §22-6-1(r). (emphasis added). The statutory provisions governing the Conservation Commission contain the same definition of a shallow well. W.Va. Code §22C-9-2(a)(11). The statutory provisions governing the Shallow Gas Well Review Board similarly define a shallow well. W.Va. Code §22C-8-2(21).

Thus, three (3) separate statutory provisions define "shallow well" in the same manner. It is a well drilled and completed above the uppermost member of the Onondaga. For a well to be "completed" in a specific formation means that the formation has been perforated and stimulated for purposes of production through that well. In other words, a well completed in only the Marcellus formation will produce gas from no other formation other than the Marcellus formation. In addition, each of the three (3) statutory provisions permits a gas operator to drill up to twenty feet (20') into the Onondaga group for logging and completion operations. This is based upon the gas operators' need to log the entire section of the formation being completed.

Deep Wells

The general statutory provisions governing the West Virginia Office of Oil and Gas define a deep gas well as, "any well other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the 'Onondaga Group.'" W.Va. Code §22-6-1(g). (emphasis added). Similarly, the statutory provisions governing the Conservation Commission (W.Va. Code §22C-9-2(a)(12)), and the Shallow Gas Well Review Board (W.Va. Code §22C-8-2(8)) contain the same definition of a deep well.

Thus, there are three (3) requirements that must be met before a well may be defined as a deep well. First, it must not be a shallow well. Second, the well must be drilled in a formation at or below the top of the uppermost member of the Onondaga Group. Finally, the well must also be completed in a formation at or below the top of the uppermost member of the Onondaga

Group. If the well is a shallow well, or if it is not drilled into the Onondaga and producing from the Onondaga, it is not a deep well.

Respondents' Applications for Special Field Rules

The Defendant operators filed applications for special field rules in which they made two primary requests regarding wells to be drilled into the Marcellus formation. First, they requested that they be allowed to drill more than twenty feet (20') into the Onondaga, but no deeper than seventy-five feet (75'). Next, they requested that the horizontal spacing limitation be lowered from three thousand feet (3,000') to one thousand feet (1,000').

In their applications, the Defendant operators expressly stated that they were not going to complete any of the wells subject to the special field rules in the Onondaga Group. For example, in its application for special field rules for Boone, Lincoln and Logan Counties, Chesapeake specifically stated, "Chesapeake has no intention to produce, perforate or stimulate the Onondaga in any manner at the present time." In the same application, Chesapeake further acknowledged that, "Chesapeake would agree not to produce, perforate, frac, or otherwise stimulate the Onondaga Group, unless and until it obtained a further Order from the Commission."

Consequently, not one of the wells subject to the applications for special field rules either approved by, or pending before, the Commission will produce gas from a formation at or below the top of the uppermost member of the Onondaga Group.

The Commission's Erroneous Legal Interpretation

As stated above, there are three (3) requirements that must be met before a well may be defined as a deep well. First, it must not be a shallow well. Second, the well must be drilled in a formation at or below the top of the Onondaga Group. Finally, the well must also be completed in a formation at or below the top of the Onondaga Group.

The Commission considered only one of the three requirements when it determined that the Marcellus wells are deep wells. In making its determination, the Commission relied solely upon the fact that the Marcellus wells would be drilled up to seventy-five feet (75') into the Onondaga Group.

In its Order granting Chesapeake's application for special field rules in Boone, Lincoln and Logan Counties, the Commission specifically stated:

> Chesapeake wishes to drill wells in the special field rule area in order to produce from the Marcellus Shale formation and other shallower formations. Although the *Marcellus Shale is a "shallow" formation*, Chesapeake proposes to drill up to 75 feet into the Onondaga Group to enable the logging and completion of the entire Marcellus Shale section. Chesapeake *will not perforate or complete* any formation *below the base of the Marcellus Shale formation*; however, by definition, since the proposed wells will be drilled in excess of twenty feet into the Onondaga Group, they will be considered deep wells.

Based upon this determination, the Commission issued the following conclusion of law, "That Marcellus Shale wells drilled more than twenty feet into the Onondaga Group are deep wells." Consequently, the Commission held that:

> Pursuant to Chapter §22C, Article 9, Code of West Virginia 1931, as amended, the Commission *has jurisdiction over the subject matter embraced in said notice*, and persons interested therein, and jurisdiction to promulgate the hereinafter prescribed Order.

(emphasis added). It is clear that the Commission believed it had jurisdiction over the applications for special field rules because it had determined that the Marcellus wells were in fact deep wells.

However, the Commission ignored two of the three factors that must be considered before a well can be categorized as a deep well. First, in order to be a deep well, a well must not meet the definition of a shallow well. A shallow well is a well that is drilled and completed

above the Onondaga. There is no question that the Marcellus wells will be drilled in formations above the Onondaga. There is also no question that the wells will be completed in the Marcellus formation, which is a shallow formation. Chesapeake specifically testified that the wells subject to its applications for special field rules will be completed in the Marcellus formation Therefore, the wells subject to the special field rules qualify as shallow wells because they are both "drilled and completed" above the Onondaga.

More importantly, a well has to be drilled and completed in, or below, the Onondaga before it can be categorized as a deep well. W.Va. Code §22-6-1(g); (W.Va. Code §22C-9-2(a)(12); (W.Va. Code §22C-8-2(8). The Commission itself has expressly acknowledged that the Marcellus wells will not be completed in the Onondaga Group. In its July 10, 2007 Order granting Chesapeake's application for special field rules, the Commission explicitly acknowledged that, "Chesapeake *will not* perforate or *complete* any formation *below* the base of the Marcellus Shale formation."

The Commission has admitted as a matter of record that one of the requirements that must be met before the Marcellus wells can be deemed deep wells does not exist. There is no dispute that a well must be drilled and completed in the Onondaga before it will be a deep well. There is also no dispute that the wells subject to the applications for special field rules will not be completed in the Onondaga Group. Therefore, the Marcellus Shale wells are not deep wells. Since they are not deep wells, the Commission lacked jurisdiction to grant the four (4) applications for special field rules already approved. The Commission also lacks jurisdiction to hear the five (5) applications for special field rules pending before it.

B. **The Board is Obligated to Set Forth the Facts Upon Which it Relied in Issuing its Order.**

Where there is a direct conflict in the evidence upon which an agency issues a decision, the agency may not elect one version of evidence over the conflicting version unless the agency resolves the conflict in a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision in a manner that is adequate for review by an appellate court. Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996). The Commission failed to do so in relation to the issue of whether one thousand foot (1,000') spacing or a seventy-five foot (75') rat hole was necessary.

C. **Remedies.**

As a result of the errors committed by the Commission in the issuing of the Special Field Rules, the Petitioners request the following remedies from this Court:

i) Enter an order finding that the Commission does not have jurisdiction to regulate the wells completed in (but not below) the Marcellus Shale geologic formation, and thus remand the matter to the Shallow gas Well Review Board;

ii) Reverse the Board's clearly erroneous decision that the seventy-five foot (75') rat hole was necessary to effectively log, complete, and produce the wells in the Marcellus formation and that without the seventy-five foot (75') rat hole natural gas reserves within the Marcellus formation would be lost.

iii) Reverse the Board's clearly erroneous decision that recoverable gas reserves would be left in place if the Marcellus formation was developed under the three thousand foot (3,000') spacing requirement imposed on deep wells.

iv) Reverse the Board's clearly erroneous decision that recoverable gas reserves would be left in place within the Marcellus formation unless the three thousand foot (3,000') spacing requirement imposed on deep wells was lowered to one thousand feet (1,000').

v) Enter an order finding that the Commission violated the Due Process Clause of the United States Constitution and the West Virginia Constitution when it granted the special field rules lowering the spacing between wells without notice being given to the coal owners and operators whose coal seams would be intersected by the respective gas wells.

WHEREFORE, the Petitioners respectfully request that this Court grant its Petition for Appeal, and any other relief that it deems appropriate.

Respectfully submitted,

PETITIONERS

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 Term

No. 33705

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STATE OF WEST VIRGINIA EX REL. BLUE EAGLE LAND, LLC, A WEST VIRGINIA LIMITED LIABILITY COMPANY, COALQUEST DEVELOPMENT, LLC, A FOREIGN LIMITED LIABILITY COMPANY, CONSOLIDATION COAL COMPANY, A FOREIGN CORPORATION, HORSE CREEK LAND AND MINING COMPANY, A WEST VIRGINIA CORPORATION, NATIONAL COUNCIL OF COAL LESSORS, INC., A WEST VIRGINIA CORPORATION, PENN VIRGINIA OPERATING COMPANY, LLC, A FOREIGN LIMITED LIABILITY COMPANY, POCAHONTAS LAND CORPORATION, A FOREIGN CORPORATION, WEST VIRGINIA COAL ASSOCIATION, A WEST VIRGINIA NON-PROFIT CORPORATION, WPP LLC, A FOREIGN LIMITED LIABILITY COMPANY, AND WOLF RUN MINING COMPANY, A WEST VIRGINIA CORPORATION,
Petitioners

v.

WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, A STATE AGENCY, CHESAPEAKE APPALACHIA, LLC, A FOREIGN LIMITED LIABILITY COMPANY, EASTERN AMERICAN ENERGY CORPORATION, A WEST VIRGINIA CORPORATION, AND PETROEDGE RESOURCES (WV), LLC, A FOREIGN LIMITED LIABILITY COMPANY,
Respondents

Exhibit A

WRIT OF PROHIBITION

WRIT GRANTED AS MOULDED

Submitted: March 12, 2008
Filed: May 27, 2008

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344-5 BOD

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Attorney for *Amicus Curiae* West Virginia Surface Owners' Rights Organization

The Opinion of the Court was delivered PER CURIAM.

JUSTICE BENJAMIN, deeming himself disqualified, did not participate in the decision of this case.

JUDGE JOHN W. HATCHER, JR., sitting by temporary assignment.

SYLLABUS

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Per Curiam:

In the instant case we find that a writ of prohibition is not an appropriate vehicle to address jurisdictional questions raised regarding certain oil and gas wells. We grant leave for the case to be re-filed as an appeal in circuit court.

I.

The petitioners are coal-owning and coal-mining companies that object to certain orders issued by the respondent, the West Virginia Oil & Gas Conservation Commission ("the Commission"), a governmental agency established pursuant to *W.Va. Code*, 22C-9-1, *et seq.*, to regulate the drilling of "deep" wells for oil and gas. (More on the distinction between a "deep" and a "shallow" well, *infra.*)

The Commission orders to which the petitioners object involve drilling permit applications that were filed with the Commission by the other respondents in the instant case. These respondents are companies that want to produce gas and oil from the "Marcellus Shale" geological formation. For the wells in question, the Marcellus Shale lies directly above the "Onondaga" formation. And, as will be further seen *infra*, the top of the Onondaga formation is the dividing line between "deep" and "shallow" wells.

The petitioners claim, via a writ of prohibition invoking this Court's original jurisdiction, that the Commission has no jurisdiction to issue orders relating to the proposed

wells, because the wells are "shallow wells" that are required to be regulated by the Shallow Well Gas Review Board, established by *W.Va. Code*, 22C-8-1, *et seq.*

The respondents claim that the orders in question were properly issued by the Commission, because the proposed wells in question do not meet the definition of "shallow wells" and do not lie within the Shallow Well Gas Review Board's jurisdiction.[1]

Although we do not have a record in this original jurisdiction proceeding other than the pleadings, it appears that the proposed wells would be drilled entirely through the Marcellus Shale and would penetrate approximately eighty feet into the Onondaga formation. The penetration into the Onondaga, it appears, is to accommodate tools that are used for preparing the well for production.

The applicable statutory language is found at *W.Va. Code*, 22C-9-2 [1998], which states in pertinent part:

> (11) "Shallow well" means any well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group": Provided, That in drilling a shallow well the operator may penetrate into the "Onondaga Group" to a reasonable depth, not in excess of twenty feet, in order to allow

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[1]The Commission and the Shallow Well Gas Review Board have somewhat different procedures and standards in the areas of notice to mineral owners and well spacing, and the petitioners apparently believe that their interests will be better served if the Shallow Well Gas Review Board exercises jurisdiction over the proposed wells. In an *amicus curiae* brief, the West Virginia Surface Owners' Rights Association asserts that oil and gas royalties from deep wells must be "pooled" and distributed among the owners of the gas – as opposed to paying royalties only to the owner of the property where the well is located, if a well is classified as a shallow well. If the instant case is re-filed as an appeal, the West Virginia Surface Owners' Rights Association should be given an opportunity to assert its interests and views.

> for logging and completion operations, but in no event may the "Onondaga Group" formation be otherwise produced, perforated or stimulated in any manner;[2]
>
> (12) "Deep well" means any well, other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group"[.]

The petitioners argue that the foregoing definitional language for a "shallow well" includes wells that are "drilled and completed" – that is, established to produce gas from – "above the top of the Onondaga," which is where the Marcellus Shale is located. The petitioners argue that the statute's twenty-feet limit on a shallow well's penetration of the Onondaga is not jurisdictional.

The respondents reply by saying that the twenty-feet statutory limitation on the penetration of a shallow well into the Onondaga is definitional and jurisdictional. The respondents also argue that a "deep well," under the statute, can be a well that is completed "*at* . . . the top of" the Onondaga – and that in fact, the Marcellus Shale wells in question will be so completed. (Emphasis added.)

II.

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the

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[2]This language is repeated at *W.Va. Code*, 22C-8-2(21) [1994].

> petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

We do not have a factual record in the instant case upon which we may adequately evaluate the contentions of the parties, particularly regarding the details of the wells in question. Under the applicable statutory language, it cannot be said, from the limited record before this Court, that the Commission's exercise of its jurisdiction is clearly erroneous.[3] Additionally, the petitioners are not without a remedy other than prohibition, because the orders of the Commission that are complained of in the instant case may be appealed to circuit court pursuant to *W.Va. Code*, 22C-9-11 [1998]. All relevant issues may

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[3]That the statutes do not clearly and without dispute entitle the petitioners to relief is illustrated by a bill that was introduced in the 2008 Legislature. Senate Bill 716, introduced on February 18, 2008, was described in its introductory language as "modifying the definitions of 'shallow' and 'deep' wells to allow a shallow well to be drilled deeper; . . .". Senate Bill 716 would have changed the definition of a "shallow well" to mean "any gas well, other than a coal bed methane well, drilled no deeper than *one hundred feet* below the top of the 'Onondaga Group . . ."(emphasis added), and would have removed the language in the current statute that permitted a shallow well to penetrate the Onondaga Group no more than twenty feet. The drafter's note to Senate Bill 716 stated that the purpose of the bill "is to modify the definitions of 'shallow' and 'deep' wells to allow a shallow well to be drilled deeper and to provide clarity to both definitions." Senate Bill 716 was not enacted.

be raised in that forum, including the Commission's jurisdiction. All of these factors militate against this Court addressing the issues raised by the petitioners in the instant original jurisdiction proceeding.

III.

Based on the foregoing, we grant a writ of prohibition as moulded, and direct that the instant case be dismissed from this Court's docket, with leave for the petitioners to file an appeal of the Commission's orders in circuit court within thirty days of the issuance of the mandate in the instant case, which shall be deemed to be a timely appeal.

Writ Granted as Moulded.

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

BLUE EAGLE LAND, LLC, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	**Case No.:**
	)	
WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION, *et al.*,	)	
	)	
	)	
Respondents.	)	

DESIGNATION OF RECORD

Pursuant to Rule 4 of the West Virginia Rules of Procedure for Administrative Appeals, the Petitioners hereby designate the following materials to be relevant to the questions presented in this appeal and request that said materials be transcribed and provided to the Circuit Court of McDowell County:

The entire record for each of the following proceedings:

1) Docket No. 175, Cause No. 160;

2) Docket No. 179, Cause No. 164;

3) Docket No. 181, Cause No. 166;

4) Docket No. 180, Cause No. 165;

5) Docket No. 182, Cause No. 167;

6) Docket No. 182, Cause No. 168;

7) Docket No. 182, Cause No. 169;

8) Docket No. 182, Cause No. 170;

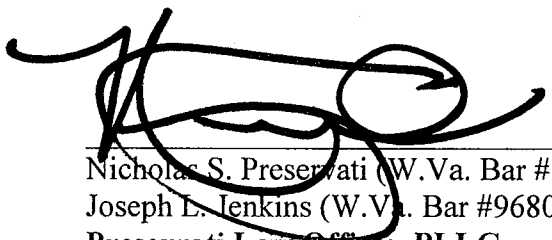
9) Docket No. 182, Cause No. 171;

10) *Blue Eagle Land, LLC, et al. v. West Virginia Conservation Commission, et al.*, Case No.: 33705

Respectfully submitted,

PETITIONERS

By Counsel.



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Facsimile: (304) 345-2456
Counsel for Petitioners

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WEST VIRGINIA

BLUE EAGLE LAND, LLC, *et al.*,	)	
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Respondents.	)	

CERTIFICATE OF SERVICE

I, Nicholas S. Preservati, do hereby certify that I have served a true and exact copy of the foregoing **Designation of Record** upon all counsel of record by first class mail on the 26th day of June, 2008, addressed as follows:

West Virginia Oil & Gas Conservation Commission
Christie S. Utt, Esquire
WV Office of the Attorney General
Capitol Complex, Bldg. 1, Room E-26
Charleston, WV 25305

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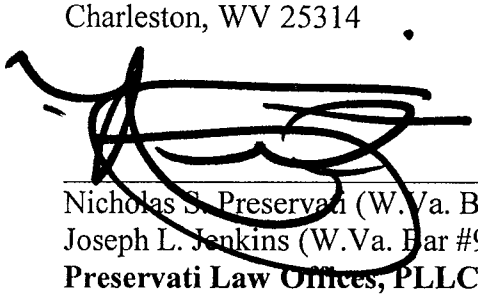

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CERTIFICATE OF SERVICE

I, Nicholas S. Preservati, do hereby certify that I have served a true and exact copy of the foregoing **Petition for Appeal from the West Virginia Conservation Commission and the West Virginia Supreme Court** and **Docketing Statement** upon all counsel of record by certified mail on the 26th day of June, 2008, addressed as follows:

West Virginia Oil & Gas Conservation Commission
Christie S. Utt, Esquire
WV Office of the Attorney General
Capitol Complex, Bldg. 1, Room E-26
Charleston, WV 25305

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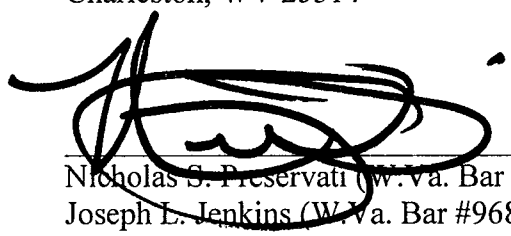

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Counsel for Petitioners

In the Circuit Court of McDowell County

ADMINISTRATIVE APPEALS DOCKETING STATEMENT

Style of case (use from agency final order including case number):

Agency: Blue Eagle Land, LLC, et. al. v. Conservation Commission, et. al., Case No. 33705

TIMELINESS OF APPEAL

Date of entry of order appealed from: May 27, 2008

Date of filing of petition for appeal: June 26, 2008

VENUE: If appeal is not filed in Kanawha County, do you reside in or do business in this County?

☑ Yes ☐ No

If so, provide the street address and telephone number for your residence or business in this County.

If not, explain your reason(s) for filing this appeal outside of Kanawha County. Pocahontas Land Corporation owns significant coal reserves in McDowell County that are currently being mined.

FINALITY OF ADMINISTRATIVE ORDER

Is the order appealed from a final decision on the merits as to all issues and parties?

☑ Yes ☐ No

If not, what type of order are you appealing?

CASE INFORMATION

State briefly the nature of the case, the relief sought and the outcome at the agency. (Attach an additional sheet if necessary).

Does the agency decision contain factual (evidentiary errors)?

☑ Yes ☐ No

If so, please list the evidentiary errors briefly. (Attach an additional sheet if necessary).

Does the agency order contain legal errors (errors of law)?

☑ Yes ☐ No

If so, please list the errors of law briefly. (Attach an additional sheet if necessary).

See attached

CASE MANAGEMENT INFORMATION

Name of Party filing this appeal (Petitioner): Pocahontas Land Corporation

Do you wish to make an oral presentation to the court?

☑ Yes ☐ No

List counsel for each party to the case at the agency. If a party is not represented by counsel, provide the requested information for that party. Include name, firm name, address and telephone number. (Attach an additional sheet if necessary).

See Certificate of Service Attached hereto.

Name of attorney or individual filing this Administrative Appeals Docketing Statement:

Nicholas S. Preservati ☑ Attorney ☐ Non-Attorney (self represented)

Will you be handling the appeal? ☑ Yes ☐ No

If yes, provide name, firm name address and telephone number.

Preservati Law Offices, PLLC

P.O. Box 1431 Charleston, West Virginia 25325 304-346-1431

If there are multiple Petitioners add their names on an additional sheet, accompanied by a certification that all Petitioners concur in this filing.

Signature:

WV Bar Number: 8050

Date: June 26, 2008

Remember to attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the agency final order or decision from which the appeal is taken.
3. A certificate of service, verifying that you have served this Administrative Appeals Docketing Statement upon all of the parties to the agency proceeding, the agency itself and the Attorney General's Office.

The Commission committed the following errors in issuing the Order's granting the Applications for Special Field Rules:

1. The Commission did not have jurisdiction to grant special field rules for wells drilled more than twenty feet (20") into the underlying Onondaga group formation but completed only in the Marcellus Shale formation because such wells are shallow wells regulated by the Shallow Gas Well Review Board.

2. The Commission violated the Due Process Clause of the United States Constitution and the West Virginia Constitution when it granted the special field rules lowering the spacing between wells without notice being given to the coal owners and operators whose coal seams would be intersected by the respective gas wells.

3. The Commission was clearly erroneous in its findings that the seventy-five foot (75') rat hole was necessary to effectively log, complete, and produce the wells in the Marcellus formation and that without the seventy-five foot (75') rat hole natural gas reserves within the Marcellus formation would be lost.

4. The Commission was clearly erroneous in its findings that recoverable gas reserves would be left in place if the Marcellus formation was developed under the three thousand foot (3,000') spacing requirement imposed on deep wells.

5. The Commission was clearly erroneous in its findings that recoverable gas reserves would be left in place within the Marcellus formation unless the three thousand foot (3,000') spacing requirement imposed on deep wells was lowered to one thousand feet (1,000').

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	)	
	)	
Respondents.	)	

The following is a list of each Petitioner in this matter that has consented to the filing of this petition for Appeal:

BLUE EAGLE LAND, LLC
COALQUEST DEVELOPMENT, LLC
CONSOLIDATION COAL COMPANY
HORSE CREEK LAND AND MINING COMPANY
NATIONAL COUNCIL OF COAL LESSORS, INC.
PENN VIRGINIA OPERATING COMPANY, LLC
POCAHONTAS LAND CORPORATION
WEST VIRGINIA COAL ASSOCIATION
WPP LLC
WOLF RUN MINING COMPANY

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