

Pursuant to Pa.R.A.P. 123 and 1972(a)(4), the Commonwealth of Pennsylvania, Department of Environmental Protection (“Petitioner” or “Department”), respectfully asks this Honorable Court to stay this proceeding due to an intervening event. In the alternative, the Department asks that this Court dismiss Respondents’, Grant Township of Indiana County and the Grant Township Supervisors (“Grant Township”), counterclaims, and, if that occurs, the Department would not oppose the dismissal of its Petition without prejudice should a case or controversy arise between the parties in the future.

**I. APPLICATION TO STAY PROCEEDING DUE TO INTERVENING
EVENT, OR IN THE ALTERNATIVE, DISMISS GRANT
TOWNSHIP’S COUNTERCLAIMS**

In support of this Application, the Department states as follows:

1. On March 27, 2017, the Department issued a permit (“Permit”) to Pennsylvania General Energy Company, LLC (“PGE”) authorizing the change-in-use of the Yanity well (“Well”) from gas production to oil and gas waste fluid injection. The Well is located in Grant Township. Concurrently, the Department filed a Petition for Review in the Nature of a Complaint Seeking Declaratory and Injunctive Relief (“Petition”) and an Application for Expedited Special Relief in the Nature of a Preliminary Injunction (“Application for Preliminary Injunction”).

2. The Petition challenged the validity of portions of a Home Rule Charter ("Charter") adopted by Grant Township that purports to prohibit, *inter alia*, the permitting and operation of oil and gas waste fluid injection wells in Grant Township, because the challenged provisions of the Charter are preempted by laws of statewide applicability that the Department enforces, including the 2012 Oil and Gas Act, Act of February 14, 2012, P.L. 87, No. 13, 58 Pa. C.S. §§ 3201 – 3274 (“Oil and Gas Act”), and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003 (“Solid Waste Management Act”).

3. The Application for Preliminary Injunction was resolved through this Court's April 10, 2017 Order enjoining the enforcement of Section 303 of the Charter (the section that prohibited the permitting of injection well permits in Grant Township) pursuant to a Joint Application for Expedited Special Relief in the Nature of a Stipulated Order.

4. On May 8, 2017, Grant Township filed an Answer to the Petition, along with New Matter and five Counterclaims.

5. On June 19, 2017, the Department filed Preliminary Objections to New Matter and all five of the Counterclaims filed with Grant Township's Answer to the Department's Petition.

6. On July 18, 2017, Grant Township filed its "Reply" to the Department's Preliminary Objections.

7. On October 10, 2017, this Honorable Court heard oral argument on the Department's Preliminary Objections.

8. In a Memorandum Opinion dated May 2, 2018, this Honorable Court sustained the Department's Preliminary Objections to some of Respondent's New Matter and to Grant Township's Counterclaims 1, 2, and 5.

9. The Court declined to sustain the Preliminary Objections to Counterclaims 3 and 4 solely for the following reason:

Counts 3 and 4, however, are based, in addition to the right of self-government, on the Environmental Rights Amendment of our

Pennsylvania Constitution. If the Township at trial is able to prevail on its claim in Count 3 that provisions of the Oil and Gas Act and [Solid Waste Management Act] are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them.

(May 2, 2018, Opinion, pp. 15-16.)

10. Thus, this Court left Grant Township's Counterclaims 3 and 4 intact solely because of a constitutional challenge to two state environmental statutes, the Oil and Gas Act and the Solid Waste Management Act (hereinafter, the "Constitutional Challenge"). (May 2, 2018, Opinion, p. 16.) References to "Counterclaims" herein refer to Counterclaims 3 and 4.

11. On December 3, 2018, the Department filed its Application for Summary Relief to Dismiss Grant Township's Constitutional Claims asserting the substantive unlawfulness of the Charter ("2018 Application"). In the 2018 Application and in oral argument, the Department explained that this Court should not hear Grant's Constitutional Challenges because the basis for those challenges, the Charter, is unlawful *per se*, and the case could be resolved on non-constitutional grounds.

12. The Court denied the 2018 Application in its March 2, 2020 Opinion, declining to rule whether the Charter is unlawful *per se*. (Opinion, March 2, 2020, p. 7.)

13. As a result of the March 2, 2020 Opinion, the Charter remains a law applicable to the Well and its use.

14. On March 19, 2020, respecting this Court's opinion earlier that month, the Department rescinded the Permit, citing the Charter as applicable law ("Rescission"). The Rescission states in relevant part:

The Pennsylvania Department of Environmental Protection hereby rescinds Well Permit No. 37-063-31807-00-00 issued for the "Yanity" well in Grant Township, Indiana County ("Injection Permit"). Operation of the injection well pursuant to the Injection Permit, issued on March 27, 2017 and amended on April 3, 2018, would violate a local law that is in effect. 58 Pa. C.S. § 3211(e.1)(1). Specifically, Section 301 of Grant Township's Home Rule Charter bans the injection of oil and gas waste fluids. Therefore, the operation of the Yanity well as an oil and gas waste fluid injection well would violate that applicable law.

The section of the 2012 Oil and Gas Act cited in the Rescission identifies conflicts with "other applicable law[s]" as a basis to deny a well permit. 58 Pa. C.S. § 3211(e.1)(1).¹

15. On April 16, 2020, PGE appealed the Rescission to the Pennsylvania Environmental Hearing Board ("Rescission Appeal"). PGE's Notice of Appeal includes, *inter alia*, objections asserting that the Department abused its discretion

¹ 58 Pa. C.S. § 3211(e.1.) states the following: "Denial of permit. The department may deny a permit for any of the following reasons: (1) The well site for which a permit is requested is in violation of any of this chapter or issuance of the permit would result in a violation of this chapter or other applicable law. . . ."

by citing the Charter as a legal basis for the Rescission. (EHB Docket No. 2020-046, Notice of Appeal, p. 8, ¶ E.)

16. The effect of the Rescission is that the Permit is of no force and effect. Thus, although this Department action would not become final until the Rescission Appeal has run its course (35 P.S. § 7514(c)), the Rescission is in effect, and the Permit is not. *Dept. of Env'tl Res. v. Norwesco*, 531 A.2d 94, 96 (Cmwlth. Ct. 1987) (Department actions are immediately effective even if appealed to the Environmental Hearing Board).

17. Since March 19, 2020, the prevailing *status quo* has been that PGE has no permit to operate the Well. Accordingly, the Department and Grant Township do not have a case or controversy that brings their laws into conflict at this time. Instead, PGE and the Department have a case before the Pennsylvania Environmental Hearing Board regarding the Rescission of the Permit.

18. In this proceeding, this Court has stated that it will address Grant Township's Constitutional Challenge to two statewide environmental statutes (the Oil and Gas Act and the Solid Waste Management Act) in the course of determining whether those laws preempt the Charter. (May 2, 2018, Opinion, pp. 13-15.)

19. The Department files this Application because there is no current case or controversy supporting the Constitutional Challenge and, therefore, the Constitutional Challenge should not be addressed by the Court.

20. This Court should not “render decisions in the abstract or offer purely advisory opinions.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005). In addition, this Court has held that it will not proceed to decide issues if the harm complained is not “sufficiently immediate.” *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 578 (Pa. 2003).

21. Because the Permit that brought the conflict of local and state law to bear in this proceeding is rescinded, there is no current case or controversy before this Court and any alleged harm therefrom is no longer *sufficiently immediate* to warrant additional proceedings.

22. In addition, it is settled law that a court should decline to decide a constitutional challenge “unless it is absolutely required to do so.” *Shuman v. Bernie's Drug Concessions*, 187 A.2d 660, 663-664 (Pa. 1963). See *Commonwealth v. Karetny*, 880 A.2d 505, 537 (Pa. 2005); *Mt. Lebanon v. Cty. Bd. of Elections of Allegheny Cty.*, 368 A.2d 648, 650 (Pa. 1977); *Integrated Biometric Tech., LLC v. Dep't of Gen. Servs.*, 22 A.3d 303, 308, fn. 9 (Pa. Cmwlth. 2011); *Atlantic-Inland, Inc. v. Board of Supervisors of W. Goshen Twp.*, 410 A.2d 380, 383 (Pa. Cmwlth. 1980).

23. This tenet of jurisprudence applies to constitutional challenges to statutes. As the Supreme Court explained, “It is a fundamental rule that a court will never pass on the constitutionality of a statute, unless it is absolutely necessary to do so in order to decide the cause before it.” *Com. to Use of Dollar Sav. & Tr. Co. v. Picard*, 145 A. 794, 796 (Pa. 1929). *See Com. v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 271 (Pa. 2010).

24. With the Permit rescinded, there is no other case or controversy between the parties before this Court to support an evaluation of the constitutionality of the Oil and Gas Act and the Solid Waste Management Act.

25. Accordingly, this Court is not *absolutely required* to consider Grant Township’s Constitutional Challenge.

26. In a recent filing, Grant Township reached a similar conclusion with respect to the Department’s constitutional challenges to Grant’s Charter. Grant Township argues that because of the Rescission, this Court should not decide the constitutional issues in the Petition. (Grant Township’s Memorandum of Law in Support of Motion to Dismiss, September 21, 2020, pp. 11-12.) Grant Township’s analysis applies equally to its own Constitutional Challenge in Counterclaims 3 and 4, as set forth in Paragraph II.3, below.

27. For these reasons, the Department requests that this proceeding be stayed during the pendency of the Rescission Appeal. Should the Rescission be

upheld by the Pennsylvania Environmental Hearing Board (and, if any appeals thereof, by the courts), the Rescission will become final, and the Department and Grant Township would not have a case or controversy for this Court to adjudicate. *See Sierra Club v. PUC*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 133 (Pa. 1999).

28. Should the Rescission be overturned, the Permit will be back in effect, and then, at that time, which could be several years from now, there would be a controversy between the parties involving the Constitutional Challenge to state environmental statutes, explained above, and the parties can ask this Court to lift the stay or file new petitions or claims that reflect conditions at that time.

29. Because no current case or controversy remains between Grant Township and the Department, neither the Department's Petition nor Grant Township's Counterclaims need be resolved by the Court. In an effort to promote judicial economy and the parties' resources, and in accordance with precedent to avoid resolution of constitutional challenges except when necessary, the Department requests that this matter be stayed during the pendency of the Rescission Appeal. Upon the final resolution of the Rescission Appeal, the parties could submit a joint status report to the Court as to whether they request that a lifting of the stay or the termination of the matter.

30. Should this Court not wish to stay this proceeding, and because Grant Township “no longer has a legally cognizable interest in the outcome of this case and any potential ruling on the issues would have no meaningful effect...”, an alternative form of relief would be for the Counterclaims to be dismissed without prejudice. (*See* Grant Township’s Application in the Nature of a Motion to Dismiss Petitioner’s Claims for Mootness, September 21, 2020, p. 5, ¶ 11.) Should Grant Township’s Counterclaims be dismissed, the Department would not oppose the dismissal of the Department’s antecedent Petition without prejudice.

II. ANSWER TO GRANT TOWNSHIP’S PENDING APPLICATION TO DISMISS THE DEPARTMENT’S PETITION

The Department responds to Grant Township’s pending Application in the Nature of a Motion to Dismiss Petitioner’s Claims for Mootness and Memorandum in Support (“Grant Township’s Application to Dismiss” or “Application to Dismiss”) as follows:

1. The Department objects to Grant Township’s summary of any filing of record, which filings speak for themselves.

2. The Department restates its Paragraphs 1-30 of Section I of this filing, above, as if fully set forth herein, explaining that the Rescission, and its pending appeal before the Pennsylvania Environmental Hearing Board, has eliminated any current case or controversy between the parties before this Court.

Therefore, a stay is warranted while the Rescission Appeal is pending or,

alternatively, a dismissal without prejudice of both the Petition and the Counterclaims.

3. A dismissal of only one party's claims, as Grant Township argues in its Application to Dismiss, is unsupported, and would result in disparate and inconsistent results. Such relief is not warranted. Notably, Grant Township's Application to Dismiss fails to address the identical circumstances surrounding adjudication of the Counterclaims and the Department's Petition. Instead, Grant Township summarily states in a footnote that its Application "does not constitute a withdrawal of [Grant Township's] Counterclaims..." (Grant Township's Memorandum of Law in Support of Grant Township's Motion to Dismiss, September 21, 2020, p. 7, n. 5.) That statement is purely procedural and does not substantively explain how the same logic and reasoning that is applied to the Department's Petition should not also result in the dismissal of Grant Township's Counterclaims. This is a glaring omission that reveals Grant Township's request for relief as self-serving and questionable. The same argument for dismissal, and the same legal standard, should be applied to both the Department's Petition and the Grant Township's Counterclaims. "The law cannot pick and choose its favorites." *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1199 (1987); *see Commonwealth v. Markum*, 541 A.2d 347, 350 (1988) ("Were we free to pick and

choose which laws we wished to obey, the result would be a society of strife and chaos.”).

4. Grant Township has offered no rationale or explanation for why it should be entitled to one-sided relief in seeking dismissal of the Department’s Petition, as requested in Grant Township’s pending Application to Dismiss.

5. The foregoing shows that Grant Township is not entitled to the one-sided relief it requests, *i.e.*, the sole dismissal of the Department’s Petition but not Grant Township’s Counterclaims.

6. Accordingly, if this Court does not stay proceedings as the Department requests in Section I, above, and because Grant Township advances the same argument as the Department that no current case or controversy exists between the parties, both sides’ counts and claims could be dismissed without prejudice, instead of just one side’s counts and claims.

WHEREFORE, the Department respectfully requests that this Honorable Court stay this matter or dismiss Grant Township’s Counterclaims in their entirety. Should the Court dismiss Grant Township’s Counterclaims, the Department would not oppose this Honorable Court’s dismissal of its Petition without prejudice.

Respectfully submitted,

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FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Date: October 16, 2020