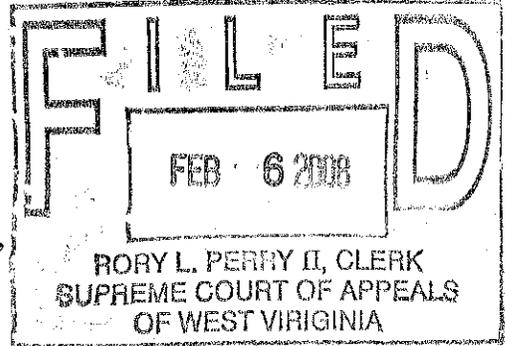


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**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,



**Petitioners,**

v.

**WEST VIRGINIA OIL & GAS CONSERVATION COMMISSION**, a state agency, **CHESAPEAKE APPALACHIAN, 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.**

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**RESPONSE OF EASTERN AMERICAN ENERGY CORPORATION  
TO RULE TO SHOW CAUSE**

---

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**Respondents.**

---

**RESPONSE OF EASTERN AMERICAN ENERGY CORPORATION  
TO RULE TO SHOW CAUSE**

---

Comes now Respondent, Eastern American Energy Corporation ("EAEC"), by and through its counsel, Susan C. Wittemeier and Suzanne Jett Trowbridge, Goodwin & Goodwin, LLP and Donald C. Supcoe, President and Counsel of EAEC, pursuant to Rule

14(d) of the West Virginia Rules of Appellate Procedure and submits its Response to the Rule to Show Cause.

**I.  
INTRODUCTION AND SUMMARY**

On November 9, 2006 the Respondent, Eastern American Energy Corporation (“EAEC”) submitted an application for Special Field Rules to the Oil and Gas Conservation Commission (the “Commission”) asking for the establishment of Special Field Rules to permit EAEC to drill gas wells up to 75 feet into the Onondaga formation so that EAEC could completely evaluate, treat and stimulate the entire Marcellus Shale formation.<sup>1</sup>

In its application, EAEC requested that it be permitted to:

- i) drill 75 feet (75’) into the top of the Onondaga formation to adequately log and stimulate the entire Marcellus formation;
- ii) drill within one-hundred feet (100’) of any lease or unit boundary; and
- iii) space wells no closer than one thousand feet (1,000’) apart.

These wells are hereinafter referred to as “Marcellus Wells.” EAEC represented and agreed that it would not perforate, frac or otherwise stimulate the Onondaga formation unless and until it filed a subsequent permit application to rework, deepen or recomplete the Onondaga formation.

Finding that EAEC’s request was reasonable and further finding that drilling beyond the 20 foot limitation into the Onondaga formation constituted the drilling of deep wells within the meaning of the statute, the Commission asserted jurisdiction over

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<sup>1</sup> The Marcellus Shale formation lies directly on top of the Onondaga formation which is the statutory delineation point between a Deep Well and a Shallow Well as defined in W.Va. Code §22-6-1(g) and W.Va. Code §22-6-1(r) respectively. The Marcellus Shale formation is a shallow formation.

the application pursuant to Chapter 22C Article 9 of the West Virginia Code. The Commission granted EAEC's application for Special Field Rules on December 21, 2006. Appendix, Exh. 1.

In their Writ of Prohibition, Petitioners allege that the Commission lacked jurisdiction to grant EAEC's application for Special Field Rules, because the Commission erroneously categorized the Marcellus Wells as deep wells. However, Petitioners concede that if the Commission properly interpreted the statutory definitions of shallow well and deep well in finding the Marcellus Wells to be deep wells, then the Commission had jurisdiction. Petitioners' Memorandum, at 2, 22.

It is uncontested that in drilling the Marcellus Wells which are the subject of EAEC's Special Field Rules, EAEC drilled in excess of twenty feet into the Onondaga formation. EAEC's drilling of wells pursuant to the Special Field Rules exceeded the permissible depth set forth in the statutory definition of a shallow well. *See* W.Va. Code §22-6-1(r). Accordingly, the Marcellus Wells do not constitute shallow wells. Since the Marcellus Wells are deep wells, the Commission had jurisdiction to grant EAEC's application for Special Field Rules and Petitioners' Writ of Prohibition must be denied.

## II STATEMENT OF RELEVANT FACTS

1. In 2006, EAEC had drilled numerous wells in Boone, Lincoln and Logan Counties, West Virginia. The majority of these wells were permitted as shallow wells and in the course of drilling four (4) of those wells EAEC drilled the same to depths in excess of twenty feet (20') into the Onondaga formation.

2. On March 31, 2006, the West Virginia Division of Environmental Protection issued violations to EAEC for the drilling of these four (4) shallow gas wells

to depths in excess of twenty feet (20') into the Onondaga formation without securing deep well permits or deep well approval from the Oil and Gas Conservation Commission.

3. EAEC and the Oil and Gas Conservation Commission entered into a Consent Order dated August 17, 2006 pursuant to which the violations were to be abated and EAEC was to pay an administrative fine. Appendix, Exh. 2.

4. In response to the Commission's actions regarding the Consent Order, on November 9, 2006, EAEC filed an application for Special Field Rules covering approximately 30,000 acres in Boone, Lincoln and Logan Counties, West Virginia as outlined in the Introduction.

5. A prehearing conference and hearing on EAEC's application for Special Field Rules was scheduled. EAEC published notice of the time, place and purpose of the prehearing conference and hearing in newspapers of general circulation in Logan, Boone and Lincoln Counties. Appendix, Exh. 3. EAEC also sent written notice of the prehearing conference and hearing to all known gas operators of any lands directly or immediately affected by its application.

6. No objections to EAEC's application for Special Field Rules were filed.

7. A hearing on EAEC's application was held on December 6, 2006 at which time EAEC presented evidence in support of its application. No person protested the application nor presented evidence in opposition to the application.

8. By Order dated December 21, 2006, the Commission found that while EAEC intended to produce only from shallow formations, it proposed to drill up to seventy five feet (75') into the Onondaga formation. The Commission held that since the

proposed wells would be drilled in excess of twenty feet (20') into the Onondaga formation, they were deep wells. Appendix, Exh. 1.

9. The Commission concluded that it had jurisdiction over the subject matter and EAEC to grant the prescribed relief.

10. The Order granting the Special Field Rules to EAEC allows EAEC to drill wells to a depth not to exceed seventy five feet (75') into the Onondaga formation and requires that each well drilled under the Special Field Rules to be located a minimum of one thousand feet (1,000') from each well covered by the Order and one hundred feet (100') from a lease line or unit boundary. The Order further requires EAEC to submit a deep well permit application for each well covered by the Special Field Rules.

11. One of the Petitioners, Pocahontas Land Company, owns coal reserves under a portion of the area covered by EAEC's Special Field Rules. Pocahontas Land Company advised EAEC that it was concerned that the granting of the Special Field Rules by the Commission might deprive Pocahontas Land Company of its statutory right to object to the spacing of wells drilled by EAEC pursuant to the Special Field Rules. Pocahontas Land Company did not appeal the Commission's Order granting EAEC's application for Special Field Rules. Instead, EAEC and Pocahontas Land Company entered into an agreement that provides if Pocahontas Land Company, or one of its lessees on the 300 acres owned by Pocahontas Land Company in the area covered by EAEC's Special Field Rules, objects to the spacing of any well drilled by EAEC under the Special Field Rules, then the Director of the Division of Environmental Protection through the Office of Oil and Gas could utilize the terms and provisions utilized to settle such disputes by the Shallow Gas Well Review Board.

12. In a subsequent proceeding, involving Respondent, Chesapeake Appalachia, L.L.C., the Commission incorporated into its Orders the provisions of W.Va. Code §22C-8-8 pertaining to the rights of an objecting coal owner in the event a dispute arose regarding the spacing of deep wells and the effect that such spacing may have on coal reserves. Petitioners' Memorandum, Exh. C, p. 4.

13. Upon information and belief, eight applications have since been filed, with the Commission, three of which were granted. Petitioners' Memorandum at p. 8-9 and Exhs. B - J.

14. On September 28, 2007 Petitioners filed their Petition for Writ of Prohibition alleging that the Commission has no jurisdiction over wells drilled more than twenty feet into the Onondaga formation where such wells are not also completed in, and producing from, deep formations.

15. This Court issued its Rule to Show Cause on November 7, 2007.

### **III. LEGAL STANDARD**

As set forth in the West Virginia statute:

The Writ of Prohibition shall be as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.

W.Va. Code § 53-1-1.

Applying this statute, this Court has held that prohibition lies only to prevent the doing of an act, and can never be used as a remedy for acts already done. *State ex rel. Burgett v. Oakley*, 155 W.Va. 75, 79, 181 S.E.2d 19, 21 (1971). Moreover, as explained by this Court:

For a writ of prohibition to issue preventing a quasi-judicial administrative tribunal from taking up a particular matter on the asserted basis of lack of jurisdiction, the petitioner must demonstrate that there is a clear limitation on the tribunal's jurisdiction, and that there are no disputed issues of fact such that the jurisdictional question may be decided purely as a matter of law. In other words, the prohibition remedy is available only where an administrative tribunal patently and unquestionably lacks jurisdiction over the matter pending before it.

Syl., *Health Management, Inc. v. Lindell*, 207 W. Va. 68, 528 S.E.2d 762 (1999).

#### IV. ARGUMENT

- A. The Commission Has Jurisdiction Over Wells Drilled More Than 20 Feet Into The Onondaga Group Even Though Such Wells May Only Be Completed In And To The Marcellus Shale Formation.

Jurisdiction over various aspects of drilling natural gas wells in West Virginia is vested in three agencies. The Division of Environmental Protection, Office of Oil and Gas oversees the permitting, drilling, and operation and abandonment of all natural gas wells. W.Va. Code § 22-6-1, *et seq.* The Shallow Gas Well Review Board exercises jurisdiction over drilling and spacing requirements for shallow wells as defined by statute. W.Va. Code § 22C-8-1, *et. seq.* The Commission has jurisdiction over the exploration for or production of oil and gas from deep wells, including drilling and spacing of deep wells. W.Va. Code § 22C-9-1, *et seq.* The Commission has specific authority to "make and enforce reasonable rules and orders reasonably necessary to prevent waste, protect correlative rights, govern the practice and

procedure before the Commission and otherwise administer the provisions of this article.” W.Va. Code § 22C-9-4(f)(2).

EAEC agrees with Petitioners that the Marcellus Shale formation is by definition a shallow formation. However, it is clear under the statutory definitions that once a well is drilled more than 20-feet into the Onondaga Group it becomes a deep well.

The Legislature defined shallow wells as follows:

“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) (emphasis added).

A deep well is defined 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).

These same definitions are employed in defining the jurisdiction of the Shallow Gas Well Review Board (W. Va. Code § 22-C-8-2(21), (8)) and the Commission. W. Va. Code § 22-C-9-2(11), (12)).

In the definition section of Chapter 22C, Article 9, governing the Commission, the Legislature declared: Unless the context clearly indicates otherwise, the use of the word “and” and the word “or” shall be interchangeable, as, for example, “oil and gas” shall mean oil or gas or both. W. Va. Code § 22-C-9-2(b). The Legislature clearly stated that “and” and “or” were interchangeable, and Petitioners have failed to submit anything to support its claim that the definition of a deep well requires that a well be drilled and

completed below the uppermost portion of the Onondaga Group. Accordingly, the Commission has acted completely within its lawful jurisdiction.

Petitioners argue that a shallow well is one that is drilled and completed above the uppermost member of the Onondaga Group, regardless of whether or not it is drilled to a depth in excess of 20 feet in the Onondaga Group. Petitioners' argument rewrites the definition of shallow well by ignoring the statutory drilling depth restriction contained in the definition. An operator is only permitted to drill twenty feet into the Onondaga Group; once that twenty-foot limitation is exceeded, the well, by definition, is a deep well.

Under Petitioners' interpretation of the definition of a shallow well there is no limitation as to drilling depths. An oil and gas operator could drill a well to any depth, and as long as it was not completed in a formation below the top of the Onondaga Group such well would be defined as a shallow well. If Petitioners' assertions are followed, an operator drilling to a depth in excess of twenty feet into the Onondaga Group would not have to comply with the following deep well obligations provided it never completed a formation below the top of the Onondaga Group:

- i) locating the well at least 400 feet from a lease boundary (39 C.S.R. 1-4.2)
- ii) Spacing the well 3,000 feet from other existing or permitted deep wells (Id.)
- iii) Filing a safety plan (39 C.S.R. 1-4.4(e))

Surely the Legislature didn't intend for such a result to occur.

In recognition that a shallow well cannot be drilled more than twenty feet into the Onondaga Group, Petitioners propose that the statutory constraint be avoided by the issuance of variances by the Chief of the Office of Oil and Gas pursuant to 35 W.Va.

C.S.R. §4-18. Petitioners' Memorandum, at 27-28. Petitioners' position is erroneous. The regulation cited by Petitioners applies solely to the Office of Oil & Gas and the enforcement of the statutory provisions of W.Va. Code §22-6-1, *et seq.* and not to the matters delegated to the Shallow Gas Well Review Board or the Oil & Gas Conservation Commission. If Petitioners' logic were followed, an operator could apply for a variance with respect to the classification of its wells as shallow or deep rather than properly submitting its proposed drilling activities to the jurisdiction of the Board or the Commission. As stated above, once a well is drilled more than twenty feet into the Onondaga Group, it is by definition a deep well and the Commission, not the Chief of the Office of Oil and Gas, is the appropriate party to grant a variance or Special Field Rules.

B. Notice of Applications for Special Field Rules is Given and Coal Operators and Owners Receive Actual Written Notice of Application for Permits to Drill a Deep Well.

Petitioners complain that a gas operator is not required to provide individual written notice of its application for Special Field Rules to coal operators or owners with real property interests within the field. Petitioners' Memorandum, ¶22, 27, pp. 8,10. Although individual notice to coal operators is not required, a gas operator is required to give notice by publication of the time and place of the prehearing conference before the Commission in the county or counties where any land affected by the application is located. 39 C.S.R. 1-6.1(a). Any person desiring to protest the application can then file a statement of opposition five days prior to the scheduled hearing and has the right to present testimony and exhibits in opposition to the application. 39 C.S.R. 1-6.1(b), 6.3. Furthermore, any person adversely affected by the Commission's Order granting Special Field Rules can appeal the decision by filing a petition to the circuit court pursuant to the

provisions of the West Virginia Administrative Procedures Act. W. Va. Code § 22C-9-11(a).

Petitioners are also concerned that by virtue of the granting of Special Field Rules they are deprived of their statutory right to object to the spacing or location of the proposed Marcellus Wells. Petitioners' Memorandum, at 14. Petitioners' concern is unfounded.

A coal operator or owner is given actual written notice of an application to drill a deep well, including a deep well proposed to be drilled pursuant to the Special Field Rules. An application for a deep well permit must be filed with the Office of Oil and Gas. The application must contain the following:

- (1) The names and addresses of (i) the well operator, (ii) the agent required to be designated under subsection (e) of this section, and (iii) every person whom the applicant must notify under any section of this article together with a certification and evidence that a copy of the application and all other required documentation has been delivered to all such persons;
- (2) The name and address of every coal operator operating coal seams under the tract of land on which the well is or may be located, and the coal seam owner of record and lessee of record required to be given notice by section twelve, if any, if said owner or lessee is not yet operating said coal seams;
- (3) The number of the well or such other identification as the director may require;
- (4) The type of well;

- (5) The well work<sup>2</sup> for which a permit is requested;
- (6) The approximate depth to which the well is to be drilled or deepened or the actual depth if the well has been drilled;

\* \* \* \*

- (13) Any other relevant information which the director may require by rule.

W. Va. Code § 22-6-6.

In addition, before drilling a well on a site above a seam or seams of coal, the well operator must also provide each and every coal operator operating beneath the tract of land and the coal seam owner of record and lessee of record, if the coal seam owner or lessee is not yet operating the coal seams, with a plat prepared by a licensed land surveyor or registered engineer showing the proposed location of the well. W. Va. Code § 22-6-12. The coal operator operating the seams beneath the tract of land or coal owner or lessee of record if said owner or lessee is not yet operating the coal seams has fifteen days to file written objections to the proposed drilling. If an objection is filed by the coal operator, or if the director objects to the proposed drilling, the coal operator and gas well operator are given written notice of the time and place to consider the objections to the permit application.<sup>3</sup> At such time the parties may agree upon the location as filed or may agree to move the location to a site which is satisfactory to all parties and the director. If

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<sup>2</sup> "Well work" means the drilling, re-drilling, deepening, stimulating, pressuring by injection of any fluid, converting from one type of well to another, combining or physically changing to allow the migration of fluid from one formation to another or plugging or replugging of any well." *W. Va. Code, §22-6-1(v)*.

<sup>3</sup> Objections to deep well permits are referred to the Chief of the Office of Oil and Gas.

the parties are unable to resolve the objections informally then a formal hearing is conducted by the director. The coal operator or owner has the right to participate in the hearing and to examine witnesses and present evidence and testimony in opposition to the proposed location of the well. In issuing his decision, the director must take into consideration the following:

- (1) Whether the drilling location is above or in close proximity to any mine opening or shaft, entry, travelway, airway, haulageway, drainageway or passageway, or to any proposed extension thereof in any operated or abandoned or operating coal mine or coal mines already surveyed and platted, but not yet being operated;
- (2) Whether the proposed drilling can reasonably be done through an existing or planned pillar of coal, or in close proximity to an existing well or such pillar of coal, taking into consideration the surface topography;
- (3) Whether a well can be drilled safely, taking into consideration the dangers from creeps, squeezes or other disturbances due to the extraction of coal; and
- (4) The extent to which the proposed drilling location unreasonably interferes with the safe recovery of coal, oil and gas.

W. Va. Code § 22-6-15.

Furthermore, although objections to a permit to drill a deep well pursuant to the Special Field Rules are considered by the Chief of the Office of Oil and Gas instead of the Shallow Gas Well Review Board, it is important to note that the Chief of the Office of Oil and Gas also sits as a member of the Shallow Gas Well Review Board. In addition, pursuant to W. Va. Code § 22-6-1 *et seq.* the parameters for the spacing of wells may be more flexible than the Commission's authority under W. Va Code §22-C-8-8. Finally,

Petitioners have acknowledged that each oil and gas operator who has been granted Special Field Rules has indicated a willingness to abide by the spacing guidelines set forth in the Shallow Well Statute when the spacing of proposed wells is an issue. Petitioners' Memorandum, at 8-9.

C. Petitioners' Remedy is an Appeal Pursuant to the West Virginia Administrative Procedures Act.

Petitioners speculate that they will be harmed by the Orders granting the applications for Special Field Rules. Petitioners' remedy was to file an appeal of the Commission's Orders pursuant to the West Virginia Administrative Procedures Act. W. Va. Code § 22-C-9-11(a) provides:

Any party adversely affected by an order of the commission shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code, shall apply to and govern such judicial review with like effect as if the provisions of said section four were set forth in this section.

Petitioners have not sought judicial review of the Commission's Orders granting Special Field Rules pursuant to the West Virginia Administrative Procedures Act. The Petitioners' request for extraordinary relief is improper. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or in which having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 2, *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984) (citing Syl. pt. 1 *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953)).

Prohibition is an improper remedy to challenge the granting of EAEC's application for Special Field Rules.

The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.

Syl. pt. 1, *Daurette v. Traders Federal Savings & Loan Association*, 143 W. Va. 674, 104 S.E.2d 320 (1958). Petitioners have not sought judicial review of the Commission's Order granting EAEC's application for Special Field Rules. Instead, Petitioners waited ten months after the Commission's Order granting EAEC's application for Special Field Rules to file their Writ of Prohibition.

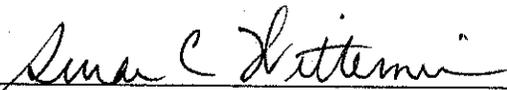
## V.

### CONCLUSION

In summary, the wells at issue in EAEC's application for Special Field Rules were not shallow wells and accordingly the Shallow Gas Well Review Board has no jurisdiction over them. Wells that are "not shallow wells" are by definition within the specific jurisdiction of the Commission. The Commission also has jurisdiction to prevent waste and protect correlative rights. Clearly, by enabling the enhanced recovery of gas

and at the same time protecting coal owners' rights, the Commission properly exercised its jurisdiction.

Respectfully Submitted,  
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## CERTIFICATE OF SERVICE

I, Susan C. Wittemeier, one of counsel for the Defendant, do hereby certify that the foregoing **Response of Eastern American Energy Corporation To Rule to Show Cause** has been served by mailing a true and exact copy thereof addressed as follows, this 6<sup>th</sup> day of February, 2008 to:

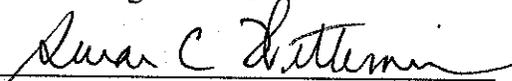
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