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EXHIBIT 1

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United States District Court, W.D. Pennsylvania.

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC, Plaintiff

v.

GRANT TOWNSHIP, Defendant.

C.A. No. 14-209ERIE

|

Filed 03/31/2017

Attorneys and Law Firms

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MEMORANDUM OPINION

SUSAN PARADISE BAXTER, United States Magistrate Judge

On Motions for Summary Judgment

***1** PGE and Grant Township have filed motions for summary judgment, which breakdown as follows: Plaintiff PGE seeks summary judgment on its own six remaining claims, as well as the counterclaim brought by Defendant Grant Township. For its part, Grant Township seeks summary judgment on its counterclaim. ECF No. 154; ECF No. 157.

I. Relevant Procedural History

Plaintiff Pennsylvania General Energy Company, LLC, ("PGE") filed this action challenging the constitutionality, validity and enforceability of an ordinance adopted by Grant Township that established a self-styled Community Bill of Rights Ordinance. Plaintiff seeks relief against Defendant Grant Township on the grounds that the Ordinance purports to strip Plaintiff of its constitutional rights. Plaintiff seeks to enforce its federal constitutional rights through 42 U.S.C. § 1983. Additionally, Plaintiff contends the Ordinance is in direct conflict with a number of Pennsylvania statutes and is therefore preempted. ECF No. 5.

Defendant raises a counterclaim pursuant to 42 U.S.C. § 1983 and § 1988 against PGE, claiming that by bringing this lawsuit challenging the Ordinance, PGE is violating the rights of the people of Grant Township to "local community self-government" as secured by the American Declaration of Independence, the Pennsylvania Constitution, the federal constitutional framework, and the Community Bill of Rights Ordinance itself. ECF No. 10.

Previously, PGE and Grant Township filed motions for judgment on the pleadings on some of their other claims. On October 14, 2015, this Court granted Plaintiff PGE's motion for judgment on the pleadings thereby invalidating six provisions of the challenged Ordinance.[1] ECF Nos. 113-114. Grant Township's motion was denied. Id. Two weeks later, on November 3, 2015, the people of Grant Township voted to repeal the Community Bill of Rights Ordinance and adopted a new Home Rule Charter. See ECF No. 180-2.

Next, PGE and Grant Township filed the instant motions for summary judgment. At issue in Plaintiff PGE's present motion are Plaintiff's remaining federal constitutional claims. Specifically, Plaintiff PGE claims the Community Bill of Rights Ordinance violates the Supremacy Clause, the Equal Protection Clause, the Petition Clause of the First Amendment, the Contract Clause, and both the substantive and procedural components of the Due Process Clause of the United States Constitution and seeks to enforce all of these federal constitutional rights through 42 U.S.C. § 1983. PGE also seeks summary judgment in its favor on Grant Township's counterclaim.

***2** Grant Township filed a motion for summary judgment on its counterclaim that PGE violated its constitutional right to "local community self-government." Grant Township's motion for summary judgment seeks judgment on its counterclaim only. Grant Township has not moved for summary judgment on PGE's claims.

Grant Township's and PGE's motions for summary judgment are fully briefed and are ripe for disposition by this Court.[2]

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II. Standard of Review on Motions for Summary Judgment

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." When applying this standard, the court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party has the initial burden of proving to the district court the absence of evidence supporting the non-moving party's claims. Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986); Andreoli v. Gates, 482 F.3d 641, 647 (3d Cir. 2007); UPMC Health System v. Metropolitan Life Ins. Co., 391 F.3d 497, 502 (3d Cir. 2004). The burden then shifts to the non-movant to come forward with specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e); Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460-461 (3d Cir. 1989) (the non-movant must present affirmative evidence —more than a scintilla but less than a preponderance— which supports each element of his claim to defeat a properly presented motion for summary judgment). The non-moving party must go beyond the pleadings and show specific facts by affidavit or by information contained in the filed documents (i.e., depositions, answers to interrogatories and admissions) to meet his burden of proving elements essential to his claim. Celotex, 477 U.S. at 322. See also Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001).

In determining summary judgment, a court uses a burden-shifting scheme: When the party moving for summary judgment would ultimately bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

***3** In a procedural situation where a plaintiff (or counterclaimant) is moving for offensive summary judgment, the movant must produce evidence sufficient to establish each element of a claim:

> A summary judgment is neither a method of avoiding the necessity for proving one's case nor a clever procedural gambit whereby a claimant can shift to his adversary his burden of proof on one or more issues. To obtain a judgment in favor of a claimant pursuant to his complaint, counter-claim, or cross-claim, the moving party must offer evidence sufficient to support a finding upon every element of his claim for relief, except those elements admitted by his adversary in his pleadings, or by stipulation, or otherwise during the course of pretrial. A plaintiff seeking summary judgment who has failed to produce such evidence on one or more essential elements of his cause of action is no more 'entitled to a judgment' than is a plaintiff who has fully tried his case and who has neglected to offer evidence sufficient to support a finding on a material issue upon which he bears the burden of proof.

Duffy v. Anderson, 2011 WL 2148855, at *2 (D. Nev. June 1, 2011) quoting United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970) (citations omitted).

When considering a motion for summary judgment, the court is not permitted to weigh the evidence or to make credibility determinations, but is limited to deciding whether there are any disputed issues and, if there are, whether they are both genuine and material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

III. Undisputed Facts

Both PGE and Grant Township have provided scant material facts in support of their respective motions for summary judgment. The undisputed facts are as follows.

PGE is a private corporation in the business of exploration and development of oil and gas. ECF No. 156, ¶ 1; ECF No. 185, ¶ 16. PGE currently owns and operates natural gas wells in Grant Township, Pennsylvania. ECF No. 185, ¶ 1. PGE's exploration and development activities include drilling and operating gas wells and managing brine and other produced fluids from operating wells. Id. at ¶ 2.

In 1997, PGE's predecessor in interest put into production a deep gas well in Grant Township on property known as the Yanity Farm. Id. at ¶ 3. PGE intends to use the Yanity Well to

inject produced fluids from its other oil and gas operations. Id. at ¶ 8. Based on its intention to convert the use of the Yanity Well to an injection well for disposal of produced fluids generated at other PGE oil and gas wells, PGE proceeded to obtain regulatory approval for such use. Id. at ¶ 3.

On March 19, 2014, PGE received an initial permit from the United States Environmental Protection Agency to convert the Yanity Well into an injection well, and on September 11, 2014, the EPA issued a final permit in this regard. ECF No. 185, ¶¶ 5-6.

On June 3, 2014, Grant Township adopted the Community Bill of Rights Ordinance. Id. at ¶ 13. The Community Bill of Rights Ordinance expressly prohibits any corporation from "engag[ing] in the depositing of waste from oil and gas extraction" and invalidates any "permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate [this prohibition] or any rights secured by [the Ordinance], the Pennsylvania Constitution, the United States Constitution, or other laws." Id. at ¶ 14.

IV. The Cross Motions for Summary judgment on Grant Township's Counterclaim

***4** Before turning to PGE's argument in favor of summary judgment, the Court will first take up the Township's request for summary judgment on its counterclaim. Grant Township's counterclaim alleges that by challenging the Community Bill of Rights Ordinance through the instant action, PGE is violating the rights of the people of Grant Township to local community self-government as secured by the American Declaration of Independence, the Pennsylvania Constitution, the federal constitutional framework, and the Community Bill of Rights Ordinance itself. ECF No. 10. Grant Township seeks to enforce this purported right to local community self-government through 42 U.S.C. § 1983.

Grant Township now moves for summary judgment on this counterclaim and requests that this Court: "dismiss PGE's action with prejudice, find Plaintiff is liable to Defendant under § 1983 and § 1988, with further proceedings to determine the extent of the Plaintiff's liability to the Defendant." ECF No. 157-1. Conversely, Plaintiff PGE seeks summary judgment in its own favor on the counterclaim, requesting that this Court dismiss the counterclaim. ECF No. 154-1. The summary judgment standard "does not change when ... the parties have filed cross motions for summary judgment." Valley Nat'l Bank v. Ford Motor Co., 2017 WL 1084524, at *4 (D.N.J. Mar. 22, 2017) quoting Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am., 559 F.Supp.2d 504, 509 (D.N.J. 2008). Cross motions for summary judgment "are not more than a claim by each side that it alone is entitled to summary judgment ..." Id. quoting Transportes Ferreos de Venezuela II v. NKK Corp., 239 F.3d 555, 560 (3d Cir. 2001).

A party may have a cause of action under § 1983 for certain violations of its constitutional rights. Section 1983 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Id. In order to "seek relief under the United States Constitution, a plaintiff must utilize the vehicle of a claim under 42 U.S.C. § 1983 and may not assert claims for relief under the United States Constitution directly." Providence Pediatric Medical Daycare, Inc. v. Alaigh, 112 F.Supp.3d 234, 247 (D.N.J. 2015) citing Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906-07 (3d Cir. 1997). "By itself, § 1983 does not create any rights, but provides a remedy for violations of those rights created by the Constitution or federal law." Morse, 132 F.3d at 907. See also Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995).

At trial, it will be Grant Township's burden to prove both of the following elements of its § 1983 claim by a preponderance of the evidence:

1) That PGE acted under color of state law; and

2) While acting under color of state law, PGE deprived Grant Township of a federal or constitutional right.

Gomez v. Toledo, 446 U.S. 635, 640 (1980). See also Morrow v. Balaski, 719 F.3d 160, 165-66 (3d Cir. 2013) citing Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (To establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right protected by the Constitution or laws of the United States that was committed by a person acting under the color of state law). In order to prevail on its motion for summary judgment on its counterclaim, Grant Township must satisfy both elements of the same test. Gomez, 446 U.S. at 640.[3]

***5** Whether PGE acted as a state actor or under color of state law "is a threshold issue; there is no liability under § 1983 for those not acting under color of state law." Groman, 47 F.3d at 638, citing Versarge v. Township of Clinton, N.J., 984 F.2d 1359, 1363 (3d Cir. 1993).

Grant Township has produced no actual evidence to demonstrate that PGE is anything other than a private corporation. A private corporation is not a state actor. See Davis v. Noble, 2016 WL 4474004, at *4 (D. Del. 2016). Grant Township makes no real argument to the contrary, see Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995). Instead, despite the evidence that shows that PGE is a private corporation, Grant Township argues that PGE has acted under color of state law. Generally, a private corporation does not act under color of state law and a legal claim against such a private actor under § 1983 fails. See Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). See also Filarsky v. Delia, 566 U.S. 377, 383 (2012) citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

The color of state law analysis is anchored on a basic requirement, "that the defendant in a § 1983 action [here, PGE has] exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " West v. Atkins, 487 U.S. 42, 49 (1988) quoting United States v. Classic, 313 U.S. 299, 326 (1941). This inquiry is fact-specific. Groman, 47 F.3d at 638.

A private action is not converted into one under color of state law simply by some tenuous connection to state action. Id. The issue is not whether the state was involved in some way in the relevant events, but whether the action taken can be fairly attributed to the state itself. Id. The Supreme Court has instructed courts to inquire "whether the State provided a mantel of authority that enhanced the power of the harm-causing individual actor." NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).

To support its argument that PGE is acting under color of state law, Grant Township theorizes:

> in the instant case, depriving Grant residents of their constitutional right of local community self-government requires many hands—the hands of the state in the legal creation of the Plaintiff company, the action of the state in its permit and regulatory capacity to enable PGE to construct and operate its proposed frack wastewater injection well, and the hands of state and federal government to bestow certain legal and constitutional powers and rights onto the Plaintiff. Indeed, the instant action really was filed at the end of a long chain of state and federal events without which the action would not have been possible. So, the instant action is merely one of enforcement—PGE's enforcement of pre-existing rights and protections that have been created and recognized by both state and federal authority.
>
> Thus, in addition to PGE being a creature of the state—a company whose form and very existence resulted from state action—the state has enabled and protected PGE to do what it seeks to do in the instant matter. That "overt" and "significant" state action thereby transforms what the law has generally treated as a "private" business entity into one almost completely dependent upon state power and authority to carry out projects harmful to the community in which it seeks to operate. For all intents and purposes, including for liability pursuant to § 1983, PGE therefore acts under the "color of state law" when it seeks to enforce its corporate constitutional "rights" against the people of Grant Township.

***6** ECF No. 158, pages 23-24. The specific points of this argument require some precise extraction. Distilled down, Grant Township argues that PGE is a state actor because: 1) the state created it through its incorporation law; 2) the state granted permits to the company and regulates the construction and operations of its proposed injection well; and 3) the state and federal governments have given the corporation certain unnamed legal and constitutional rights. These arguments are insufficient to deem PGE a state actor.

First, even if there was evidence that PGE was incorporated under Pennsylvania law, such an incorporation does not transform PGE into a state actor. Doug Grant, Inc. v. Great Bay Casino Corp., 232 F.3d 173, 189 (3d Cir. 2000) (mere fact of incorporation does not transform the entity into a state actor). Second, it is well settled that a private corporation is not a state actor simply because it is subject to state regulation. Blum v. Yaretsky, 457 U.S. 991, 1004, 1011 (1982) ("[The] mere fact that a business is subject to state regulation does not by itself convert its action into that of the State"); Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974); Rendell-Baker, 457 U.S. at 841 (finding that state regulation, no matter how extensive, does not make an organization's actions state actions); Doug Grant, 232 F.3d at 173 (regulation and licensing of casino activities did not transform casinos into state actors for purposes of § 1983); Bethel v. Jendoco Constr. Corp., 570 F.2d 1168 (3d Cir. 1978) (the fact that construction companies were protected and regulated as "legal entities" of the State was insufficient to bring the conduct of these

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companies within the purview of § 1983, even if these companies received a portion of their income from projects financed, in whole or in part, by state governmental agencies). See also White v. St. Joseph's Hosp., 369 Fed.Appx. 225, 226 (2d Cir. 2010) (licensing by the state alone does not render the licensee a state actor); Gipson v. Rosenberg, 797 F.2d 224, 225 (5th Cir. 1986), cert. denied, 481 U.S. 1007 (1987) (business does not become a state actor because it is granted a license by the state).

Third, Grant Township alleges that PGE is a state actor because both the federal and state governments have given certain unidentified legal and constitutional powers and rights to the corporation. The Township offers no specifics here, failing to explain which powers and rights it sees as establishing state action. The determination whether a private entity like PGE qualifies as a state actor "hinges on whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." Glunk v. Noone, 186 F.Supp.3d 453, 460 (E.D. Pa. 2016) citing Kach v. Hose, 589 F.3d 626, 646 (3d Cir. 2009). Grant Township's nearly bald assertions that unspecified laws or enactments by the Commonwealth of Pennsylvania cannot establish this close nexus and, therefore, are insufficient to establish PGE as a state actor.

Thus, all of Grant Township's arguments in favor of state action are contrary to established law. See Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 277 (3d Cir. 1999), quoting Lugar, 457 U.S. at 937 (noting that "[w]ithout a limit such as this [the precedent on acting under color of state law], private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."). Since the Township offers no other basis on which this Court could conclude that PGE acted under color of state law, the Township's § 1983 claim for a violation of its "rights to local self-government" fails as a matter of law.[4]

***7** Accordingly, Grant Township's motion for summary judgment will be denied and PGE's motion for summary judgment will be granted on this counterclaim. Such a judgment is appropriate "as a matter of law" when the non-moving party has failed to make an adequate showing on an essential element of his or her case, as to which he or she has the burden of proof. See Celotex Corp., 477 U.S. at 322-23.

V. PGE's Motion for Summary Judgment

The Court now takes up PGE's motion for summary judgment on all six of its federal constitutional claims and its request for a trial on damages.

A. Comprehensive Arguments in opposition to PGE's motion for summary judgment

In opposition to PGE's motion for summary judgment, Grant Township advances two overarching arguments applicable to all of PGE's federal constitutional claims. First, Grant Township argues that because this Court has already invalidated certain provisions of the Community Bill of Rights Ordinance, no relief on PGE's federal constitutional claims can be ordered, rendering them moot. Second, Grant Township argues that PGE has failed to establish a direct causal connection, which is necessary for a successful claim of municipal liability.

This Court will address these comprehensive arguments first, before turning to each of Plaintiff's individual constitutional claims.

Mootness

Grant Township's comprehensive mootness argument is twofold. First, the Township maintains that the only remedy available for PGE's constitutional claims is declaratory and injunctive relief and, because the Court already afforded PGE declaratory and injunctive relief on its state law claims, PGE's federal constitutional claims must be moot. Second, Grant Township argues that PGE's constitutional claims are moot because PGE has not stated a viable claim for damages.

Article III of the Constitution mandates that "federal courts enforce the case-or-controversy requirement through the several justiciability doctrines that cluster about Article III." Coastal Outdoor Advertising Group, LLC v. Township of Union, New Jersey, 676 F.Supp.2d 337, 344 (D.N.J. 2009) quoting Allen v. Wright, 468 U.S. 737, 750 (1984). These justiciability doctrines "include standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions." Id. quoting Toll Brothers, Inc. v. Township of Readington, 555 F.3d 131, 137 (3d Cir. 2009).

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"Mootness 'ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit.... [A] court will not dismiss a case as moot, even if the nature of the injury changes during the lawsuit, if secondary or collateral injuries survive after resolution of the primary injury." Freedom from Religion Foundation, Inc. v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 476 (3d Cir. 2016) (internal citation omitted). "The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection, 833 F.3d 360, 374 (3d Cir. Aug.8, 2016) (internal citation omitted). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party." Decker v. Northwest Environmental Defense Center, —— U.S. ——, ——, 133 S.Ct. 1326 (2016) quoting Knox v. Service Employees Int'l, 567 U.S. 298, ——, 132 S.Ct. 2277, 2287 (2012).

***8** So then, as a practical matter, this Court must review the relief requested in PGE's Amended Complaint to determine if any relief remains available to PGE. See CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 623 (3d Cir. 2013). In its Amended Complaint, PGE seeks the following relief on its constitutional claims:

— A declaration that the Community Bill of Rights Ordinance is unconstitutional under the Supremacy Clause, the First and Fourteenth Amendments, and the Contract Clause of the United States Constitution;

— A declaration that the Community Bill of Rights Ordinance violates PGE's substantive and procedural due process rights;

— An injunction prohibiting Grant Township from enforcing the Community Bill of Rights Ordinance;

— The award of compensatory and consequential damages pursuant to 42 U.S.C. § 1983, including its legal rights taken as a result of the Community Bill of Rights Ordinance.

ECF No. 5, pages 20-22.

In it Amended Complaint, PGE also seeks multiple types of additional relief on its state law claims. By virtue of this Court's prior ruling invalidating six provisions of the Ordinance on various state law grounds, PGE has already achieved **some** of the declaratory and injunctive relief it sought in its Amended Complaint. However, PGE's remaining requests for relief (including the nominal damages[5] available for the alleged infringement of constitutional rights, as well as any compensatory and consequential damages flowing therefrom[6]) remain viable on PGE's federal constitutional claims despite this Court's prior ruling. PGE may therefore pursue the remainder of the relief it seeks on its § 1983 claims. See Freedom from Religion, 832 F.3d at 476 (implying that a request for nominal damages alone suffices to create standing (and avoid mootness) to seek backward-looking relief); County Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 168 (3d Cir. 2006) ("[T]he remedies for a successful substantive due process or equal protection claim as to the face of a zoning ordinance are the invalidation of the regulation and actual damages."); Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 535 (3d Cir. 1996) (In an as-applied challenge under the Petition Clause of the First Amendment, court held that "...§ 1983 actions, when successful, do more than compensate injured plaintiffs: they serve the important public purpose of exposing and deterring official misconduct, and thereby protecting the rights of the public at large.").

Accordingly, PGE's remaining requests for relief are not automatically moot.[7]

Lack of Causal Connection

***9** Next, Grant Township argues that PGE has failed to establish evidence of a "direct causal link between the Ordinance and the alleged violation of PGE's constitutional rights and its supposed damages." ECF No. 186, ¶ 17.

Municipalities are subject to § 1983 liability only where the municipality itself causes a constitutional violation. Monell v. Dep't of Soc. Serv., 436 U.S. 658, 691 (1978).[8] In addition to demonstrating evidence of an unlawful policy, "[a] plaintiff bears the additional burden of proving that the municipal practice was the proximate cause of the injuries suffered." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) citing Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984). The requisite causation is established where a plaintiff demonstrates a "plausible nexus" or "affirmative link" between the municipality's custom and the specific deprivation of constitutional rights at issue. Id. citing Estate of Bailey by Pare v. County of York, 768 F.2d 503, 507 (3d

Cir. 1985). However, plaintiffs "need not demonstrate that their injuries were the *direct* result" of the ordinance to satisfy the causation requirement. Id. at 851 (emphasis in original). So long as the "causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." Id. at 851, citing Black v. Stephens, 662 F.2d 181, 190-91 (3d Cir. 1981). See also Watson v. Abington Tp., 478 F.3d 144, 157 (3d Cir. 2007).

In the Amended Complaint, PGE claims that as a direct and proximate cause of Grant Township's enactment of the Community Bill of Rights Ordinance, "PGE will be precluded from operating the Yanity Well for legally permissible storage and injection purposes, along with the seven (7) conventional hydrocarbon wells, and will have to shut in the wells and seek more costly alternatives for managing produced fluids. PGE has suffered and will continue to suffer injury and damages if the Community Bill of Rights Ordinance is deemed valid and enforceable." ECF No. 5, pages 6-7.

Grant Township argues:

> There is no causal link between the Ordinance and the alleged violation of PGE's constitutional rights and its supposed damages. The Ordinance was never enforced against PGE. It was PGE's lack of a state permit and failure to satisfy the conditions of its EPA permit—not the Ordinance—that prevented PGE from using the Yanity Well to deposit fracking waste.... PGE claims that it is entitled to damages for Grant Township's alleged constitutional violations based on the idea that it could have been injecting fracking waste into the Yanity Well from January, 2015 through March 2015. Yet, the undisputed facts show that PGE could not have done so without violating its EPA permit because by March 2015 it had still not satisfied the mechanical integrity test.

***10** ECF No. 186, page 17.

In reply, Plaintiff states that it did not operate the injection well because it did not want to open itself to liability by violating the Community Bill of Rights Ordinance. In support of its position, PGE points to the affidavit of James E. Ashbaugh, P.E.,[9] the Vice President of Engineering for PGE, who testifies that:

> ¶ 3 Even when it possessed all necessary permits, PGE did not take action to operate the Yanity Well as an injection well because of the presence of Grant Township's Community Bill of Rights Ordinance. Until the Ordinance was successfully challenged, to operate the Yanity Well as an injection well would have resulted in a violation of the Ordinance. PGE did not intentionally violate or ignore the Ordinance. Instead, PGE filed this lawsuit to seek to have the Ordinance invalidated. Under the circumstances of the passage of the Ordinance, PGE believed that seeking court intervention to invalidate the Ordinance was the most appropriate, reasonable and responsible action, rather than to intentionally violate or ignore a government ordinance which had yet to be deemed invalid. PGE sought to have a prompt decision on its request to invalidate the Ordinance, filing two requests for injunctive relief, and has attempted to move this matter expeditiously so that PGE could minimize the harm and damage caused by the Ordinance. Unfortunately, Grant Township's Ordinance did cause PGE significant harm.
>
> ¶ 6—PGE had its DEP and EPA permits from October 22, 2014 until March 12, 2015. Had the Ordinance not been in [sic] enacted, and based on my experience and the actual experience with the Yanity Well in January 2016, PGE would have been able to and would have performed the mechanical integrity test soon after October 22, 2014, would have obtained a prompt and positive result from that test, would have received prompt approval from EPA for that test and would have been in a position to begin to inject material into the Yanity Well by January 2015.
>
> ¶ 7—It was the Ordinance and only the Ordinance that prevented PGE from injecting into the Yanity Well from January 2015 until March 12, 2015. Except for the Ordinance, the mechanical integrity test would have been performed and passed and PGE would have been using the Yanity Well for injection by January 2015. Because of the Ordinance, PGE suffered damage as a result of not being able to use the Yanity Well from January 2015 until March 12, 2015.

ECF No. 189-1.

Ashbaugh's affidavit unequivocally states that PGE did not operate its injection well on the Yanity Farm because it did not want to intentionally run afoul of the Community Bill of Rights Ordinance. PGE has, through this affidavit, brought sufficient evidence to show that the Township's policy, as expressed in the Community Bill of Rights Ordinance, merits a finding of municipal liability for a violation of constitutional rights. While Ashbaugh avers that PGE had the necessary state permits to operate the Yanity Well, he conclusively states that the reason PGE did not green-light the use of this well was because it did not want to violate the Community Bill

of Rights Ordinance. Further, Ashbaugh testifies that PGE suffered injuries and damages from not being able to operate this well. This connection between the Township's policy and PGE's injuries is far from tenuous. A reasonable jury, based on these averments, could find in favor of PGE with respect to its claims asserted against the Township. For that reason, the Court rejects the Township's argument that in this regard.

B. The Supremacy Clause Challenge

***11** Plaintiff moves for summary judgment on its claim under the Supremacy Clause. Plaintiff claims that § 5(a) of the Community Bill of Rights Ordinance purports to divest corporations, such as PGE, of virtually all of its constitutional rights. Plaintiff alleges that the Community Bill of Rights Ordinance conflicts with the United States Constitution in that corporations are considered persons for purposes of the First Amendment and Fourteenth Amendments and the Contract Clause. ECF No. 5, ¶¶ 31-35. Plaintiff further alleges that the Community Bill of Rights Ordinance strips corporations of 1) their status as persons under the law; 2) their right to assert state or federal preemptive laws in an attempt to overturn the Community Bill of Rights Ordinance; and 3) their power to assert that Grant Township lacks the authority to adopt the Community Bill of Rights Ordinance. Id. at ¶ 32.

In Armstrong v. Exceptional Child Ctr., Inc., the Supreme Court held that "[T]he Supremacy Clause ... does not create a cause of action," is not the "source of any federal rights," but instead "instructs courts what to do when state and federal law clash." —— U.S. ——, ——, 135 S.Ct. 1378, 1383 (2015). The Armstrong Court further explained, "If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law ... a limitation unheard-of with regard to state legislatures." Id. at ___, 1384. Therefore, since Plaintiff is a private actor, Plaintiff cannot seek to enforce or otherwise bring a cause of action under the Supremacy Clause. See Davis v. Shah, 821 F.3d 231, 246 (2d Cir. 2016) (holding that Armstrong forecloses plaintiff's claim of a private right of action under the Supremacy Clause). See also Alliance v. Alt. Holistic Healing, LLC, 2016 WL 223815, at *2 (D. Colo. 2016) (agreeing that there is no private right of action under the Supremacy Clause and explaining that parties cannot use it as a basis for equitable relief); Tohono O'odham Nation v. Ducey, 130 F.Supp.3d 1301, 1315 (D. Ariz. 2015) (explaining that the Tohono O'odham Indian Nation cannot seek relief under the Supremacy Clause since no private cause of action exists); Mercer County Children's Medical Daycare, LLC v. O'Dowd, 2015 WL 5335590, at * 2 (D.N.J. 2015) ("The Supreme Court's analysis of the Supremacy Clause [in Armstrong] appears standalone, not tied to or in any way affected by its analysis of § 30(A).").

Accordingly, Plaintiff's motion for summary judgment will be denied and the Supremacy Clause claim will be dismissed.

C. The Equal Protection Challenge

At Count II, PGE's Equal Protection claim under § 1983 is based on assertions that the Ordinance discriminates against corporations because it applies only to corporations and governments, and not to individuals. Plaintiff PGE also alleges that it has been singled out as a "class of one" for disparate treatment by Grant Township. ECF No. 5, at ¶¶ 37-46. Plaintiff's brief in support of its motion for summary judgment focuses on the general part of this equal protection claim and not on the "class of one" allegation, so that assertion will not be analyzed.[10]

Grant Township argues that PGE's equal protection challenge fails for two reasons: 1) companies and individuals are not similarly situated, and 2) the Ordinance is rationally related to a legitimate government interest.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) citing Plyler v. Doe, 457 U.S. 202, 216 (1982).[11]

***12** First, the court must examine whether corporations are similarly situated to individuals who are not affected by the Community Bill of Rights Ordinance's prohibitions. If corporations and individuals are "similarly situated," then Grant Township "must justify its different treatment of the two," by demonstrating that the Community Bill of Rights Ordinance is rationally related to a legitimate governmental purpose. County Concrete Corp v. Town of Roxbury, 442 F.3d 159, 171 (3d Cir. 2006). Finally, PGE bears the burden "of negating all conceivable rational justifications for the allegedly discriminatory action or statute." RHJ Medical Center, Inc. v. City of Dubois, 2012 WL 12859837, at *19

(W.D. Pa. Aug. 17, 2012) quoting New Direction Treatment Services v. City of Reading, 490 F.3d 293, 302 (3d Cir. 2007).

"Persons are 'similarly situated' for purposes of an equal protection claim when 'they are alike in *all* relevant aspects.' " Castaneira v. Potteiger, 621 Fed.Appx. 116, 121 (3d Cir. 2015) quoting Startzell v. City of Phila, 533 F.3d 183, 203 (3d Cir. 2008) (emphasis in original). In the Third Circuit, "a plaintiff need not show that comparators are identical in all relevant aspects but rather that they share pertinent similarities." Tucker Indus. Liquid Coatings, Inc. v. Borough of E. Berlin, 85 F.Supp.3d 803, 810 (M.D. Pa. 2015), aff'd sub nom., 2016 WL 4136894 (3d Cir. 2016) citing Borrell v. Bloomsburg Univ., 955 F.Supp.2d 390, 405 (M.D. Pa. 2013).

PGE maintains that individuals and corporations are similarly situated. This Court agrees As support for its argument, PGE points out that the federal regulations on "Underground Injection Control" wells apply equally to and do not discriminate based on corporate or individual status. The regulations apply to "persons" who are defined as "an individual, association, partnership, corporation, municipality, State, Federal or Tribal agency, or an agency or employee thereof." 40 C.F.R. § 144.3.

More generally, there is a large body of case law holding that corporations and individuals are similarly situated with respect to the protections afforded by the United States Constitution. See Monell v. Dep't of Social Services, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."). See also Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 (1985) ("It is well established that a corporation is a 'person' within the meanings of the Fourteenth Amendment."); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (applying Due Process Clause of the Fourteenth Amendment) ("Corporations can invoke the benefits of provisions of the Constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation affecting it.").

So then, since corporations and individuals are similarly situated here, Grant Township must show that the disparate treatment of individuals and corporations is rationally related to a legitimate governmental purpose. Land use ordinances will generally survive an equal protection challenge "if the law is 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.' " Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 133 (3d Cir. 2002) quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). However, land use regulations still must possess a legitimate interest in promoting public health, safety, morals, and general welfare in order to pass scrutiny. Id. citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). This review is "highly deferential" and "very forgiving." Id. at 134-5. Moreover, a "federal court sitting in judgment of a local municipality's legislative actions owes the municipality a degree of deference in its determination of local needs and preferences." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981). There is a "strong presumption of validity" when examining an ordinance under rational basis review, and the onus is on the party challenging the validity of the legislative action to establish that the statute is unconstitutional. Mon Rail Terminal, Inc. v. Borough of Dunlevy, 2016 WL 7187841, at *7 (W.D. Pa. Dec. 12, 2016) quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993). "Local legislative actions enjoy a 'presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.' " Deraffelle v. City of Williamsport, 2015 WL 5781409, at *15 (M.D. Pa. 2015) citing Hodel v. Indiana, 452 U.S. 314, 331-32 (1981).

***13** As the basis for its disparate treatment of individuals and corporations, Grant Township advances three arguments to support its legitimate governmental purpose. First, only corporations and companies have historically applied for EPA permits. As a corollary, the Township also claims that injection is a dangerous activity and no individual would ever undertake it. Third, Grant Township cites to the Ordinance itself as evidence of the Township's purpose.

Grant Township maintains that it "was a near-certainty that only corporations ... would potentially engage in the depositing of fracking waste," pointing out that only companies and corporations have historically applied for EPA permits to operate injection wells in Pennsylvania. As evidence in support of this assertion, Grant Township points to a document entitled "EPA's Underground Injection Well Control Program Overview." ECF No. 186, page 21; ECF No. 185-1. In an affidavit by Grant Township's counsel, reference is made to the document as "EPA's Underground Injection Control Program Overview, Solid Waste Advisory Committee Meeting." ECF No. 185-1, page 8 ¶ 8. The discrepancy in the title of this document aside, the document appears to be a Power Point presentation by **Pennsylvania DEP's** Oil and Gas Management division that purports to provide an overview of the **U.S. E.P.A.'s** UIC program.

Despite its citation by counsel, the document provides no clarity regarding corporate versus individual applications for permits in Pennsylvania. Such statistics could and should have been discovered and presented to the Court to support this contention on summary judgment. Unclear, or vague assumptions from a Power Point presentation do not qualify as evidence. This defense, therefore, fails for lack of evidentiary support.

Next, Grant Township states "it is hard to fathom an instance where an individual, without being shielded from liability by the corporate form, would ever engage in such a dangerous activity." ECF No. 186, page 22. Unlike its previous argument, Grant Township does not even attempt to provide support for this contention. The Township's uncorroborated supposition requires no further legal analysis because "unsubstantiated arguments made in briefs are not considered evidence of asserted facts." Hill v. Samuels, 2016 WL 1126499, at *2 (M.D. Pa. 2016) quoting Versage, 984 F.2d at 1370.

Lastly, Grant Township calls the Court's attention to the text of the Ordinance itself as evidence of its legitimate government purpose. ECF No. 186, pages 22-23 n.7. Grant Township claims that the people of the Township have identified a "multitude of reasons" for the adoption of the Community Bill of Rights Ordinance:

> — The Preamble reads that "this community finds that the depositing of waste from oil and gas extraction is economically and environmentally unsustainable, in that it damages property values and the natural environment, and places the health of residents at risk."
>
> — The Ordinance states that the depositing of oil and gas waste threatened the residents' rights to clean air, water, and soil, threatened residents' 'rural quality of life,' and threatened the ability of ecosystems within the Township to 'exist, flourish, and naturally evolve.'

See ECF No. 5-1.

While the goals of the Ordinance are legitimate, there is no evidence of a rational relationship between the disparate treatment of corporations and the stated goals of the Ordinance. If these goals can only be achieved through the elimination of fracking, it makes no constitutional sense to allow the same activity by individuals.

***14** Accordingly, the motion for summary judgment will be granted on this claim.

D. The Petition Clause Challenge

At Count III, Plaintiff alleges that the Ordinance suppressed PGE's right to make a complaint to, or seek the assistance of, the government for the redress of grievances in violation of PGE's First Amendment right to do so. ECF No. 5, ¶¶ 48-51. This claim specifically challenges § 5(a) and § 7 of the Community Bill of Rights Ordinance.[12] The Community Bill of Rights Ordinance's § 5(a) provides: that corporations that violate or seek to violate the Community Bill of Rights Ordinance "shall not be deemed to be 'persons,' nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. 'Rights, privileges, powers, or protections, shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the municipality lack the authority to adopt this Ordinance." ECF No. 5-1. Meanwhile, § 7 provides that "use of the courts ... in attempts to overturn the provisions of the Ordinance shall require community meetings focused on changes to local governance that would secure the right of the people to local self-government." Id.

In its motion for summary judgment, PGE argues:

> The Ordinance was designed to and does divest corporations, such as PGE, of their constitutional right to petition the government for redress of grievances in that it strips corporations of: (1) their status as 'persons' under the law; (2) their right to assert state or federal preemptive laws in an attempt to overturn the Ordinance; and (3) their power to assert that Grant Township lacks the authority to adopt the Ordinance. (SOF ¶ 19). As such, the Ordinance is aimed at suppressing PGE's fundamental right to lodge a complaint, or seek the assistance of the Court, for the redress of its grievances related to the Ordinance.

ECF No. 155, pages 13-14.

In opposition, Grant Township states that "the Ordinance did not prevent PGE from using this Court to nullify parts of the Ordinance, or from aggressively litigating this case" as evidenced by PGE's initiation and prosecution of the instant action. ECF No. 186, page 24. Grant Township's argument misses the mark. While the Ordinance did not actually prevent PGE from filing the instant action, the Ordinance attempted to do so. It is that attempt that runs afoul of the Constitution.

The First Amendment protects "the right of the people ... to petition the Government for a redress of grievances." Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 382 (2011). The threshold question in a right-to-petition case ... is ... whether the plaintiff's conduct deserves constitutional protection." EJS Properties, LLC v. City of Toledo, 698 F.3d 845, 863 (6th Cir. 2012) quoting Holzemer v. City of Memphis, 621 F.3d 512, 520 (6th Cir. 2010). The petition clause protects a citizen's right of access to governmental mechanisms for the redress of grievances, including the right of access to the courts for that purpose. See Bieregu v. Reno, 59 F.3d 1445, 1453 (3d Cir. 1995); Citizens United v. Federal Election Comm'n, 558 U.S. 310, 342 (2010) ("... First Amendment protection extends to corporations.").

***15** By limiting access to courts only through approved "community meetings," the Community Bill of Rights Ordinance shuts the courthouse door to litigants, which it cannot constitutionally do. Therefore, as a matter of law, §§ 5(a) and 7 of the Community Bill of Rights Ordinance violate the Petition Clause of the First Amendment. Summary judgment will be granted in favor of PGE.

E. The Substantive Due Process Challenge

The Due Process Clause of the Fourteenth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. 14 § 1. Although the face of the provision speaks only to the adequacy of procedures, the Supreme Court has held that the Due Process Clause contains a substantive, as well as a procedural, component. Nicholas v. Pennsylvania State University, 227 F.3d 133, 138-39 (3d Cir. 2000) citing Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 846-47 (1992).

Substantive due process review is no straightforward matter. As the Third Circuit explained in Nicholas, substantive due process "is an area of law 'famous for controversy, and not known for its simplicity.' " Id. at 139, quoting DeBlasio v. Zoning Bd. Of Adjustment, 53 F.3d 592, 598 (3d Cir. 1995). Although courts have attempted to define a "test," a bright line review has not been possible because of the very different nature of the underlying facts and rights involved in each case. "Each new claim to [substantive due process] protection must be considered against a background of constitutional purposes, as they have been rationally perceived and historically developed." Id. at 140, quoting Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 229 *1985) (Powell, J., concurring).

The Nicholas Court identified two separate threads woven into the "fabric of substantive due process" and then attempted to "untwist this tangled skein." Id. at 139. The first thread of substantive due process arises when a plaintiff challenges the validity of a legislative act, while the second thread arises out of non-legislative action. Id. The legislative/non-legislative "distinction is significant because it determines the appropriate standard of review for substantive due process challenges." RHJ Medical Center, Inc. v. City of DuBois, 754 F.Supp.2d 723, 767 (W.D. Pa. 2010). Each separate thread requires a separate analysis, although many courts and parties conflate the two and their corresponding levels of review. Careful attention must be paid.

Here, the challenged Ordinance is a legislative act. Id. See also County Concrete Corp., 442 F.3d at 169. So then, the Ordinance is properly analyzed under the first thread of substantive due process. In this first thread, a plaintiff does not need to establish a "protected property interest to which the Fourteenth Amendment's due process protection applies' as this standard only applies in a 'non-legislative substantive due process claim.' " RHJ Medical Center, 754 F.Supp.2d at 768-69, citing Nicholas, 227 F.3d at 139-40 and County Concrete Corp, 442 F.3d at 169. ("For Plaintiff's facial substantive due process challenge to the Ordinance to be successful, [it] must 'allege facts that would support a finding of arbitrary or irrational legislative action ...' ").

PGE suggests that a strict scrutiny test is appropriate by reason of the fundamental interests affected by the Ordinance; however, the Third Circuit has reserved a stricter review for non-legislative, or executive, action and the "shocks the conscience" review for as-applied legislation, not facial attacks. County Concrete Corp., 442 F.3 at 169. Instead, when reviewing **legislative** acts on their **face,** the courts have looked for arbitrary or irrational legislation that impermissibly goes beyond serving a legitimate state interest. Id. at 169-70.

***16** Even under this "lesser" standard, the Community Bill of Rights Ordinance fails to survive a substantive due process review. The language of the Ordinance itself runs afoul of constitutional protections afforded corporations such as PGE

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and attempts to immunize Grant Township from clashes with current federal and state law:

— "Whereas, private corporations engaged in depositing waste from oil and gas extraction [such as PGE] are wrongly recognized by federal and state governments as having more 'rights' than the people who live in our community, and thus, recognition of corporate 'rights' is a denial of the rights of the people of Grant Township." [Ordinance Preamble].

— "Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be 'persons,' nor possess any other legal rights, privileges, powers or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. 'Rights, privileges, powers, or protections' shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the municipality lack the authority to adopt this Ordinance." [Ordinance, at § 5(a)].

— "No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance ... shall be deemed valid within Grant Township." [Ordinance, at § 3(b)].

— "All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that the [sic] do not violate the rights or prohibitions of this Ordinance." [Ordinance, at § 5(b)].

— "All rights delineated and secured by this Ordinance are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. The rights secured by this Ordinance shall only be enforceable against actions specifically prohibited by this Ordinance." [Ordinance, at § 2(g)].

— "Any corporation or government that violated any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation." [Ordinance, at § 4(a)].

— "Use of the courts or the Pennsylvania legislature in attempts to overturn the provisions of this Ordinance shall require community meetings focused on changes to local governance that would secure the right of the people to local self-government." [Ordinance, at § 7].

ECF No. 5-1.

In addition to the words of the Ordinance, PGE points to other statements of Grant Township or its representatives in the record that reinforce the text of the Ordinance and explain the Township's effort to elevate "inalienable" rights over those provided by federal and state constitutions and law:

— "Community lawmaking as the legitimate exercise of self-government by people **where they live** has generated mostly critical, occasionally derisive treatment from legislators, jurists, and commentators since the time of the founding. Consistent with this attitude, American jurisprudence has developed legal doctrines to infringe the right of local, community self-government, both by denying it outright, and by severely restricting local governmental power allowed for communities by state law. Such doctrines include corporate constitutional 'rights,' Dillon's Rule, and preemption." Grant Township's Brief in Support of its Motion For Summary Judgment, ECF No. 53, p. 30 (emphasis original).

***17** — In "the past 150 years, the judiciary has 'found' corporations within the U.S. Constitution and bestowed constitutional rights upon them." ECF No. 53, p. 33. "By enacting the Community Bill of Rights Ordinance, the people of Grant Township decided that the existing municipal system of law—constrained by precisely the same legal doctrines asserted against the Township by PGE in this action—was failing to provide the most basic constitutional guarantees of American governments." ECF No. 53, pp. 44-45.

— "A Community Bill of Rights takes nothing for granted except the supremacy of inalienable rights over other laws, and the necessity for challenging legal obstacles to the real-time enjoyment of those rights ... Each CBOR calls for constitutional change at the state and national level that will recognize and enforce the right to community local self-government, free from state preemption and corporate interference when local laws are enacted to protect community rights." Exhibit to Plaintiff's Statement of Facts, ECF No. 156-1, Exhibit E.

These record facts, among others, demonstrate irrational and arbitrary behavior, which acknowledges language contrary to

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existing law and takes the purpose outside of the original point of the Ordinance.

In response, Grant Township makes three arguments: 1) that because the Township had legitimate reasons to pass the Ordinance, PGE cannot show arbitrariness and irrationality; 2) the Ordinance did not deprive PGE of a protected property interest because it had no such interest in using the Yanity Well to inject fracking waste; and 3) even assuming that PGE had a protected property interest, the Ordinance was never applied to it to deprive it of that interest. ECF No. 186, pages 25-27. Each of these arguments fails based on the analysis above.

First, that Grant Township had legitimate reasons to pass **an** ordinance is beside the point. The substantive due process review tests the arbitrariness and irrationality of the result and the efforts of the Ordinance beyond any alleged legitimate reason. Here, a starting point of seeking a clean environment spun out of control into an Ordinance that does much more, including stripping corporations of their federal constitutional rights.

Second, the text of the permit itself[13], which states that it does not convey property rights, does not support an argument that PGE did not have a right to inject waste in the Yanity Well. One point does not follow the other. More importantly, it is not a necessary point in a successful substantive due process claim.

Finally, Grant Township's argument that the Community Bill of Rights Ordinance did not actually deprive PGE of any property interest because the Ordinance was never applied to it simply misses the facial versus as-applied attack on the Ordinance. It is the former that is brought by PGE.

Accordingly, PGE's motion for summary judgment will be granted on this claim.

F. The Procedural Due Process Challenge

At Count V, Plaintiff alleges that the Ordinance's prohibition of underground injection and storage of oil and gas materials "significantly and materially devalues PGE's legal rights and interests related to and/or held within Grant Township, including PGE's UIC permit" without any due process in violation of the procedural due process clause of the Fourteenth Amendment under § 1983. ECF No. 5, ¶¶ 58-62.

In order to trigger the protections of the procedural aspects of the Due Process Clause, a plaintiff must demonstrate a property or liberty interest. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). See also Mathews v. Eldridge, 425 U.S. 319 (1976); Mudric v. Attorney Gen. of U.S., 469 F.3d 94, 98 (3d Cir. 2006) ("It is axiomatic that a cognizable liberty or property interest must exist in the first instance for a procedural due process claim to lie.").[14]

***18** The Fourteenth Amendment's "procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." Bd. of Regents v. Roth, 408 U.S. 564, 576 (1972). For purposes of procedural due process, property interests are "... not created by the Constitution." Id. at 577. Instead, these property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [She] must have more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement to it." Id.

In support of its motion for summary judgment, PGE argues that it has a property interest in: 1) its Underground Injection Control ("UIC") permit[15] and 2) its leases with landowners in Grant Township. As a property interest is an element of its procedural due process claim, it is PGE's burden to produce evidence of that requisite property interest. PGE has not produced either the UIC permit or any leases with landowners within Grant Township in support of its motion for summary judgment. However, the EPA permit for the Yanity Well has been produced by Grant Township as part of the record and therefore, this will be considered by this Court. See Fed.R.Civ.P. 56(c)(3) ("[T]he court need consider only the cited materials but it may consider other materials in the record.").

The UIC Permit

The UIC permit is issued by the U.S. Environmental Protection Agency and serves as an "Authorization to Operate Class II-D Injection Wells" in compliance with the provisions of the Safe Drinking Water Act and its corresponding regulations. ECF No. 170-2. The federal regulations indicate that neither the permit itself or the issuance of the permit

"convey any property rights of any sort, or any exclusive privilege." 40 C.F.R. § 144.51(g); 40 C.F.R. § 144.35(b).

PGE points to nothing in the permit itself or the law regulating such permits that automatically creates a legitimate claim of entitlement sufficient to demonstrate a property interest. The face of the permit itself spells out that it "does not convey property rights or mineral rights of any sort or any exclusive privilege." ECF No. 170-2. Because PGE has not satisfied its burden to prove the required property interest, the motion for summary judgment will be denied.

G. The Contract Clause Challenge

At Count VI, Plaintiff alleges that the Ordinance violates the Contract Clause pursuant to § 1983 based upon PGE's being unable to realize the benefits of the preexisting contracts (leases) it obtained with the owners of the subsurface estates at great cost to PGE. ECF No. 5, ¶¶ 64-67.

Article I, section 10 of the United States Constitution provides, in relevant part: "No State shall pass any ... Law impairing the Obligation of Contracts." U.S. CONST. ART. I, § 10. "The purpose of the Contract Clause is to protect the legitimate expectations that arise from ... contractual relationships from unreasonable legislative interference." Transport Workers Union of America, Local 290 By and Through Fabio v. Southeastern Pa. Transp. Auth., 145 F.3d 619, 622 (3d Cir. 1998). Accordingly, "[i]n order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the state ..." New Orleans Waterworks Co. v. La. Sugar Ref. Co., 125 U.S. 18, 30 (1888). "Acts of state legislation include ... ordinances of municipal corporations that constitute 'an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality.' " Price v. Pa. Prop & Cas. Ins. Co. Ass'n, 158 F.Supp.2d 547, 551 (E.D. Pa. 2001) quoting New Orleans Waterworks, 125 U.S. at 30-31.

***19** To prove a violation of the Contract Clause of Article I of the U.S. Constitution, a plaintiff must demonstrate that a "change in state law has 'operated as a substantial impairment of a contractual relationship.' " Transport Workers Union., 145 F.3d at 621, quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978). The court must first engage in three threshold inquiries to establish a violation: "(1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial." Id.

Summary judgment will be denied on this claim as PGE has provided no evidence of any contractual relationship. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 504 (1987) ("In assessing the validity of petitioners' Contract Clause claim in this case, we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment."). Without providing the contract that bases its claim, an appropriate review is impossible.

An appropriate order will be entered.

All Citations

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Footnotes

1 This Court held that Sections 3(a) and (b), 4(b) and (c), and 5(a) and (b) of the Community Bill of Rights Ordinance were invalid as they were preempted by various state laws. Grant Township was enjoined from enforcing these sections of the ordinance. ECF No. 114. Specifically, this Court held that: §§ 3(a) and (b) were enacted without legal authority in violation of the Second Class Township Code and were exclusionary in violation of Pennsylvania law; §§ 4(b) and (c) were enacted without legislative authority in violation of the Second Class Township Code; § 5(a) was preempted by the Limited Liability Companies Law; and §§ 5(a) and (b) were preempted by the Second Class Township Code. Id.

2 This Court previously permitted the Pennsylvania Independent Oil and Gas Association ("PIOGA") to intervene as a plaintiff in this action. PIOGA filed a motion to dismiss the Township's counterclaim [ECF No. 235], which remains pending and will be resolved by separate order. Additionally, PIOGA has filed a brief in opposition to Grant Township's motion for summary judgment on its counterclaim. ECF No. 182. Within that brief, PIOGA requests partial summary judgment. Because such a request within an opposition brief is not contemplated by or consistent with either the Local or Federal Rules of Civil Procedure, PIOGA's request for partial summary judgment is dismissed without prejudice. See also ECF

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No. 223, n.2. However, this Court has reviewed and considered the arguments made by PIOGA in opposition to Grant Township's motion for summary judgment.

3 Grant Township's position that the right of local community self-government contains no requirement of state action (see ECF No. 159, ¶ 21) runs counter to all § 1983 jurisprudence.

4 Because the Court concludes that PGE is not a state actor, there is no need to discuss whether the Township's purported constitutional right to local community self-government has been violated.

5 If a constitutional violation has not caused actual damages, nominal damages are the appropriate remedy. Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986); Carey v. Piphus, 435 U.S. 247 (1978). See also Stein v. Bd. Of Ed., 792 F.2d 13 (2d Cir.), cert. denied, 479 U.S. 984 (1986). Moreover, "it is not necessary to allege nominal damages." Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) quoting Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965). See also Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993) (actual damages are not an essential element of a § 1983 claim).

6 See J&B Entertainment v. City of Jackson, Miss., 720 F.Supp.2d 757 (S.D. Miss. 2010) (for discussion of consequential damages).

7 Moreover, the repeal of the Community Bill of Rights Ordinance does not automatically moot PGE's requests for monetary relief. CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 622 (3d Cir. 2013) ("Claims for damages are retrospective in nature—they compensate for past harm. By definition, then, such claims cannot be moot and a case is saved from mootness if a viable claim for damages exists."); Lighthouse Institute for Evangelism v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).

8 A plaintiff seeking to advance a Monell claim must: "(1) identify a policy or custom that deprived him of a federally protected right, (2) demonstrate that the municipality, by its deliberate conduct, acted as the 'moving force' behind the alleged deprivation, and (3) establish a direct causal link between the policy or custom and the plaintiff's injury." Blasi v. Borough of Pen Argyl, 2015 WL 4486717, at *5 (E.D. Pa. 2015) citing Bd. Of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 404 (1997). It is clear that a municipality's legislative action constitutes government policy: "No one has ever doubted ... that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body —whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy." Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

9 This Affidavit forms the basis of a motion to strike by Grant Township. ECF No. 193. Because the Ashbaugh Affidavit addresses the argument raised by Grant Township in its opposition brief, this Court finds Grant Township's motion to strike the affidavit unpersuasive. The motion to strike will be denied by separate Order.

10 This Court has previously cautioned the parties that it will not act as "an advocate" for either party. See ECF No. 113, page 10. It is not the Court's responsibility to create an argument on Plaintiff's behalf here.

11 Safeguard Mut. Ins. Co. v. Miller, 472 F.2d 732, 733 (3d Cir. 1973) (corporations "are deemed to be persons within the meaning of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and persons, as well whose rights are protected by 42 U.S.C. § 1983.").

12 This Court has previously held that § 5(a) of the Community Bill of Rights Ordinance is preempted by the Limited Liability Companies Law and the Second Class Township Code. ECF No. 113.

13 See ECF No. 170-2.

14 Once a protected interest has been identified, a court must examine the process that accompanies the deprivation of that protected interest and decide whether the procedural due process safeguards built into the process, if any, are constitutionally adequate. Zinermon v. Burch, 494 U.S. 113, 126 (1990).

15 In its reply brief, PGE clarifies that this reference is to the EPA permit, and not the permit issued by the Pennsylvania Department of Environmental Protection. See ECF No. 189, page 22.

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EXHIBIT 2

celdf.org

KeyCite Blue Flag – Appeal Notification
Appeal Filed by PENNSYLVANIA GENERAL ENERGY CO v. GRANT TOWNSHIP, 3rd Cir., May 7, 2019

2018 WL 306679
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC, Plaintiff

v.

GRANT TOWNSHIP, Defendant.

C.A. No. 14-209ERIE
|
Filed 01/05/2018

Attorneys and Law Firms

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Elizabeth M. Dunne, Honolulu, HI, Thomas A. Linzey, Community Environmental Legal Defense Fund, Mercersburg, PA, Karen Hoffmann, Philadelphia, PA, for Defendant.

OPINION AND ORDER

Susan Paradise Baxter[1], U.S. Magistrate Judge

***1** Pending before the Court are: (1) the renewed motion for sanctions filed on behalf of Plaintiff Pennsylvania General Energy Company, LLC ("PGE") (ECF No. 249); (2) Defendant Grant Township's motion to strike PGE's motion for sanctions (ECF No. 253); (3) Little Mahoning Watershed and East Run Hellbenders Society, Inc.'s motion to strike PGE's motion for sanctions as untimely (ECF No. 256); and (4) Grant Township's counter-motion for sanctions (ECF No. 264).

For the reasons that follow, the Court grants in part PGE's motion for sanctions, and attorneys' fees and costs will be assessed against Attorneys Linzey and Dunne of the Community Environmental Legal Defense Fund ("CELDF") ONLY, and not, either directly or indirectly, against Defendant Grant Township. In addition, Attorney Linzey will be referred to the Disciplinary Board of the Supreme Court of Pennsylvania for such further proceedings as the Board may deem appropriate. Attorney Schromen-Wawrin's motion to strike, filed on counsel's behalf via proposed intervenors Little Mahoning Watershed and East Run Hellbenders, reluctantly is granted. The remaining motions are denied.

I. Background and Relevant Procedural History[2]

PGE is a private corporation in the business of exploration and development of oil and gas. PGE currently owns and operates natural gas wells in Grant Township, Pennsylvania. PGE's exploration and development activities include drilling and operating gas wells and managing brine and other produced fluids from operating wells.

In 1997, PGE's predecessor in interest put into production a deep gas well in Grant Township on property known as the Yanity Farm. PGE intends to use the Yanity Well to inject produced fluids from its other oil and gas operations. Based on its intention to convert the use of the Yanity Well to an injection well for disposal of produced fluids generated at other PGE oil and gas wells, PGE proceeded to obtain regulatory approval for such use.

On March 19, 2014, PGE received an initial permit from the United States Environmental Protection Agency to convert the Yanity Well into an injection well, and on September 11, 2014, the EPA issued a final permit in this regard.

On June 3, 2014, with the assistance and direction of Community Environmental Legal Defense Fund ("CELDF"), Grant Township adopted the Community Bill of Rights Ordinance (the "CBR" or "Ordinance"). The CBR expressly prohibits any corporation from "engag[ing] in the depositing of waste from oil and gas extraction" and invalidates any "permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate [this prohibition] or any rights secured by [the Ordinance], the Pennsylvania Constitution, the United States Constitution, or other laws."

***2** PGE filed this action challenging the constitutionality, validity, and enforceability of the CBR. Through this action, PGE seeks relief pursuant to 42 U.S.C. § 1983 against the Township on the grounds that the Ordinance stripped Plaintiff of its federal constitutional rights, and otherwise is in direct

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conflict with a number of Pennsylvania statutes and therefore is preempted. ECF No. 5.

Attorney Linzey, on behalf of Grant Township, filed an Answer and Counterclaim invoking 42 U.S.C. § 1983 and § 1988 against PGE, claiming, *inter alia*, that by bringing this lawsuit challenging the Ordinance, PGE, "acting under color of state law" sought to violate the right of the people of Grant Township to "local community self-government" as secured by the Pennsylvania Constitution, the federal constitutional framework, and the CBR itself. ECF No. 10. Grant Township's counterclaim sought various remedies comprised, in part, of both a declaration that the CBR is a valid exercise of the right to self-government; a declaration that PGE, by virtue of its corporate status, is not a "person" under the law; and an injunction preventing PGE from violating the Ordinance.

Thereafter, community group East Run Hellbenders Society Inc. ("Hellbenders"), also represented by Attorney Schromen-Wawrin, also of CELDF, filed a motion to intervene in this action as of right or permissively. Attorney Schromen-Wawrin identified the Little Mahoning Watershed ("Ecosystem") as an additional Proposed Intervenor. ECF No. 37. This Court denied intervention[3], and the Third Circuit affirmed. In affirming, the Circuit acknowledged serious and substantive concerns at the attempted intervention of an ecosystem as a proper party to federal litigation under the plain language of the Federal Rules of Civil Procedure. The Third Circuit further concluded that counsel for Grant Township adequately represented the interests asserted by the community group, at least in part given legal representation by the same environmental law organization. *Pennsylvania General Energy Company, LLC v. Grant Township*, 658 Fed.Appx. 37, 41 (3d Cir. 2016).

Cross-motions for judgment on the pleadings were resolved as to certain of the parties' claims, with this Court granting in part PGE's motion and declaring invalid six operative provisions of the challenged Ordinance.[4] Grant Township's motion for relief as to its counterclaim was denied. ECF No. 114. Attorney Linzey, on behalf of Grant Township, followed with a motion for reconsideration, necessitating a response in opposition by PGE. Upon consideration, this Court denied the motion finding, at best, that Attorney Linzey misapprehended the scope of review inherent in a motion for judgment on the pleadings, and merely sought to relitigate the denial of Grant Township's initial motion. ECF No. 172. In the interim, the people of Grant Township voted to repeal the Community Bill of Rights Ordinance and, with the guidance of Attorney Linzey and CELDF, adopted a new Home Rule Charter incorporating many of the provisions previously declared invalid. ECF No. 180-2.

***3** PGE next sought summary judgment on its remaining federal constitution claims; specifically, that the CBR violates the Supremacy Clause, the Equal Protection Clause, the Petition Clause of the First Amendment, the Contract Clause, and both the substantive and procedural components of the Due Process Clause of the United States Constitution. PGE also sought summary judgment in its favor on Grant Township's counterclaim. Grant Township filed its own motion for summary judgment, again asserting, *inter alia*, that PGE violated the Township's right to "local community self-government." This Court issued a judgment order, denying Grant Township's motion in full, and granting PGE's motion in part and denying it in part, with relief granted in PGE's favor as to Grant Township's counterclaim, the Equal Protection Claim, the Petition Clause claim, and the Substantive Due Process challenge. Summary judgment was denied on PGE's Procedural Due Process and Contract Clause challenges due to PGE's failure to submit a copy of an existing Underground Injection Control ("UIC") permit conveying a property interest to PGE, as well as PGE's omission of copies of any leases with Grant Township landowners to substantiate its contract claims, the absence of which left limited questions of fact to be resolved.

A trial as to PGE's remaining claims is scheduled for May 2018.

II. Discussion

A. PGE's Motion for Sanctions

PGE's pending motion for sanctions renews and supplements a previously filed motion for sanctions, and seeks to recover over $500,000 in attorneys' fees and costs incurred as a consequence of "frivolous, unfounded, harassing pleadings and motions in pursuit of ... illegitimate ends, thereby increasing litigation costs, abusing process, and wasting judicial resources." ECF No. 249, p.1.

PGE argues that CELDF counsel guided Grant Township's promulgation of an unlawful CBR Ordinance and filed numerous motions and pleadings which were conceded to be without legal support, but nevertheless were submitted

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for judicial consideration, in pursuit of a political agenda to "reorder and restructure" our system of government. ECF No. 250. PGE points to examples of filings asserting Grant Township's "right" to "local, community self-government" rising above well-established concepts of state and federal preemption, as well as arguments propounded by CELDF counsel throughout this litigation rejecting the longstanding legal recognition and protection of corporations as "persons" under the United States Constitution.[5] PGE contends that counsel cannot claim incompetence or lack of awareness of the frivolous nature of the claims asserted by them in this action, given that identical arguments were raised by CELDF and/or Attorney Linzey in prior litigation and uniformly rejected by courts in this Circuit and elsewhere.

PGE states that as a result of Attorney Linzey's conduct, the litigation of this matter extends to over 250 docket entries, reflecting a strategy to delay resolution of this action in order to interfere with PGE's ability to conduct lawful activities within Grant Township, and to impose unwarranted financial strain on PGE as it litigates this action to preserve its rights. As just one of many examples of frivolous motions, PGE points to the motion to strike the affidavit of PGE's Vice President of Engineering, filed in response to arguments raised by Grant Township in opposition to PGE's motion for summary judgment. ECF No. 250, *citing* ECF No. 193 and ECF No. 244. Based upon the course of conduct evinced by Defendant's counsel, PGE asserts the propriety of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the inherent power of the Court to assess attorney's fees when a party has acted in bad faith, or for oppressive reasons.

In addition, PGE claims it is entitled to sanctions against Attorney Schromen-Wawrin, pursuant to 28 U.S.C. § 1927, as a result of a "patently frivolous claim" on behalf of the Little Mahoning Watershed, as well as proposed intervention on behalf of the East End Hellbenders, a community group comprised of residents of Grant Township.

1. Rule 11

***4** Under Rule 11 of the Federal Rules of Civil Procedure, by signing a pleading, motion or other filing, an attorney certifies, *inter alia*, that to the best of his or her knowledge, and formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law.

Fed. R. Civ. P. 11(b). In the event a party believes a motion or pleading has been interposed for an improper purpose, upon appropriate notice and a 21-day waiting period to permit the withdrawal of the offending paper, claim, defense, contention, or denial, a motion for sanctions may be filed. Fed. R. Civ. P. (11)(c).

PGE asserts that throughout this litigation, Attorneys Linzey and Dunne, in conjunction with CELDF, have acted unreasonably, pursuing discredited legal theories, misrepresenting facts, and unnecessarily multiplying litigation, and therefore are subject to sanctions to bear the expense incurred by PGE to retain its right to operate its legal business within Grant Township. In opposition to the requested sanctions, Defendant's counsel contend that PGE's motion has been interposed to harass, is untimely, and is filed without required safe harbor notice, and that Grant Township's legal arguments are supported by existing law, are reasonable arguments to extend, modify or reverse existing law, or to establish new law.[6] In addition, counsel assert that sanctions against the Township or its counsel are inappropriate because CELDF and its associated attorneys have not previously been sanctioned, and have candidly disclosed the existence of opposing case law.

Counsel for Defendant and Proposed Intervenors argue that PGE's motion for sanctions as to Attorney Schromen-Wawrin should be denied as untimely and in violation of Rule 11's safe harbor provisions, requiring service of an intended motion 21 days on the offending party prior to filing.

***5** Before addressing the merits of a party's Rule 11 motion, the Court must determine whether the party complied with the "safe harbor" provision of Rule 11(c)(2). Under that provision, a party cannot file a motion for sanctions until it first presents the motion to the offending party, and allows 21 days for the other party to withdraw or correct the challenged issue. *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 99 (3d Cir. 2008) (citing Fed. R. Civ. P. 11(c)(2)). Counsel for Grant Township challenge the motion as violating Rule 11's safe harbor provisions because PGE failed to serve a copy of

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the renewed motion prior to filing, "and seeks to rely on the original notice given in 2015 to comply with the notice rule."[7] ECF No. 260, p. 4.

PGE's renewed motion for sanctions primarily addresses the counterclaim and defenses set forth in Grant Township's Answer and repeatedly asserted throughout this litigation. In this respect, the motion is nearly identical to PGE's initial motion for sanctions, which was dismissed by the Court as premature. ECF No. 224. There is scant authority as to whether the refiling of substantially the same motion on nearly identical grounds implicates or requires a second safe harbor period, but examination of the purpose indicates that the goal of a safe harbor period is met under these circumstances. "The purpose of the safe harbor is to give parties the opportunity to correct their errors," *Schaefer*, 542 F.3d at 99, and "encourage the withdrawal of papers that violate the rule without involving the ... court." *In re Miller*, 730 F.3d 198, 204 (3d Cir. 2013)(internal citation omitted). In this case, PGE's initial motion for sanctions was preceded by sufficient service of a copy of the proposed motion, requesting withdrawal of Grant Township's offending defenses and counterclaim. Under these circumstances, the initial notice provided ample opportunity for Grant Township to abandon those claims not reasonably founded in the law. Despite notice of the offending conduct, counsel for Grant Township continued to assert identical legally implausible arguments throughout this litigation.

While the grounds asserted in PGE's renewed motion remained the same, the Third Circuit has held that, "[i]f the twenty-one day period is not provided, the [Rule 11] motion must be denied." *Schaefer,* 542 F.3d at 99; *Metropolitan Life Ins. Co. v. Kalenvitch*, 502 Fed.Appx. 123, 125 (3d Cir. 2012). Cases within this Circuit applying the rule are readily distinguishable on the basis that the moving party failed to serve notice of the objectionable content to permit withdrawal of the offending documents prior to seeking judicial intervention. However, the mandate to provide notice with service of a copy of the proposed motion in compliance with Rule 11(c) appears to be without exception. The Court is mindful that in this instance, relief is also sought pursuant to 28 U.S.C. § 1927 and the inherent power of the court, which do not implicate the mandatory nature of Rule 11's safe harbor. Accordingly, to the extent PGE is entitled to sanctions predicated upon the conduct of opposing counsel, the propriety of an award will be reviewed pursuant to the available alternatives.

2. Section 1927

PGE's motion for sanctions seeks relief pursuant to 28 U.S.C. § 1927 as to Attorney Schromen-Wawrin with regard to the attempted proposed intervention of East End Hellbenders and the Little Mahoning Watershed, and as to Attorneys Linzey and Dunne for the "frivolous arguments of Grant Township and Counsel." ECF Nos. 249; ECF No. 250, p. 31-32. Section 1927 provides:

> ***6** Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. "[T]he principal purpose of imposing sanctions under 28 U.S.C. § 1927 is the deterrence of intentional and unnecessary delay in the proceedings." *Zuk v. Eastern Pennsylvania Psychiatric Institute*, 103 F.3d 294, 297 (3d Cir. 1996)(internal quotation marks and citations omitted). The Third Circuit has held that § 1927 requires a finding of bad faith or intentional misconduct on the part of the offending attorney. *In re Prudential Ins. Co. America. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 188 (2002). " 'Indications of this bad faith are findings that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment.' " *Id.*, *quoting Smith v. Detroit Federation of Teachers Local 231, Am. Federation of Teachers, AFL-CIO*, 829 F.2d 1370, 1375 (6th Cir. 1987).

a. Timeliness

Attorneys Schromen-Wawrin, Linzey, and Dunne initially object to the imposition of sanctions under Section 1927 on timeliness grounds. As set forth below, the motion is timely with regard to Attorneys Linzey and Dunne. However, the Court finds that PGE's delay of one year after final judgment was entered as to Proposed Intervenors Little Mahoning Watershed and East Run Hellbenders precludes the imposition of sanctions as to Attorney Schromen-Wawrin.

Attorney Linzey concedes that on December 2, 2015, PGE served notice of its intent to seek sanctions against Grant Township based upon alleged legally spurious claims and defenses contained in Grant Township's Answer and

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Affirmative Defenses, and requested that the claims and defenses be withdrawn. The notice was served one year after Grant Township filed its Answer to the Complaint, and shortly after its motion for reconsideration of the Court's order granting in part PGE's motion for judgment on the pleadings. The Court stayed and subsequently dismissed both motions for sanctions without prejudice, determining that resolution was appropriate after disposition of the pending cross-motions for summary judgment. ECF Nos. 161; ECF No. 171; ECF No. 175; ECF No. 218; and ECF No. 224.

Attorney Linzey cites the Third Circuit opinion in *Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90 (3d Cir. 1988), in support of the contention that PGE's one-year delay before filing the initial motion for sanctions renders the motion for sanctions untimely, "baseless," "for an improper purpose," and "frivolous." The *Pensiero* Court, however, addresses **only** Rule 11, and adopts "as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court *before the entry of a final judgment.* Where appropriate, such motions should be filed at an earlier time—as soon as practicable after discovery of the Rule 11 violation." *Id.* at 99 (emphasis added). The goal of the rule is to avoid fragmented appeals and "inefficiency resulting from delay in filing a sanction motion until after resolution of the merits appeal." *Id.* In addition,

> ***7** "The Advisory Committee Notes recommend that '[a] party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so ... *However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter.*"

Id. (emphasis added). Judgment has not yet been entered as to all claims against Grant Township, and sanctions are sought as a result of conduct that commenced at the pleading stage, with its assertion of certain frivolous claims and defenses. Furthermore, given this Court's discretion, all such motions were held in abeyance and dismissed for resolution after the disposition of summary judgment motions. Accordingly, to the extent timing of motions for sanctions pursuant to Rule 11 is at all relevant to motions proceeding under § 1927, the motion for sanctions as to Linzey and Dunne is timely. *Schaefer*, 542 F.3d at 102.

Attorney Schromen-Wawrin contends that PGE's sanction motion with regard to the attempted intervention of the Little Mahoning Watershed and East End Hellbenders is untimely because it was filed after judgment was entered as to both Proposed Intervenors. The Third Circuit has specifically concluded that, "to the extent the [Rule 11] supervisory rule remains viable [requiring the filing of motions before the entry of judgment], it does not apply where sanctions are sought under § 1927. That having been said, however, a motion for sanctions should be filed within a reasonable time." *Id.*

Attorney Schromen-Wawrin filed a motion to intervene on behalf of the Watershed and East End Hellbenders in November 2014. After extensive briefing by the parties, this Court held the motion in abeyance to permit resolution of potentially dispositive motions. ECF No. 37; ECF No. 78. The motion to intervene was renewed on April 16, 2015, and ultimately denied on October 14, 2015. ECF No. 96; ECF No. 115. Schromen-Wawrin filed a timely appeal to the Third Circuit, resulting in a panel affirmance of this Court's decision. Despite the Third Circuit's unequivocal finding that intervention was unwarranted, Schromen-Wawrin sought reconsideration *en banc*, which the full Court of Appeals denied. A mandate order affirming this Court's decision was entered on August 30, 2016. ECF Nos. 116; ECF No. 221.

PGE filed its motion for sanctions as to all CELDF, and Attorneys Linzey, Dunne, and Schromen-Wawrin, on June 2, 2017. ECF No. 249. Unlike PGE's prior sanction motion, the pending motion is the first asserting bad faith or misconduct related to the proposed intervention of Hellbenders and the Watershed. PGE does not offer an explanation for its failure to seek sanctions earlier, which weighs against a finding of reasonable delay, especially where discovery of alleged misconduct was not hindered by fraud or obfuscation. *See, e.g., In re Grigg,* 568 B.R. 498, 508-510 (Bankr. W.D. Pa. 2017)(finding the delay of one year unreasonable where no explanation for delay provided, and misconduct apparent); *cf., Marino v. Usher,* 2013 WL 12146386, at *3 (E.D. Pa. Nov. 19, 2013) (Section 1927 motion for sanctions timely four months after alleged misconduct, where moving party attempted settlement and motion was filed one month after settlement negotiations proved unsuccessful).

***8** Having found that the motion for sanctions as to Attorney Schromen-Wawrin is untimely, the Court shall enter an Order granting the motion to strike filed on behalf of Little Mahoning Watershed and East End Hellbenders (ECF No. 258) on that basis only. The Court stresses, however, that the denial of relief should not be interpreted as condoning the commencement of proceedings to intervene

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where, as under the facts presented here, no reasonable interpretation of existing case law rendered such motion appropriate. As readily discerned by the Third Circuit, the arguments advanced by Attorney Schromen-Wawrin represent a "misread[ing]" of applicable law, are "untenable" in light of the facts, "[fatal]ly" flawed, unpersuasive, "conclusory and nonspecific," "purely speculative," and unsupported by any evidence. *Pennsylvania Gen. Energy Co., LLC v. Grant Twp.*, 658 Fed.Appx. at 41-42, 43. Such an approach is unreasonable under any circumstance, but especially in light of the expense and resources borne by PGE, this Court, and the Third Circuit to resolve what is otherwise a plainly frivolous attempt to intervene in pending litigation for purposes unrelated to the just litigation of a claim. Accordingly, the disposition of the motion for sanctions with regard to Attorney Schromen-Wawrin reflects only the untimeliness of the motion, and not the merits.

b. § 1927 Merits as to Attorneys Linzey and Dunne

In assessing the propriety of a motion pursuant to § 1927, the Court acknowledges longstanding guidance informing a decision to award sanctions:

> It is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, ...

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-422 (1978). The Third Circuit has held that the court's sanctioning powers should be used sparingly in order to avoid chilling novel legal or factual arguments from counsel. *In re Orthopedic Bone Screw Products Liab. Litig.*, 193 F.3d 781, 796 (3d Cir. 1999). "The power to sanction under § 1927 necessarily 'carries with it the potential for abuse, and therefore the statute should be construed narrowly and with great caution so as not to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.' " *LaSalle Nat. Bank v. First Connecticut Holding Group, LLC.*, 287 F.3d 279, 289 (3d Cir. 2002) *quoting Mone v. Comm'r of Intern. Revenue*, 774 F.2d 570, 574 (2d Cir. 1985). In particular, "[t]he uncritical imposition of attorneys' fees can have an undesirable chilling effect on an attorney's legitimate ethical obligation to represent his client zealously." *Ford v. Temple Hosp.*, 790 F.2d 342, 349 (3d Cir. 1986).

Citing these limiting principles, Attorneys Linzey and Dunne defend their conduct and that of CELDF, and through briefs and an attached affidavit of a member of CELDF's board, claiming that the arguments asserted are in the tradition of *Brown v. Board of Ed.,* 347 U.S. 483 (1954), the striking down of prohibitions on gay marriage, and other defining moments in legal history. *See, e.g.,* ECF No. 260. However, sanctions may be imposed under § 1927 where, as here, counsels' conduct results from bad faith and not well-intentioned zeal. "A showing of bad faith requires clear and convincing evidence that counsel or a party intentionally advanced a baseless contention for an improper purpose. Bad faith is plain when the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *Wise v. Washington County*, 2015 WL 1757730, at *11 (W.D. Pa. 2015)(internal citations and quotation marks omitted).

To differentiate responsible and legally plausible claims from those that are plainly unreasonable and subject to sanctions, this Court finds instructive the analysis employed by the district court in *Matthews v. Freedman*, 128 F.R.D. 194, 200 (E.D. Pa. 1989), *aff'd* 919 F.2d 135 (3d Cir. 1990). In that case, counsel asserted legally frivolous constitutional claims, but the district court, mindful of the potential to chill "creative and enthusiastic advocacy in support of novel constitutional claims," adopted the "more concrete" and objective approach outlined by Professor Edward Cavanaugh to determine whether counsel's argument is "plainly unreasonable" and therefore subject to sanctions.[8] *Id.*, *citing* E.D. Cavanaugh, *Developing Standards under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 Hofstra L.Rev. 499 (Spring 1986). There, the district court summarized:

> ***9** On Cavanaugh's spectrum, a legal argument is "clearly reasonable" in the following situations:
>
> — argument is based on plain meaning of statutes or Supreme Court decisions;
>
> — argument is based on caselaw from within circuit;
>
> — circuit caselaw is unsettled, but caselaw from another circuit or district supports argument;
>
> — circuit caselaw is contrary to argument, but another circuit supports it.
>
> — plausible argument in case of first impression;

— argument counter to established caselaw, but compelling facts or values suggest re-examination of settled precedent; or

— settled precedent is factually distinguishable, and argument meets one of the other standards above.

In the middle, "gray area" of his spectrum, Cavanaugh classifies legal arguments according to rebuttable presumptions. An argument is "presumptively reasonable" if it is based on

— novel (plausible) theories based on analogies to unrelated areas of law; or

— plausible theories in a complicated area of the law.

By comparison, an argument is "presumptively unreasonable" if it is founded on

— farfetched analogies that imply an improper purpose; or

— misrepresentations of governing law that suggest an intention to mislead the court.

Lastly, Cavanaugh classifies the following types of argument as "clearly unreasonable":

— fatal, irremediable defect on face of pleading;

— **settled law opposes argument and counsel does not confront or attempt to distinguish adverse authority**; or

— argument consists of dubious legal propositions unsupported by legal research.

Cavanaugh suggests that this type of conduct is not merely suspect: instead, it is conclusively sanctionable under Rule 11 absent a "clear and convincing" justification for the pleader's conduct.

Matthews v. Freedman, 128 F.R.D. at 200 (E.D. Pa. 1989)(internal case citations omitted)(emphasis added).

In opposition to the motion for sanctions, counsel contend that the various pleadings and memoranda filed on behalf of Grant Township meet ethical obligations to disclose contrary law, appropriately seek to reverse or extend existing law in good faith, and have been filed at the direction of their clients to pursue what counsel asserts are valid arguments for self-government. ECF No. 260, pp. 20-22. However, the objective criteria outlined in *Matthews* render it apparent that Attorneys Linzey and Dunne have repeatedly filed pleadings and motions that are "clearly unreasonable" and therefore in bad faith within the meaning of § 1927.

As reflected in the record, Attorneys Linzey, Dunne and Schromen-Wawrin provided free legal assistance to Grant Township and an affiliated community group to pursue a discredited and previously litigated "community rights" approach to prevent oil and gas operations within the Township. In particular, the CBR seeks to disavow constitutional rights afforded corporations so as to prevent PGE from the lawful exercise of its right to pursue gas extraction related activities within its borders. This is in keeping with CELDF's strategy, described by the Third Circuit as advocating, "that communities pass laws that assert community rights against corporations and others engaged in activity disfavored by members of the community." *Seneca Resources Corporation v. Township of Highland, Elk County, PA*, 863 F.3d 245, 248 (3d Cir. 2017).[9]

***10** The record reflects that on June 3, 2014, prior to passage of the challenged CBR, counsel for PGE advised the Grant Township Board of Supervisors that the proposed Ordinance suffered numerous insurmountable legal deficiencies, as determined by this Court at least once before with regard to a similar ordinance also drafted by Attorney Linzey and CELDF. ECF No. 273, pp. 15-19, *citing Penn Ridge Coal, LLC v. Allegheny Pittsburgh Coal Co.,* C.A. No. 08-1452P, ECF No. 30 (W.D. Pa. April 8, 2009) (concluding that the Township had no legal authority to annul constitutional rights afforded corporations by the United States Supreme Court).

Despite this information, the Ordinance passed and CELDF-affiliated counsel continued to press forward with a counterclaim and defenses remarkably unchanged from prior CELDF litigation seeking to overturn longstanding corporate rights and ignoring the established preemptive effect of valid federal and state permits and environmental regulation.[10]

Upon detailed review of the briefs filed by the parties and governing law, this Court granted PGE's motion for judgment on the pleadings as to those portions of the Ordinance challenged specifically, and granted PGE's motion for summary judgment as to its remaining constitutional claims, save those for which specific evidence was required. The Court rejected as unfounded and contrary to established law all arguments propounded by counsel for Grant Township seeking to deem PGE a state actor amenable to suit pursuant

to 42 U.S.C. § 1983, and otherwise seeking to strip PGE of certain constitutional rights recognized pursuant to over one hundred years of Supreme Court precedent. In reaching its conclusion, this Court observed that counsel for Defendant provided no legal precedent to the contrary, nor other legal basis for a different result, and merely reasserted the existence of historical documents and events previously rejected by this Court as justification for Grant Township's claims. *Pennsylvania General Energy Company, LLC v. Grant Twp.*, 139 F. Supp.3d 706, 714 (W.D. Pa. 2015).

In determining the propriety of sanctions for advancing plainly unreasonable arguments, the Court has examined CELDF's federal environmental litigation occurring over the past fifteen years in Pennsylvania. CELDF, with Attorney Linzey as lead counsel, has championed the notion of "community self-governance" as justification for CELDF-drafted local ordinances to invalidate corporate property rights, and to strike at the preemptive effect of state and federal law where in conflict with a community-enacted ordinance. *See, Penn Ridge Coal LLC v. Allegheny Pittsburgh Coal Co., supra; Range Resources-Appalachia, LLC v. Blaine Township, supra; Friends and Residents of Saint Thomas Township, Inc. v. Saint Thomas Development, Inc.*, 2005 WL 6133388 (M.D. Pa. Mar. 31, 2005), *aff'd sub nom. Friends & Residents of St. Thomas Twp., Inc. v. St. Thomas Dev., Inc.*, 176 Fed.Appx. 219 (3d Cir. 2006). In each cited action, the district court reviewed CELDF's arguments and found them wanting, lacking argument predicated in law or facts, and failing to justify setting aside historically well-settled legal precepts.[11] The most recent cases, including the instant action, find identical arguments reasserted, but not advanced in any material manner by distinguishing facts, analogy, or supporting case law from any court of coordinate or superior jurisdiction.

***11** Attorneys Linzey and Dunne contend that because adverse precedent is acknowledged in supporting briefs, the duty of candor owed to the Court and other parties to the litigation has been met thereby precluding an award of sanctions. This position is equally untenable and unsupported by appropriate citation. Merely acknowledging historical fact does not cloak frivolous litigation with a mantle of seriousness. Instead, such litigation creates enormous expense to parties and taxes limited judicial resources. Rather, counsel's repeated presentation of identical theories over the course of fifteen years eliminates any claims of novelty or plausibility, and cannot be excused as a good faith course of conduct.

Counsel would have been advised to take to heart the court's decision over a decade ago in *Friends and Relatives of Saint Thomas Twp.*, where the Court narrowly declined the imposition of sanctions, concluding that Attorney Linzey "endeavored against unfavorable precedent to convert his clients' feeling and concerns into a constitutional framework," but finding fault with counsel's arguments:

> The Court finds the question of whether sanctions should be imposed in this case to be very close. Many of Plaintiffs' arguments are asserted without acknowledgment or sufficient apparent regard for established legal principles and holdings. Throughout much of their papers, Plaintiffs do not so much argue that the Court should establish a change in the law regarding the rights of corporations under the United States Constitution, but rather they argue that such rights simply do not exist, ignoring scores of decisions to the contrary. To be sure, Plaintiffs have pointed to numerous historical documents and secondary sources demonstrating a long-running argument among scholars on this legal issue. However, Plaintiffs pay insufficient attention to the fact that established constitutional law on this subject demonstrates conclusively that corporations do, in fact, enjoy such rights.

St. Thomas, 2005 WL 6133388 at *14. The present litigation shows that no lessons in good faith legal argument have been learned. Rather, Attorneys Linzey and Dunne continue to pursue nearly identical and rejected theories unabated, without regard to their obligation to conduct reasonable inquiry into applicable law prior to filing. As a result, PGE and this Court were left to resolve claims and defenses that in all candor, should have been abandoned, given the absence of any attempt to distinguish or confront adverse authority. Such conduct evinces bad faith, and the invocation of the courts for purposes unrelated to the speedy and just resolution of legal causes.

Under the circumstances presented, the Court finds that an award of sanctions pursuant to 28 U.S.C. § 1927 against Attorneys Linzey and Dunne is appropriate.

3. Inherent Power of Court to Impose Sanctions

PGE also invokes the inherent power of the Court to impose sanctions upon Grant Township and its counsel. Specifically, PGE asserts that sanctions should be awarded on the grounds that Grant Township and its counsel "(a) defended this

action and filed a counterclaim to the action for an improper purpose and for the purpose of harassing and intimidating PGE, thereby increasing its litigation costs, (b) filed multiple frivolous claims and documents, and (c) multiplied the proceedings for an improper purpose and for the purpose of harassing and intimidating PGE, thereby increasing its litigation costs." ECF No. 249, page 2.

"Federal courts possess certain 'inherent powers,' not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That authority includes; the ability to fashion an appropriate sanction for conduct which abuses the judicial process. And one permissible sanction is an 'assessment of attorney's fees' ..., instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side." *Goodyear Tire & Rubber Co. v. Haeger,* 137 S. Ct. 1178, 1186 (2017) (internal citations omitted).

***12** As explained *supra* with regard to § 1927, the Court finds that Attorneys Linzey and Dunne have acted in bad faith with regard to the pursuit of frivolous legal claims and defenses.[12] Such conduct has resulted in the expenditure of significant litigant and judicial resources, and warrants the imposition of sanctions that are beyond the compensatory relief afforded by § 1927. Accordingly, where appropriate, the Court's imposition of sanctions pursuant to its inherent power will be ordered.

4. Sanctions Awarded

This Court has determined that Attorneys Linzey and Dunne have pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, each was on notice of the legal implausibility of arguments previously advanced as to: (1) the purported invalidity of corporate rights; (2) the identification of a regulated corporation as a "state actor"; (3) community self-governance as a justification for striking or limiting long-standing constitutional rights, federal and state laws, and regulations; and, (4) the purported invalidity of "Dillon's Rule" to the extent it applies to limit a municipality's ability to enact ordinances in conflict with state and federal law. Despite their own prior litigation, CELDF and Attorney Linzey, in particular, continue to advance discredited arguments as a basis for CELDF's ill-conceived and sponsored CBR, and in so doing have vexatiously multiplied the litigation of this matter.

According to PGE, nearly all litigation expenses incurred in this matter are related to Attorney Linzey's bad faith. ECF No. 250. While it is clear that PGE was required to bear significant expense to challenge the CBR, recovery of all litigation costs is not warranted in the absence of definitive evidence that the entirety of an action was the result of fraud. Rather, as the Supreme Court recently made clear, sanctions must be sufficiently causally connected to conduct. "This but-for causation standard generally demands that a district court assess and allocate specific litigation expenses —yet still allows it to exercise discretion and judgment. The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued." *Goodyear Tire & Rubber Co.,* 137 S. Ct. at 1187.

This standard applies whether sanctions are awarded pursuant to § 1927, or the Court's inherent authority to control litigation before it. "[U]nder 28 U.S.C. § 1927, a court may require an attorney who unreasonably multiplies proceedings to pay attorney's fees incurred 'because of' that misconduct. Those provisions confirm the need to establish a causal link between misconduct and fees when acting under inherent authority, given that such undelegated powers should be exercised with especial 'restraint and discretion.' " *Id. quoting Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). In this regard, PGE bears the burden to establish the link, and seeks to do so by providing the Court with copies of its billing records for the entirety of this litigation. ECF No. 250-9 through ECF No. 250-14.

***13** The Court has undertaken review of the billing records, and finds approximately $52,000 in costs and fees reasonably incurred by PGE to research and draft motions and memoranda in support and in opposition to dispositive motions for judgment on the pleadings and summary judgment.[13] The litigation of CELDF's previously discredited theories was central to each motion, and therefore is an appropriate measure of sanctions, directly resulting from the misconduct occasioned by Attorneys Linzey and Dunne.

This sum is approximately 10% of the total litigation costs incurred by PGE in pursuit of its legitimate challenge to Grant Township's enactment of the CBR, and while small in comparison, bears a direct relationship to PGE's challenge of the claims and defenses asserted in the Answer and Counterclaim. Other expenses incurred in discovery, with

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regard to motions to intervene and to dismiss, or in pursuit of a preliminary injunction, while necessitated by litigation of this matter, do not directly implicate the relitigation of arguments previously found lacking by this and other courts of coordinate jurisdiction.[14]

B. Grant Township's Motion for Sanctions

Grant Township, through Attorney Dunne, has filed a counter-motion for sanctions. The motion is denied, as it rests upon the alleged impropriety of PGE's sanctions motion. Because the Court concludes that PGE is entitled to limited sanctions, for the reasons set forth above, Grant Township is not entitled to sanctions under Rule 11, § 1927, or the inherent power of the Court.

III. Conclusion

The Court does not derive pleasure in the task before it today. However, as made clear by the pattern of CELDF-affiliated litigation (all of which has been led by Attorney Linzey) in the years leading to this action, foregoing sanctions in this instance would be inconsistent with the Court's duty to ensure that lawyers who practice before it do so ethically and responsibly. An attorney's zealous advocacy for the protection of a client's interests is certainly appropriate; however, the legitimate pursuit of justice imposes important obligations on counsel to ensure that the Court is not a mechanism of harassment or unbridled obstruction. The continued pursuit of frivolous claims and defenses, despite Linzey's first-hand knowledge of their insufficiency, and the refusal to retract each upon reasonable request, substantially and inappropriately prolonged this litigation, and required the Court and PGE to expend significant time and resources eliminating these baseless claims. Accordingly, sanctions are imposed and justified in this instance.

For the reasons set forth above, this 5th day of January, 2018, it is hereby ORDERED:

1. The Motion for Sanctions filed by PGE (ECF No. 249) is granted in part, and the Court sanctions Attorneys Linzey and Dunne ONLY in the total sum of $52,000, to be paid to PGE within 120 days of this Order. The motion is denied in all other regards.

2. The Clerk is directed to transmit this Opinion and Order to the Disciplinary Board of the Pennsylvania Supreme Court, with a request to determine appropriate disciplinary measures, if any, to be imposed upon Attorney Linzey for the reasons set forth herein.

3. The Motion to Strike filed on behalf of the East End Hellbenders (ECF No. 256) is granted.

***14** 4. The Motion to Strike filed by Grant Township (ECF No. 253) is denied.

5. The Motion for Sanctions filed on behalf of Grant Township (ECF No. 264) is denied.

All Citations

Not Reported in Fed. Supp., 2018 WL 306679

Footnotes

1 This civil action was originally assigned to District Judge Frederick J. Motz and then assigned to District Judge Arthur J. Schwab for settlement purposes. Thereafter, in accordance with the provisions of 28 U.S.C. § 636(c)(1), the parties voluntarily consented to having a United States Magistrate Judge conduct proceedings in this case, including the entry of a final judgment.

2 For purposes of the resolution of the pending motions, certain undisputed facts gleaned from the litigation of this matter and set forth in this Court's Opinion resolving cross-motions for summary judgment shall be reiterated herein. *See*, *Pennsylvania General Energy Company, LLC v. Grant Township*, 2017 WL 1215444 (W.D. Pa. Mar. 31, 2017).

3 Pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, the Court also granted a motion to intervene filed by Pennsylvania Independent Oil & Gas Association ("PIOGA"), a Pennsylvania nonprofit trade association representing individuals and corporations involved in the oil and gas industry. Intervention was requested to permit PIOGA to challenge the Defendant's Ordinance on behalf of at least five member oil and gas well operators in Grant Township that were affected by the terms of the Community Bill of Rights Ordinance, and whose interests were broader than those represented by PGE. ECF No. 115.

4 The Court held that Sections 3(a) and (b), 4(b) and (c), and 5(a) and (b) of the Community Bill of Rights Ordinance were invalid as each is preempted by state law and Grant Township was enjoined from enforcing these sections of the

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Ordinance. ECF No. 114. Specifically, this Court held that: §§ 3(a) and (b) were enacted without legal authority in violation of the Second Class Township Code, and were exclusionary in violation of Pennsylvania law; §§ 4(b) and (c) were enacted without legal authority in violation of the Second Class Township Code; § 5(a) was preempted by the Limited Liability Companies Law; and §§ 5(a) and (b) were preempted by the Second Class Township Code.

5 PGE has supplied the Court with hundreds of pages of newspaper articles, CELDF organizational materials, and citations to interviews of Attorney Linzey to demonstrate intent to manipulate the judicial system to harass and obstruct corporate targets. The Court has not relied upon these materials, because they involve activities outside the progress of litigation of this matter, and are not necessary to the disposition of the pending motions.

6 In support of the claim that PGE's motion for sanctions is part of a scheme to harass, Attorneys Linzey and Dunne point to POIGA's referral of Attorney Linzey to the Supreme Court of Pennsylvania Disciplinary Board for his conduct in litigating this matter. Such proceedings are not relevant to the disposition of the pending motions given *inter alia*, the referral from a party other than PGE.

7 Objection as to lack of notice also forms the basis of Grant Township's motion to strike. ECF No. 253.

8 The *Matthews* court adopted the Cavanaugh criteria for purposes of determining a Rule 11 violation, but upon reaching the conclusion that the Rule 11 motion was late, the court applied its findings of bad faith and awarded sanction pursuant to § 1927. *Matthews*, 128 F.R.D. at 207.

9 *Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d at 248 (3d Cir. 2017), citing Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. Colo. L. Rev. 927, 959–60 (2015) (referring to CELDF-sponsored antifracking legislation in Pittsburgh, Pa., Mora, N.M., and Lafayette, Colo.); Catherine J. Iorns Magallanes, *Foreword: New Thinking on Sustainability*, 13 N.Z. J. Pub. & Int'l L. 1, 12 (2015) ("160 communities in the United States have adopted such rules that have been drafted by the CELDF....").

10 *See e.g., Range Resources—Appalachia, LLC v. Blaine Tp*, 649 F. Supp.2d 412 (W.D. Pa. 2009) (invalidating an ordinance drafted by CELDF banning shale operations in Washington County, Pennsylvania and seeking "to guarantee to the residents of Blaine Township their right to a republican form of governance by refusing to recognize the purported constitutional rights of corporations."). The CBR at issue here similarly invokes the "People's Right to Self-Governance and Right of Separation."

11 In particular, this Court has reviewed CELDF's memoranda in *Penn Ridge Coal,* C.A. No. 08-14252P, at ECF No. 14 (pps. 28-108); ECF No. 19; and ECF No. 43 (pps. 17-22); *Range-Resources,* C.A. No. 09-355P, at ECF No. 11; ECF No. 22; and *St. Thomas,* C.A. No. 04-627, at ECF No. 13; ECF No. 18.

12 Dunne entered her appearance as counsel affiliated with CELDF on March 4, 2016. ECF No. 187. Since that time, through briefs and in person when appearing before the Court, she has actively participated in the litigation of this matter pursuant to the "community self-government" theories previously asserted by CELDF and Attorney Linzey. *See, e.g.*, ECF No. 233, Grant Township's supplemental brief in support of cross-motion for summary judgment ("More fundamentally, and cutting across all of PGE's claims, is the fact that even if PGE could show a violation of its constitutional rights—which it cannot—such rights cannot trump the people's fundamental right of local, community self-government, including the people's right to exercise that right to protect their air, water, and soil."). Accordingly, the Court finds Dunne's participation equally troubling, and demonstrating the requisite degree of bad faith.

13 The Court has determined that the number of hours indicated for research, drafting, editing, and revising is reasonable, as is the hourly rate charged for the work completed by the various attorneys retained by PGE.

14 This Court has determined not to impose sanctions directly on Grant Township.

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EXHIBIT 3

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KeyCite Blue Flag – Appeal Notification
Appeal Filed by PENNSYLVANIA GENERAL ENERGY CO v. GRANT TOWNSHIP, 3rd Cir., May 3, 2019

2019 WL 1436937
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC, Plaintiff

v.

GRANT TOWNSHIP, Defendant.

C.A.No. 1:14-cv-209
|
Filed 03/31/2019

Attorneys and Law Firms

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Elizabeth M. Dunne, Pro Hac Vice, Honolulu, HI, Thomas A. Linzey, Pro Hac Vice, Community Environmental Legal Defense Fund, Mercersburg, PA, Karen Hoffmann, Pro Hac Vice, Philadelphia, PA, for Defendant.

Re: Motion for Attorney's Fees

ECF No. 320

MEMORANDUM OPINION

Susan Paradise Baxter, District Judge[1]

***1** Pending before this Court is PGE's motion for attorney's fees and costs. ECF No. 320. In support of its motion, PGE submitted detailed billing records for over $ 600,000, but to avoid bankrupting Grant Township, PGE expressed a willingness to accept $ 102,979.18[2]. In opposition to the motion for fees, Grant Township argues: (1) PGE is not a prevailing party; (2) any award of fees would be unreasonable; (3) any award of fees would be unjust; and (4) the specific amount of fees requested is unreasonable. ECF No. 328.

Relevant Procedural History[3]

Plaintiff PGE, a corporation, filed this suit challenging the constitutionality, validity, and enforceability of the Community Bill of Rights Ordinance ("Ordinance") adopted by Grant Township. Plaintiff sought relief to enforce its federal constitutional rights through § 1983.[4] Plaintiff also alleged that the Ordinance was preempted by Pennsylvania state statutes. ECF No. 5. As relief, PGE sought injunctive relief and declaratory judgment, as well as compensatory and consequential damages. Grant Township filed a counterclaim against PGE for violation of the rights of the people of the Township to "local community self-government" as secured by the American Declaration of Independence, the Pennsylvania Constitution, the federal constitutional framework, and the Ordinance itself. ECF No. 10.

Cross-motions for judgment on the pleadings were resolved as to certain of the parties' claims by the partial granting of PGE's motion. The Court declared six operative provisions of the challenged Ordinance invalid, as each was preempted by state law, and the Township was enjoined from enforcing each of these six provisions. Grant Township's motion seeking judgment on its counterclaim was denied. ECF No. 172.

Next, motions for summary judgment were filed. PGE sought summary judgment on its federal constitutional claims and in its favor on Grant Township's counterclaim. Grant Township moved for summary judgment, again asserting that PGE violated the rights of the people of Grant Township to "local community self-government."

Grant Township's motion was denied and PGE's motion for summary judgment was granted in part and denied in part. Important to the discussion here, summary judgment was entered in favor of PGE on Grant Township's counterclaim, as well as its own challenges under the Equal Protection Clause, the Petition Clause, and the substantive component of the Due Process Clause. Summary judgment was denied on PGE's procedural due process and Contract Clause challenges because of PGE's failure to submit sufficient evidence to support summary judgment, and the Supremacy Clause claim was dismissed because that Clause is not privately enforceable. ECF No. 241.

***2** Before trial commenced, PGE and Grant Township settled[5] and filed a Joint Stipulation agreeing that PGE would dismiss with prejudice its procedural due process claim,

the Contract Clause claim, and the Pennsylvania Sunshine Act claim, as well as its request for compensatory and consequential damages, in exchange for accepting $ 1.00 from Grant Township on the constitutional claims on which the Court had previously entered summary judgment in PGE's favor. ECF No. 319.

Analysis

Prevailing party

42 U.S.C. § 1988 provides for the award of a "reasonable attorney's fee as part of the costs" to the prevailing party in a § 1983 action. 42 U.S.C. § 1988(b). Despite Grant Township's arguments to the contrary,[6] PGE is the prevailing party in this litigation.

A party prevails within the meaning of § 1988 "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Lefemine v. Wideman, 568 U.S. 1, 4-5 (2012) quoting Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). The prevailing party inquiry does not turn on the award of monetary damages. See id. citing Rhodes v. Stewart, 488 U.S. 1, 4 (1988) ("... we have repeatedly held that an injunction or declaratory judgment ... will usually satisfy" the prevailing party inquiry).

PGE prevailed on several state law claims at the motion for judgment on the pleadings stage where it achieved injunctive and declaratory relief on those claims.[7] Grant Township was enjoined from enforcing several of the meatiest provisions of its Ordinance. Later, PGE prevailed on several of its federal constitutional claims at the summary judgment stage.In contrast, Grant Township did not prevail on its counterclaim against PGE. There can be no doubt that PGE is the prevailing party here.

No presumption against award of fees

Next, Grant Township argues that, even if PGE is technically a prevailing party, any award of fees would be unreasonable. According to Grant Township, a presumption arises under Farrar v. Hobby, 506 U.S. 103 (1992), and its progeny when "nominal damages" are awarded that precludes any award of fees. Not only is this a misreading of Farrar, but more to the point, this argument is based on the false premise that "nominal damages" were awarded by the Court here. **They were not**.[8] This case is thus unlike the cases where nominal damages were awarded by a jury. Here, it was the settlement language between the parties, which resulted in PGE accepting $ 1.00 in return for other terms in the settlement agreement, not any award by this Court or a jury.[9]

Special Circumstances

***3** Grant Township claims that any award of fees would be unjust. The prevailing party should recover an attorney's fee "unless special circumstances would render such an award unjust." Lefemine, 568 U.S. at 4-5.

Grant Township's arguments in this regard lack merit: The limited financial means of Grant Township do not constitute special circumstances nor is any fee award automatically contrary to public policy here. Grant Township appeals to the sympathy of the Court regarding the dire financial circumstances that would be brought about by the award of any amount of attorney's fees; nonetheless, "the losing party's financial ability to pay is not a 'special circumstance' " under § 1988. Inmates of Allegheny County v. Pierce, 716 F.2d 177, 180 (3d Cir. 1983). Moreover, Grant Township should have to bear some of the responsibility here as it was on notice that the Ordinance was constitutionally suspect and likely preempted before it was passed. Even after the Ordinance was adjudged preempted by state law, Grant Township sought to make an end run around that judicial determination by amending its form of government and adopting the pre-empted and constitutionally deficient provisions in the form of a Home Rule Charter.

Grant Township also argues that PGE's litigation strategy prolonged the proceedings. As this Court has already determined, complex and protracted litigation such as this "creates enormous expense to parties and taxes limited judicial resources." ECF No. 290, page 20. That said, it is not PGE's litigation strategy that has prolonged this case, but Grant Township's. In awarding sanctions to PGE under 28 U.S.C. § 1927, this Court found "[t]he continued pursuit of frivolous claims and defenses, despite Linzeys' first-hand knowledge of their insufficiency and the refusal to retract each upon reasonable requests, substantially and inappropriately prolonged this litigation, and required the Court and PGE to expend significant time and resources eliminating these baseless claims." Id. at page 24.

Select Opinion

Reasonableness of request for fees

Finally, Grant Township argues that the specific amount of $ 100,000.00 in attorney's fees requested by PGE is unreasonable. PGE argues to the contrary.

The party seeking fees bears the burden of proving "that its requested hourly rates and the hours it claims are reasonable." Arneault v. O'Toole, 2016 WL 7029620, at * 3 (W.D. Pa. 2016) quoting Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 703 n.5 (3d Cir. 2005). To satisfy this burden, the party seeking fees is first required to submit evidence supporting the hours worked and the rates claimed. Id. If it seeks to challenge the fees sought, "the opposing party must then object 'with sufficient specificity' to the request." Id.

When awarding attorney's fees and costs under § 1988, courts within the Third Circuit use the "lodestar" method. See Maldonado v. Houstoun, 256 F.3d 181, 184 (3d Cir. 2001). The first step in using the lodestar method is to calculate "the product of the hours reasonably expended and the applicable hourly rate for the legal services." Pub. Interest Research Grp. of N.J., Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995) citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). A court has substantial discretion in determining what constitutes a reasonable rate and reasonable hours[10], but once the lodestar is determined, it is presumed to be the reasonable fee, even though the court has discretion to adjust the fee for a variety of reasons. Lanni v. New Jersey, 259 F.3d 146, 149 (3d Cir. 2001).

***4** PGE has supplied information sufficient to recover all the fees billed for this litigation but only seeks a fraction of those fees in a good-faith effort to reduce the financial hardship on the Township. PGE has submitted Affidavits, detailed invoices, and summaries of each Babst Calland attorney's work. The time entries for each billing attorney for each day of billed work show how much time was spent and why that time was spent. ECF No. 322; ECF No. 323; ECF No. 324.

The records show that attorneys billed PGE for 1738.70 hours. This number comes as no surprise to this Court. This case has a protracted and convoluted procedural history including assignment to three judges, a proposed assignment to a Special Master, an early motion for preliminary injunction with associated discovery disputes, and two motions for intervention. Each of the many filings was inordinately lengthy and some were byzantine. The calculation of this number of hours is reasonable.

In fact, this Court finds that the number of hours billed is reasonable both for what is included, but even more so for what is not included. The most striking example is the work of Lisa Manus, Vice President and General Counsel for PGE, who spent over one thousand hours drafting filings; yet, none of her time is included in the request for fees. ECF No. 322, Manus Affidavit at ¶ 16. The billing records do not include any time spent primarily attributable to supporting or opposing the two motions for intervention, both of which were significant. Finally, not included is time spent by any attorney who billed fewer than ten hours and nothing is included for legal services in which Babst Calland waived or reduced its fees.

Grant Township also challenges two entries as "potentially improper *ex parte* communications" with the Court:

- "review option of behind the scenes discussion with Judge Schwab" on February 26, 2015; and

- "telephone call to Judge Baxter's clerk to provide information re: DEP's[11] position" on July 31, 2015.

ECF No. 322-3, page 67 and ECF No. 322-5, page 28 (February 26th entry); ECF No. 322-3, page 90 and ECF No. 322-5, page 7 (July 31st entry).

It is necessary for the Court to address this charge against it. Neither of these challenged entries raises an issue of improper *ex parte* communication. The first entry does not indicate that any attorney called Judge Schwab, only that the option of doing so was reviewed. Even if the entry means an attorney contacted Judge Schwab, such a communication would not have been improper as Judge Schwab was never the presiding judge on this matter. The second challenged entry is also not improper as the Chambers Policies and Practices of the undersigned allow attorneys to discuss procedural matters with law clerks, which was the issue here.

PGE was invoiced for 1738.70 hours at an average hourly rate of $ 355.00.[12] PGE's suggestion that fees be awarded in the amount of $ 100,000.00 is infinitely reasonable. By doing so, PGE is basically agreeing to an average hourly rate of approximately $ 57.51.

Costs

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***5** PGE's fee petition includes a request for costs of $ 2,979.18. Grant Township has expressed no objections to the request. These costs are not unreasonable and will therefore be awarded.

Grant Township's Request for Hearing

Grant Township requested a hearing on the motion for attorney's fees, which will be denied as moot. This Court generally does not find oral argument useful in the resolution of motions where briefing has already occurred. In unusual situations where argument would be helpful to the Court's resolution of complex matters, oral argument may be permitted. This Court believes that oral argument here would not significantly assist its understanding or resolution of PGE's request for fees and costs. Nothing about the request presented issues of unusual complexity, and argument in this matter would have increased litigation costs without providing any appreciable assistance to the Court.

In addition, the Court found no basis for an evidentiary hearing. Grant Township's only justification for requesting an evidentiary hearing is that, to the extent that Court finds that there are any issues of disputed fact, ... the proper procedure is for the Court to hold an evidentiary hearing." ECF No. 332, at 1-2. Notably, Grant Township did not identify any specific issues of disputed fact that would require resolution through evidentiary hearing, and this Court found none.

Conclusion

PGE is awarded attorney's fees in the amount of $ 100,000.00 and costs of $ 2,979.18. An appropriate order follows.

All Citations

Not Reported in Fed. Supp., 2019 WL 1436937

Footnotes

1 This civil action was originally assigned to District Judge Frederick J. Motz and then assigned to District Judge Arthur J. Schwab for settlement purposes. Later, in accordance with the provisions of 28 U.S.C. § 636(c)(1), the parties voluntarily consented to the full jurisdiction of a Magistrate Judge and this case was then assigned to the undersigned. On September 14, 2018, the undersigned was elevated to the position of United States District Judge and this case remained assigned to her.

2 This number includes $ 100,00.00 in attorney's fees and $ 2,979.18 in costs and online research fees.

3 Because the Court writes for the parties who are well-acquainted with the protracted and complex nature of this case, only the procedural history relevant to resolving the present motion is related here.

4 In Citizens United v. Federal Election Comm'n, 558 U.S. 310, 342 (2010), the Supreme Court announced that First Amendment protections extended to corporations.

5 Trial on damages on the Equal Protection, Petition Clause and substantive due process challenges and trial on liability on the other constitutional claims were both avoided by the settlement.

6 Grant Township posits that because PGE is a corporation and because § 1988 was intended to advance the civil rights movement, PGE should not be considered a prevailing party under § 1988. Grant Township has cited no legal authority in support of its position in either regard. The plain language of the statute and the Supreme Court's recognition of a corporation's ability to enforce its constitutional rights means that § 1988 applies here.

7 Attorney's fees may be recovered under § 1988 on pendent state law claims so long as they arose from a common nucleus of operative fact with federal claims. See Rogers Group, Inc. v. City of Fayetteville, Arkansas, 683 F.3d 903, 913 (8th Cir. 2012). See also Jama v. Esmor Corr. Services, Inc., 577 F.3d 167, 177, n.9&10 (3d Cir. 2009) ("[T]he language of 1988(b) seems to be sufficiently broad to endorse the inclusion of state claims in the consideration of overall success."). Most of the pendant state law claims raised by PGE shared a common nucleus of operative facts with the federal claims as most of the claims were a direct challenge to the Ordinance.

8 This Court is not bound by the term "nominal damages" used in the Joint Stipulation Order as descriptive of the settlement amount.

9 Therefore, the cases cited by Grant Township in support of their presumption argument are inapposite here. See Jama, 577 F.3d at 169 (remanded for a determination of whether a RFRA claim on which **jury awarded nominal damages** and pendant state negligence claims on which jury awarded $ 100,000.00 involved common core of facts or were based on related legal theories); Velius v. Township of Hamilton, 466 Fed.App'x 133, 140-41 (3d Cir. 2012) (in a case in which **jury awarded only nominal damages** on a Fourth Amendment claim, Third Circuit held "we read Farrar to grant district courts substantial discretion to decide whether no fee or some fee would be reasonable, as long as they acknowledge

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that a nominal damages award is presumptively a technical victory that does not merit an award of attorney's fees."); Carroll v. Clifford Township, 625 Fed.App'x 43 (3d Cir. 2015) (upholding a district court's denial of attorney's fees in case in which **jury awarded the plaintiff nominal damages alone** on a freedom of association claim).

10 See Arneault, 2016 WL 7029620, at *7 ("The Supreme Court expressly recognized in Fox [v. Vice, 563 U.S. 826 (2011)] that, while a fee applicant must submit appropriate documentation to meet his burden of establishing entitlement to an award, 'trial courts need not, and indeed should not, become green-eyeshade accountants.' 563 U.S. at 838. Rather, 'the essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.' Id. to that end, 'trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allowing an attorney's time.' ").

11 The DEP is not a party to this case.

12 Six attorneys from the firm of Babst Calland billed PGE for work here. Each attorney billed at a different hourly rate (that rose throughout the long pendency of this matter) and for a different number of hours. To arrive at the average hourly rate of $ 355.00, this Court divided the total fee invoiced by the total number of hours invoiced (from the chart found at ECF No. 321, page 35).

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EXHIBIT 4

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

* * * * * * * * * *

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner	*	No. 126 M.D. 2017
and		
PENNSYLVANIA GENERAL ENERGY COMPANY, LLC, Intervenor		
vs.		
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, Respondents		

* * * * * * * * * *

DEPOSITION

OF

CORPORATE DESIGNEE JON PERRY

September 9, 2021

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certain enumerated items relating to this matter?

A. Yes.

Q. And one of those is Grant Township's consideration of banning or prohibiting the use of oil and gas waste fluid injection wells in Grant Township. Do you understand that?

A. Yes.

Q. And another one of those is the consideration of its decision to adopt the home rule charter. You're going to have to speak up because -

A. Yes.

Q. - I can't hear you. And to be honest with you, I'm a little hard of hearing. So it's hard for me to hear you. Okay.

And are you aware that Grant Township has designated you to testify on behalf of Grant Township, pursuant to that notice sent by the Pennsylvania Department of Environmental Protection?

A. Stacy and myself.

Q. Yes. But you, you personally?

A. Sure.

Q. And your testimony today that you are giving is on behalf of and authorized by Grant Township.

Correct?

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A. To the best of my recollection, yes.

Q. Well, I'm not asking you about a specific question. I'm asking you whether that you understand that the testimony you are giving today is on behalf of and authorized by Grant Township on these subject matters.

And in fact, of the current supervisors of Grant Township, you have been a supervisor during the entire period of time that Grant Township has either issued a community bill of rights ordinance or a home rule charter banning the disposal of waste from hydraulic fracturing fluid.

Correct?

A. Uh-huh (yes). Yes.

Q. What's your current position on the Grant Township Board of Supervisors?

A. Chairman.

Q. Okay.

How long have you been chairman?

A. Seven years.

Q. So that would be going back to 2015?

A. Perhaps.

Q. Earlier?

A. No.

Q. Okay.

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Q. Okay.

So from the outset of your involvement in this, you've worked with CELDF as an advisor to the Township on these issues.

Is that correct? Okay.

It started with this informal meet with Mr. Nicholson back sometime in 2013?

A. Yes.

Q. And that's continued throughout this entire process to today?

A. We've had a good working relationship with CELDF, yes.

Q. No offense taken, but I didn't ask you what the nature of your relationship was. I just asked you if you've had a continuous relationship from that 2013 meet and greet through today.

A. The last word was yes.

Q. So they were involved in giving advice to the township in the adoption of the community bill of rights ordinance that would have prohibited disposal of waste from hydraulic fracking into underground injection well in Grant Township.

Correct?

ATTORNEY HOFFMANN: Objection. That's privileged.

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ATTORNEY FOX: I don't know how that's privileged. Is Mr. Nicholson a lawyer?

ATTORNEY HOFFMANN: He is not. He is part of a legal organization and you asked about CELDF.

BY ATTORNEY FOX:

Q. I didn't ask whether they were - what the advice was. All I asked is did you consult with them with respect to the adoption of the ordinance, the community bill of rights ordinance for prohibiting disposal of waste from hydraulic fracturing fluid in underground injection wells.

A. Yes.

Q. And you also coordinated with them in your decision to adopt a home rule charter which prohibited the disposal of waste from hydraulic fracturing fluid into underground injection wells in Grant Township?

A. They had some influence, yes.

Q. And you're aware that both the community bill of rights ordinance and the home rule charter have been challenged in court.

Correct?

A. Yes.

Q. Okay.

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And you also coordinated with CELDF in the defense of those challenges.

Correct?

A. Certainly.

Q. And that would include the Township's positions in this case, in state court.

A. Yes.

Q. Okay.

So you mentioned your contacts with Mr. Nicholson. Did you also coordinate with Thomas Lindsay?

A. Yes.

Q. All right.

Mr. Lindsay's a lawyer.

Correct?

A. Yes, he is, I believe. Yeah.

Q. And he's a lawyer with CELDF.

Correct? Or was?

A. Yes. He was at the time.

Q. Okay.

And he was a lawyer and providing consultation to you at the time that Grant Township adopted its community bill of rights ordinance?

A. To me and the township in general, yes.

Q. And the same thing, he was involved with

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CELDF as an advisor to Grant Township when the Township adopted the home rule charter.

Correct?

A. Yes.

Q. Mr. Lindsay is well-versed in these types of ordinances and home rule charters.

Correct?

A. I sure hope so.

Q. It wasn't his first rodeo?

A. I don't think so.

Q. This was actually not the first time that CELDF had advised an approach either through ordinance or home rule charter to stop activities relating to hydraulic fracturing.

Correct?

A. You'd have to ask Tom that question.

Q. Well, in your discussions with them, were you aware that this was not the first time that they had tried to stop hydraulic fracturing activities through the adoption of ordinances or home rule charters?

A. I assume that it is now. I was not directly aware of that.

Q. Did you ever determine whether any of those attempts to limit or prohibit hydraulic

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Did Mr. Nicholson ever tell you that this had not worked in any other jurisdiction?

A. Not to my recollection.

Q. Have you watched the documentary The Invisible Hand?

A. Yes.

Q. Okay.

I'm going to read you a quote from Mr. Lindsay from that documentary. Here's the quote. Quote, under the law, that permit, meaning the permit for an underground injection well, legally overrides anything the community can do. So if the community wants to ban the frack well, the community can't. They are legally prevented from doing so. And in fact, if they move to ban the frack, they are not acting - they are acting not only illegally, but they are acting unconstitutionally. Do you recall hearing that when you watched The Invisible Hand?

A. No.

Q. Any basis for you to believe that that statement from Mr. Lindsay, who was a lawyer at the entity who was consulting with the Township, was inaccurate in what he said?

A. I don't recall it. Why would I have an opinion on it?

Certified

of rights ordinance was challenged by Pennsylvania General Energy.

Correct?

A. I am aware of that, yes.

Q. And in your defense of that on behalf of Grant Township was one of the bases that you defended your actions predicated on article one, section 27 of the Pennsylvania Constitution?

A. Which is?

Q. You don't know what that is?

ATTORNEY FOX: Excuse me. Counsel, he should not be consulting with you in-between questions. He's got to answer my questions. He can't be consulting with you. I'm sorry?

ATTORNEY HOFFMANN: Mr. Fox, I said I'm aware of that. Thank you.

ATTORNEY FOX: Well, he keeps turning to you when I ask him a question.

BY ATTORNEY FOX:

Q. So could you answer my question? You do not know what article one, section 27 of the Pennsylvania Constitution is?

A. Not off-hand, no.

Q. And so if I asked you the same question with respect to the challenge that was made by

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Pennsylvania General Energy to the home rule charter, you do not know whether the Township, Grant Township in defense of that relied upon article one, section 27 of the Pennsylvania Constitution?

A. Offhand, no, I don't.

Q. And you don't know whether in the defense of this action brought by the Department, whether Grant Township relies on article one, section 27 of the Pennsylvania Constitution?

A. Do I have a working knowledge of article one, section 27 like here in front of me?

Q. I'm not really here to educate you on article one, section 27. You said you don't know what it says. So I'm asking you and you need to answer the question whether you know that the Township has defended, in part, this action brought by the Department based upon article one, section 27 of the Pennsylvania Constitution.

A. No, I do not know that.

Q. Okay.

Do you know whether, if this case were dismissed, whether the Township would still have available to it the ability to defend against the permits in front of the Pennsylvania Environmental Hearing Board?

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A. Is there supposed to be something on my screen here?

Q. No. Just asking you were you aware that that EPA permit that we went over was originally issued sometime in March of 2014?

A. I was aware that it was issued, but the timeline is fuzzy.

Q. Okay.

So that's just - we'll have facts on the record for that.

A. Okay.

Q. Are you aware that after the permit was issued though, that is when Grant Township passed its community bill of rights ordinance?

A. That would make sense.

Q. Okay.

And, in fact, that was one of the reasons that you passed it because the permit had been issued for the Yanity Well?

A. That works in the timeline, yeah.

ATTORNEY FOX: Okay. And if we can turn to PGE Exhibit 25.

(Whereupon, Intervenor's Exhibit 25, Community Bill of Rights, was marked for identification.)

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A. Correct.

Q. And that was the same premise that you had when you eventually adopted a home rule charter?

A. Yes.

Q. Okay.

And was part of that also a determination by the Township that the traditional route of just appealing the permits to EPA or DEP was a waste of time?

A. That had been proven unsuccessful in the past, yes.

Q. And so that was also the opinion of CELDF.

Right? That it was a waste of time to go through the typical route of appealing permits, and that you needed to do something else like adopting an ordinance or a home rule charter instead?

ATTORNEY HOFFMANN: Objection. That's attorney/client privilege.

ATTORNEY FOX: Well, actually it's not. So let's turn to Exhibit, PGE Exhibit 26.

(Whereupon, Intervenor's Exhibit 26, Sierra Club Article, was marked for identification.)

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with CELDF -

A. Yes.

Q. - to go the route of adopting a community bill of rights ordinance instead of appealing it. So you must have been aware that that was their position.

A. You're making an awful lot over two sentences.

Q. Okay.

Well, maybe I'll have a couple more sentences and that'll jog your memory. Let's turn to the next page. So it says Nicholson explained the different routes available, do nothing and let the well happen, proceed with the usual environmental appeals, or just say quote no, we're not going to accept this. Nicholson said that if the township pursued the third option, CELDF would help draft a local ordinance that would simply outlaw the injection well.

A. What's your question?

Q. Same question. Were you aware that CELDF's position as expressed to the Township was that going the traditional route was a waste of time and that the only way to deal with this was through adopting an ordinance?

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A. That's how everyone felt at the time, yes.

Q. Including CELDF?

A. I can't say how they felt.

Q. Well, let's go to the next paragraph then. Can you pull the next paragraph up? What I'm asking you is not that complicated. You were in discussions with your residents, with Judy Wanchisn, with CELDF that the normal route of appealing these permits was not going to be enough.

Isn't that correct?

A. That is correct.

Q. Okay.

Because this one says Wanchisn was sold. She took the idea to the township supervisors. That's you.

Correct?

A. Yes, it is.

Q. Telling them I think this is the only way it's going to work. Under CELDF's guidance, the Grant Township supervisors directed the community bill of rights ordinance that was approved that steamy June night in 2014. So it was under CELDF's guidance that you, that the ordinance that they drafted was passed.

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A. I'd have to say yeah.

Q. Okay. Thank you. All right.

So now let's take a look at the community bill of rights ordinance that was passed in 2014. So if we could go back to Number 25. So if you look at the last two whereas clauses in this ordinance, and this is an ordinance that you were involved in the passage of and signed.

Correct?

A. Yes.

Q. And you're familiar with this ordinance? Okay.

Let's take a look at the last two whereas clauses. Whereas that right to local self-government now recognized and secured by article one, section two of the Pennsylvania Constitution declares that all power is inherent in the people and all free governments are founded on the authority and instituted for the peace, safety and happiness. And whereas this ordinance establishes a community bill of rights to further recognize the right to local self-government in Grant Township and secures that right by prohibiting those activities that would violate this local bill of rights. So those were some of the findings that you made as a

Celotron

supervisor in support of this community bill of rights.

Correct?

A. Yes.

Q. Okay.

And again, that's just like the local self-government provisions that we went over in the Highland Township ordinance.

Right?

A. It has similar wording, yes.

Q. Okay.

And, in fact, if you look at now turn to section 2A. Can we pull that up? That says all residents of Grant Township possess the right to a form of governance where they live which recognizes that all power is inherent in the people, and that all free governments are founded on the people's consent. The title of that section is right below the self-government. That's the similar language that we looked at in Highland Township's community bill of rights.

Correct?

A. It has similarities, yes.

Q. All right.

So now let's take a look at sections 2B

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A. Literally or figuratively?

Q. Well, what action, what official government action did Grant Township do in response to this opinion?

A. I'm not sure I recall.

Q. Well, did it adopt a home rule charter?

A. We did eventually do that, yes.

Q. And you say eventually. This opinion was issued on October 14th, 2015. What's the date that your home rule charter was adopted?

A. I don't remember.

Q. So it was in November of 2015. So when you say eventually, within a month of this opinion, you adopted a home rule charter.

Correct? Is it safe to say that the adoption of the home rule charter was in response to this opinion?

A. That'd be a good conclusion, yes.

Q. And did you adopt that home rule charter again in consultation with CELDF?

A. Yes.

Q. Had you already planned that in the event that a community bill of rights ordinance had been struck down that you were going to pursue a home rule charter?

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A. That would make sense.

Q. So that's a yes? You need to answer. I didn't hear you.

A. I said yes.

Q. Thank you. So now let's take a look at the home rule charter provisions. Can we pull up PGE-2?

(Whereupon, Intervenor's Exhibit 2, Home Rule Charter Provisions, was marked for identification.)

BY ATTORNEY FOX:

Q. You're familiar with the home rule charter.

Correct?

A. Yes.

Q. And that's not ancient history. That's still on the books as of today.

Correct?

A. It would appear so, yeah.

Q. Okay.

So let's go through the home rule charter provisions.

A. Step by step?

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Q. We're going to go through it step by step.

A. Okay.

Q. Let's look at section 102. The people of Grant Township possess what the collective and individual right of sub-government in their local community, the right to assist them with government that embodies that right, and the right to assist them with government that protects and secures their human civil and collective rights. Same concept as in the community bill of rights ordinance that you passed, correct? The right of self-government?

A. Yes.

Q. Let's take a look at section 701. For the adoption of this charter, the people in Grant Township call for an amendment of the Pennsylvania constitution and the federal constitution to recognize the right of local community self-government free from government mansion and nullification by corporate rights and powers. Same concept as in your community bill of rights - self-governors correct? Local self-governors?

A. Yes.

Q. All right. Let's take a look at sections 104, 106, and 1 - and 305. Let's start with 104.

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So we just went through the fact that the home rule charter from Grant Township and the community bill of rights ordinance which were struck down both have provisions that deal with local self-governments. They also - the home rule charter also has provisions just like the community bill of rights Ordinance that deal with rights of nature.

Is that correct?

A. Yes.

Q. Okay.

So the first one I want to pull up is 104. All residents of Grant Township along with natural communities and ecosystem within the township possess the right to clean air, water and soil, which shall include the right to be free from activities which oppose - may pose potential risk to clean air, water, and soil within the township, including the depositing of waste from oil and gas extraction.

So that's part of the rights of nature theory.

Correct?

A. Yes.

Q. One - one phrase in there that I want to go over, it doesn't say that this right is a right

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to be safe from these activities. It says the right to be free from them. So you're looking to prohibit them, not just regulate them.

Correct?

A. Yes.

Q. Okay.

Let's take a look at section 106. Natural communities and ecosystems within Grant Township, including but not limited to rivers, streams, and aquifers possess the right to exist, flourish, and naturally evolve. Again, the same rights of nature concept that's embedded in the community bill of rights ordinance that was struck down.

Correct? Is that correct?

A. Yeah.

Q. Now let's take a look at section 305. So you recall when we talked about the community bill of rights, we talked about the ability to enforce directly in the name of natural resources and ecosystems. Do you recall that conversation with your community bill of rights ordinance?

A. Yeah.

Q. Okay.

And that's exactly what this section

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says; ecosystems and natural communities within Grant Township may enforce their rights and this charters' prohibitions through an action brought by Grant Township or residents of Grant Township in the name of the ecosystem or natural community as the real party and interest. Same concept, virtually the same language as in the community bill of rights ordinance, correct?

A. So it would appear.

Q. I couldn't hear you.

A. So it would appear.

Q. Okay. All right.

Now let's look at section 301. It shall be unlawful within the Township for any corporation or government to engage in the depositing of waste soil - waste from oil and gas extraction. That's the exact same prohibition that's in the community bill of rights ordinance.

Correct?

A. Not having them side by side I couldn't say that, but I would imagine so.

Q. Okay. All right.

Let's take a look at section 302. And just like your community bill of rights ordinance that was struck down, this section says no permanent

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license for which charter or other authorization issued to a corporation by any state or federal entity that would violate the prohibitions of this charter or any rights secured by this charter shall be deemed valid within Grant Township.

The same provision that's in the community bill of rights.

Correct?

A. It's similar.

Q. Same exact concept?

A. Is it the same exact verbiage?

Q. I - I'd have to compare them, but I'm not even asking you that. It's the same concept. If you have a permit that's issued and it's inconsistent with Grant Township's home rule charter, it's invalid.

A. Yes.

Q. Right. And when you had the community bill of rights ordinance, it said any permit that was issued that was inconsistent with the community bill of rights ordinance was invalid.

Correct?

A. Is that what it said?

Q. Yes. We went through that. Do you want me to go back and - go back to that? I - I'm happy

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to do it if you want to see it.

A. Yeah. Let's go back.

Q. Okay. Let's do it. Let's go back to Exhibit - just give me a second. Let's go back to Exhibit 25, is that it? And let's go to section 3b.

No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this ordinance or any right secured by this ordinance, Pennsylvania Constitution, the United States Constitution, other laws shall be deemed valid.

A. Okay. Let's see the other one underneath it.

Q. You want to go back to the home rule charter?

A. No, underneath it.

Q. Okay.

Well I'm not asking about that provision, but that's fine. Let's look at three - I - I don't think there is anything under three other than B.

ATTORNEY HOFFMANN: Bob, I think he's saying he wants to see them side by side if possible.

ATTORNEY FOX: Oh. Okay. I don't know if we can do that side by side but let's toggle

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back to Exhibit 2. He just read that. And we're looking at section 302.

BY ATTORNEY FOX:

Q. And you can read that and say is that the same concept that was in the community bill of rights ordinance has now been put into the home rule charter?

A. It's similar.

Q. Same concept?

A. Yeah.

Q. Okay. Thank you. Okay.

So now let's go to section 401. This one says corporations that violate this charter or the laws of the Township or to seek to violate the charter of those laws shall not be deemed to be persons to the extent that such treatment would interfere with the rights or prohibitions enumerated by this charter or those laws, nor shall they present that any other legal rights, powers, privileges, immunities or duties and so forth. Same concept that we read in the community bill of rights ordinance.

Correct? Corporations are not - persons and they can't author purposes of trying to interfere with this charter?

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A. Okay.
Q. Correct?
A. Yeah.
Q. Okay. All right.
Let's look at section 303. Any corporation or government that violates any provision of this charter shall be guilty of an offense, and upon conviction shall be sentenced to pay the maximum fine allowable under state law. Same concept as in the community bill of rights ordinance that Grant Township passed for violations of the ordinance.
Correct?
A. What's the other one?
Q. Okay.
Can we go to number two please? And pull up number 4a - number - section 4a? Okay. Can you read that and tell me if the provision that we just looked at in the home rule charter, section 303 is the same concept as is embedded in the community bill of rights ordinance of Grant Township?
A. They have similarities.
Q. Same concept.
Correct?
A. Same idea.

Certified

Q. All right.

Let's go back to the home rule charter, section 304.

A. If you're going to keep comparing these, I would really like to see them side by side.

ATTORNEY FOX: Okay.

Can we do that, put them up side by side?

ATTORNEY HOFFMANN: Yes, we can do that.

BY ATTORNEY FOX:

Q. Okay.

So let's go to - let's go to section 304 of home rule charter. Okay.

So this says Grant Township or any resident of Grant Township may enforce the rights and prohibition to the charter through an action brought at any court possession jurisdiction or activities occurring within Grant Township.

Now you want to call up section 4b of the community bill of rights. Want to compare those and tell me if it's the same concept? It's actually the same language, isn't it?

A. Yes, it is.

Q. Okay.

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A. Very similar.

Q. Well other than the word ordinance and charter, it's the same. Okay. All right.

A. This is how we're going to do this if we're going to keep going this direction.

Q. That's fine. All right.

So let's take a look at an action being brought on behalf of ecosystems, so if we want to look at the - give me one second. Let's take a look at the section 305 and we're going to pull up from the community bill of rights section 4c. Same concept?

A. I'm reading. Yes.

Q. Okay.

And then the last one is - can we bring up section 306 and section 5b, please? So this is enforcement of state laws in the home rule charter. Although it's adopted by the legislature of the State of Pennsylvania, it was also adopted by interstate agency shall be the law of Grant Township only to the extent that they do not violate the rights and prohibitions recognized by this charter. Same exact provision in the - in the community bill of rights ordinance.

Correct?

Certified

A. I'm reading. Correct.

Q. So let me pull up just from the home rule charter section 301. So this is the prohibition and it says it shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

Correct?

A. That's what it says.

Q. Okay.

And that only - that prohibition only applies by these terms to a corporation or a government.

Correct?

A. That's what it says.

Q. Okay.

So let's take a look at the definitions of corporation and government. Let's start with corporation. The purposes of this charter includes any corporation or other business entity organized under the laws of any state or country. That's the definition that you adopted.

Correct?

A. Yes.

Q. Okay.

Let's pull up the definition of person.

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And this is the definition you adopted for a person.

Correct?

A. Yes.

Q. Okay.

So that's a natural - keep that up. Person means a natural person or an association of natural persons that does not qualify as a corporation under this chapter. So this is either individual or group of individuals that's not a corporation.

Correct?

A. That's how it reads.

Q. Okay.

Sir, let me ask you this question. Clearly you have concerns because you put it in - this prohibition into your community bill of rights ordinance and your home rule Charter about a corporation operating an underground injection well in Grant Township.

Correct?

A. I didn't really hear you very well.

Q. Sure. So clearly, because you put this prohibition in both your community bill of rights ordinance and your home rule charter, you have concerns about a corporation operating an

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underground injection well in Grant Township?

A. Yes.

Q. Okay.

Would you have the same concerns if an individual attempted to permit, construct, and operate an underground injection well in Grant Township?

A. Why would we do that?

Q. That's not my question. Assume an individual wanted to do that or a group of individuals, but they weren't a corporation. You would have the same concerns about them permitting, operating, and constructing an underground injection well in Grant Township.

Correct?

A. Not sure.

Q. You don't know?

A. I'm not sure.

Q. So that means you don't know?

A. Yeah.

Q. Okay.

A. That situation would have to present itself.

Q. So if just one individual who is wealthy wanted to do this, and had the funds to do that, you

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wouldn't be concerned about that?

A. I'd be very concerned about it.

Q. Would you want to prohibit that?

A. Yeah.

Q. All right. So let's take a stock of where Grant Township was as of November 3rd, 2015 and just - you know, go along with me here. You're aware that after EPA permitted the Yanity well, Grant Township decided to pass a community bill of rights ordinance, that as we've gone through, had similar - concepts in it to the community bill of rights ordinance in Highland Township.

Correct?

A. There were similarities, yeah.

Q. And PGE had challenged that Grant Township community bill of rights ordinance in federal court and that had been - the community bill of rights ordinance had been invalidated.

Correct?

A. Parts of it, yeah.

Q. And three weeks later, Grant Township adopted a home rule charter that was consistent with the provisions of the community bill of rights ordinance.

Correct?

Certified

these provisions similar concepts to what's in your home rule charter? If you'd prefer to have it side by side –.

A. I'd like to see it side by side.

Q. You would prefer to do that?

A. Yes.

Q. Okay. Let's do that then. Okay?

A. Yep.

Q. So let's put up the two charters. Just waiting to put them up. Okay. This could take a little bit, but let's do it.

A. All right.

Q. So the first issue that we talked about that was in Grant Township's home rule charter was the – the provisions with respect to local self-government. You recall that, right? So let's put up section 102 and then let's put up section – and – and pull up – yeah. Let's put up section 102 and 10 – I'm sorry. 102 and 701 of the Grant Township.

Let's do it this way. This'll make it faster. Let's just put on 102 of Grant Township and section 102 of Highland Township's home rule charter.

So are those provisions the same concept?

A. Sure is.

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Q. Okay.

And that's the concept of - of - that's the local self-government.

Correct?

A. Yeah. Hold on. Hold on. Hold on. Okay. All right.

Q. Yes?

A. Yeah. Uh-huh (yes).

Q. Okay.

Can we put up section 701 in - of the Grant Township and section 801 of the Highland Township?

So this is a call in both of these home rule charters for the amendment to the Pennsylvania and federal constitution to recognize a right of community self-government.

Correct?

A. Yes.

Q. Same in both - both home rule charters?

A. Pretty much the exact verbiage.

Q. Okay. All right.

Let's go to the next concept which is the rights of nature. And I'm not going to pull up everything here, but let's pull sections 305 in the Grant Township home rule charter and section 407 of

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the Highland Township home rule charter.

ATTORNEY HOFFMANN: Can you repeat that, Rob? Sorry.

ATTORNEY FOX: Yes. Section 407 of the Highland Township.

ATTORNEY HOFFMANN: I don't think there is a 507.

ATTORNEY FOX: 407.

BY ATTORNEY FOX:

Q. Okay.

So these sections are both called enforcement of natural community and ecosystem rights. These rights of nature provisions in Grant Township's home rule charter and Highland Township's home rule charter the same?

A. Reading. Very - very - very similar.

Q. Okay. All right.

Now let's take a look at sections 301a of the Grant Township home rule charter and section 401 of the Highland Township home rule charter. These - this is the prohibition against the depositing of waste from oil and gas extraction and these are identical.

Correct?

A. Yes.

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Q. Okay. All right.

Let's take a look at section 302 of the Grant Township home rule charter and section 404 of the Highland Township home rule charter. This is the provision that basically says you can't have a permit that's inconsistent or violates the home rule charter. Therese are the same as well, between Grant Township's home rule charter and Highland Township's home rule charter.

Correct?

A. They're very similar, year.

Q. All right.

The next ones I want to pull up is section 303 of the Grant Township home rule charter and section 405 of the Highland Township home rule charter. These are the provisions that make it a summary offense for a corporation to violate these and these are virtually identical as well.

Correct?

A. Yes.

Q. Okay.

Next one is - can you pull up section 304 of the Grant Township home rule charter and section 406 of the Highland Township home rule charter? This is the provision that says standing for

Veritext

township and residents that allows township and residents to enforce this and to get legal fees. And that's identical.

Correct?

A. Very similar. Yeah.

Q. Okay.

Can you pull up the next in the Grant Township home rule charter, section 305 and section 407 of the Highland Township home rule charter? Again, same heading, enforcement of natural community ecosystem rights. This is the provision that gives the ability to bring an action directly in the name of ecosystem and natural rights and to get legal fees for that. And these are the same as well between Highland Township's home rule charter and Grant Township's home rule charter.

Correct?

A. Reading. Very similar.

Q. Okay.

Let's pull up section 306 of the Grant Township home rule charter and section 410 of the Highland Township home rule charter. This is enforcement of state law, same heading again. And very similar.

Correct?

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A. Uh-huh (yes). Yes.

Q. And this is - these are the provisions that say all laws adopted by the legislature of the Commonwealth or rules adopted by the state agencies are not laws of Grant Township if they violate the charters.

Correct?

A. So it would appear.

Q. Right. And the same statement for any state law or state agency regulation that violates the charter of Highland Township?

A. Correct.

Q. Correct? I couldn't hear you.

A. Well with a little more verbiage, yes.

Q. It's the same concept.

A. Yes.

Q. And then can we pull up - one second. Can we pull up 401 of the home rule charter of Grant Township 501 of the charter for Highland Township? So this is the same heading again, corporate privileges, and this is the one that says that corporations that violate this on persons that they don't possess certain rights. Same in both of those home rule charters between Grant Township and Highland Township.

Correct?

A. Reading. Yeah. Correct. Yes. Did you not hear me?

Q. Yes. Fine. Thank you. Okay. So are you aware - you can take those down.

Are you aware that in March of 2017 the federal court granted Pennsylvania General Energy's motion which said that by passing the community bill of rights, Grant Township had violated PGE's constitutional rights?

A. I don't recall.

Q. You don't recall that? Nobody ever told you that?

A. It was five years ago. No I don't recall.

Q. Hold on. Hold on. You've been a supervisor for over seven years. If a federal district - if a federal district court holds that an action that you took violated someone's constitutional rights, you don't remember that?

A. Not specifically.

Q. Okay.

Can we pull up Exhibit 30?

(Whereupon, Intervenor's Exhibit 30, 3/31/17

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Memorandum Opinion, was marked for identification.)

BY ATTORNEY FOX:

Q. This is the opinion that holds that Grant Township, by passing the community bill of rights, violated the rights of Pennsylvania General Energy under the federal constitution. And you don't recall this sitting here today?

A. Not specifically, no.

Q. Well do you recall it generally? Do you recall it generally?

A. I'd say it's likely.

Q. What do you recall about it?

A. Not very damn much, thank you.

Q. Okay.

Does it refresh your recollection that the court found that by adopting a community bill of rights, Grant Township had violated PGE's rights under the U.S. Constitution Judicial Clause, the Equal Protection Clause, and violated PGE's Substantive Due Process rights? I couldn't hear your answer.

A. I don't remember that.

Q. Do you find it troubling, as you sit here

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today, that a district court found that you as a township had violated an entity's constitutional rights by adopting and passing an ordinance that you voted in favor of?

A. I'm sure we dealt with it.

Q. No, I'm asking you. You're a supervisor. Do you find - you find it troubling that you adopted an ordinance that you voted for and signed that violated an entity's federal constitutional rights?

A. No, I don't find that troubling at all.

Q. When you were sworn into office, did you have to take an oath?

A. Yes.

Q. And was that - oath to uphold the federal constitution?

A. Would have been.

Q. And so you don't find it troubling that a federal court said that you violated the federal constitution by an act that you took, officially?

ATTORNEY HOFFMANN: Objection, asked and answered.

ATTORNEY FOX: No it's not. You can answer it.

THE WITNESS: Ask it again.

BY ATTORNEY FOX:

Celia Fong

Q. You took an oath of office to uphold the federal constitution.

Correct?

A. Yes.

Q. Okay.

You don't find it troubling that a federal court found that you violated the federal constitution by an act that you took as supervisor?

A. Of course I find it troubling.

Q. Well you just said that you didn't.

A. Well guess what?

Q. What - what's the rest of that answer? I'm confused. One time you said it didn't bother you and now you're saying of course it did.

A. And so am I. I - I'm really not following your line of questioning. It doesn't make a lot of sense right at this point. Let's start again.

Q. I think you know exactly what I'm asking but I'll ask it for a third time.

A. Go ahead.

Q. You took an oath of office to uphold the federal constitution.

Correct?

A. Yes.

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Q. Do you find it troubling, sitting here today, that a federal court said that you violated an entity's federal constitutional rights by an action that you took and approved? Namely, the passing of the community bill of rights ordinance?

A. No.

Q. Are you aware that the federal district court in that case actually sanctioned your lawyers for CELDF for pursuing what it called a discredited in previously litigated community rights approach to prevent oil and gas operations within Grant Township?

A. They did.

Q. Are you aware that they referred that attorney from CELDF to the Pennsylvania Disciplinary Board for his actions in pursuing this community bill of rights ordinance?

A. Yes, I was aware of that.

Q. Have you read the opinion sanctioning your attorney for taking that position?

A. No.

Q. Just got to make sure that you haven't seen it before. Can we show him Exhibit - PGE Exhibit 31?

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(Whereupon, Intervenor's Exhibit 31, Federal Court Opinion, was marked for identification.)

BY ATTORNEY FOX:

Q. Have you read that opinion, the sanctions opinion?

A. I just told you no.

Q. Okay.

Were you aware that there's a finding in that opinion – can you turn to page 18? The first top paragraph there? That there's a finding by a federal district court judge, quote, the record reflects that on June 3rd, 2014, prior to passage of the challenged community bill of rights, Counsel for PGE advised the Grant Township board of supervisors that the proposed ordinance suffered numerous insurmountable legal deficiencies, as determined by this court at least once before, with regard to similar ordinance drafted by Attorney Lindsay and CELDF.

Do you recall the attorneys – the Counsel for PGF telling you that this was legally insufficient and had been rejected at least once before, prior to the time that you passed the community bill of rights ordinance?

A. No.

Q. Can we go to the bottom of page 18? That last sentence, let's start with the last sentence there and carry over. So it says were you aware that the court also found the court rejected the unfounded and contrary to established law all arguments propounded by Counsel for Grant Township seeking to deem PGE a state actor amenable pursuant to 42 USC 1983 and otherwise seeking to strip PGE of certain constitutional rights recognized pursuant to over 100 years of Supreme Court precedent. Were you aware of that finding by the court?

A. I'm not sure.

Q. Okay.

Are you aware that subsequent to this opinion, the court also awarded PGE legal fees against Grant Township for violating PGE's constitutional claims?

A. Yes, I was aware of that.

Q. Okay.

So in light of the federal court action that held that the community bill of rights passed by Grant Township violated PGE's federal constitutional rights, the sanctioning of your attorneys, and the awards of attorneys' fees against the Township, did

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you consider the legality of the home rule charter that's virtually identical to the provisions as in Grant Township's community bill of rights?

A. No.

Q. As a result of all that did you do anything to regarding the home rule charter?

A. We pressed forward.

Q. Did you seek to amend it to address the federal court opinions and the findings made by the federal court?

A. Not sure.

Q. Did you believe somehow that a home rule charter allowed you to do what was unconstitutional under your community bill of rights ordinance?

A. No.

Q. Okay.

Now, I want to talk about another case you sparred with me a little bit about.

A. Are we -?

Q. Yeah, a little bit. It's okay. It's not the first time.

A. Might be the last.

Q. May not. Okay.

So you sparred with me a little bit when I said if with respect to the invalidation of the home

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opportunity to raise those federal issues?

A. I'm not sure of that specifically.

Q. You're not aware of that?

A. Specifically, no.

Q. Well, are you aware of that generally?

A. Maybe.

Q. Okay.

Well, do you know what the status of the federal court action is? Are you aware that it's stayed while these issues are decided in state court?

A. Yes. That much, I'm aware of.

Q. And that was really the basis of allowing Pennsylvania General Energy to intervene in this case, so that it could pursue its federal constitutional issues in state court.

Correct?

A. I guess, yeah.

Q. Is it simple to say or fair to say that Grant Township preferred to have this issue decided in state court because it didn't like the way the federal court had decided the issue previously?

A. It'd be fair to have that as an opinion.

Q. I'm asking you if that's your opinion. You're a supervisor. You're here on behalf of Grant Township. Is it fair to say that Grant Township's

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with the opinions that you got in federal court.

Correct? I didn't hear your answer.

A. I didn't answer yet.

Q. Okay.

A. Ask your question again.

Q. Is it fair to say that you prefer to have these issues decided in state court because you disagreed with the decisions that you got in federal court?

A. Yes.

ATTORNEY FOX: Can we just take a five minute break? I'm almost done. I just want to make sure that I'm done. Five minutes.

(WHEREUPON, A SHORT BREAK WAS TAKEN.)

COURT REPORTER: We are back on the record.

ATTORNEY FOX: I have no further questions of this witness.

ATTORNEY WATLING: Department has no further questions for Grant Township's corporate designees. We'll note for the record that there seemed to be a lack of preparation and understanding of some of the issues listed in the corporate designee

Celia Fox

EXHIBIT 5

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UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C. Plaintiff, vs. GRANT TOWNSHIP, Defendant.	Case No. 1:14-CV-209 ***ELECTRONICALLY FILED***

AMENDED COMPLAINT

COMES NOW Plaintiff Pennsylvania General Energy Company, L.L.C., by and through its undersigned counsel, Babst, Calland, Clements and Zomnir, P.C., and hereby files the following Amended Complaint against Grant Township:

PARTIES AND JURISDICTION

1. Plaintiff, Pennsylvania General Energy Company, L.L.C., ("PGE") is, and at all times relevant herein was, a limited liability company organized and existing under the laws of the State of Pennsylvania, having its principal place of business at 120 Market Street, Warren, Pennsylvania 16365. PGE is, and at all times relevant herein was, authorized to do business in the Commonwealth of Pennsylvania. At all relevant times herein, PGE was in the business of exploration and development of oil and gas.

2. Defendant, Grant Township, Indiana County, Pennsylvania ("Grant Township") is, and at all times relevant herein was, a political subdivision organized and existing under the

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Pennsylvania Second Class Township Code, 53 P.S. §§ 65101 *et seq*., with offices at 100 East Run Road, Marion Center, Pennsylvania 15759.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and, as to the state law claims, pursuant to this Court's supplemental jurisdiction under 28 U.S.C. § 1367.

4. PGE also seeks equitable relief and a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this Court because the events and omissions giving rise to PGE's claims occurred and are occurring in the Western District of Pennsylvania.

6. Venue is also proper in this Court because Grant Township is located within the Western District of Pennsylvania.

FACTUAL BACKGROUND

7. On June 3, 2014, Grant Township adopted an Ordinance that bears a title reading an ordinance "[e]stablishing a Community Bill of Rights for the people of Grant Township, Indiana County, Pennsylvania, which prohibits activities and projects that would violate the Bill of Rights, and which provides for enforcement of the Bill of Rights" (the "Community Bill of Rights Ordinance"). What is believed to be a true and correct copy of the Community Bill of Rights Ordinance, which was advertised in *The Indiana Gazette* on May 24, 2014, together with the May 24, 2014 advertisement, is attached hereto as Exhibit "1".

8. The Community Bill of Rights Ordinance expressly prohibits within Grant Township any corporation or government from "engag[ing] in the depositing of waste from oil and gas extraction" and invalidates any "permit, license, privilege, charter, or other authority issued by any

state or federal entity which would violate [this prohibition] or any rights secured by [the Community Bill of Rights Ordinance], the Pennsylvania Constitution, the United States Constitution, or other laws". *See* Exhibit "1" at §§ 3(a) and (b).

9. The Community Bill of Rights Ordinance defines "[c]orporations" as "any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, business entity, or limited liability company organized under the laws of any state of the United States or under the laws of any County." *See* Exhibit "1" at § 1(a).

10. PGE is a "corporation" as the term is defined in the Community Bill of Rights Ordinance.

11. "Depositing of waste from oil and gas extraction", as defined by the Community Bill of Rights Ordinance, includes, without limitation, the following:

> [T]he depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "fract [sic] water," tailings, flowback or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

See Exhibit "1" at 1(b). For purposes of this Complaint, the phrase "brine, 'produced water,' 'fract [sic] water,' tailings, flowback or any other waste or by-product of oil and gas extraction" will be referred to as "Oil and Gas Materials".

12. The Community Bill of Rights Ordinance provides that corporations that violate or seek to violate the Community Bill of Rights Ordinance "shall not be deemed to be 'persons,' nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. 'Rights, privileges, powers, or protections' shall include the power to assert state or federal preemptive laws in an attempt to

overturn this Ordinance, and the power to assert that the people of the municipality lack the authority to adopt this Ordinance." *See* Exhibit "1" at § 5(a).

13. The Community Bill of Rights Ordinance also provides that "[a]ll laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions of this Ordinance." *See* Exhibit "1" at § 5(b).

14. The Community Bill of Rights Ordinance grants all residents of Grant Township the right to "enforce the rights and prohibitions secured by [the Community Bill of Rights Ordinance]", and the right "to intervene in any legal action involving rights and prohibitions of [the Community Bill of Rights Ordinance]." *See* Exhibit "1" at § 2(f).

15. The Community Bill of Rights Ordinance states that "[a]ny corporation or government that violates any provision of [the Community Bill of Rights Ordinance] shall be guilty of an offense and, upon conviction thereof, *shall* be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of [the Community Bill of Rights Ordinance], shall count as a separate violation." *See* Exhibit "1" at § 4(a). (Emphasis added).

16. The Community Bill of Rights Ordinance provides that "Grant Township, or any resident of the Township, may enforce the rights and prohibitions of [the Community Bill of Rights Ordinance] through an action brought in any court possessing jurisdiction over activities occurring within the Township, in such an action, the Township or the resident shall be entitled to recover all costs of litigation, expert and attorney's fees." *See* Exhibit "1" at § 4(b).

17. The Community Bill of Rights Ordinance further provides that "[a]ny action brought by either a resident of Grant Township or by the Township to enforce or defend the natural rights of

ecosystems or natural communities secured by [the Community Bill of Rights Ordinance] *shall* bring that action in the name of the ecosystem or natural communities secured by [the Community Bill of Rights Ordinance] in a court possessing jurisdiction over activities occurring within the Township. Damages *shall* be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Township to be used exclusively for the full and complete restoration of the ecosystem or natural community." *See* Exhibit "1" at § 4(c). (Emphasis added).

18. PGE's exploration and development activities include drilling and operating oil and natural gas wells and managing, *inter alia*, brine and produced fluids generated from operating wells.

19. In 1997, Pennsylvania General Energy Corp., PGE's predecessor in interest, put into production a deep gas well in Grant Township on property known as the Yanity Farm pursuant to Well Permit No. 37-063-31807-00-00 issued by the Pennsylvania Department of Environmental Protection (the "Yanity Well").

20. PGE currently has tanks located on the Yanity Well site used for the storage of Oil and Gas Materials.

21. The United States Environmental Protection Agency ("EPA") issues Underground Injection Control ("UIC") program Class II-D permits under the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq.*, to authorize the injection of brine and produced fluids for disposal. Pennsylvania currently does not have primacy to administer the UIC program and issue UIC permits.

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22. On May 2, 2013, PGE submitted an application to EPA for a UIC permit to convert the Yanity Well into a Class II-D brine injection well and to inject produced fluids generated at other PGE oil and gas wells into the Yanity Well.

23. EPA issued the UIC permit to PGE on March 19, 2014. That permit was appealed to the United States Environmental Appeals Board at EAB Dkt. No. UIC 14-63, UIC 14-64, and UIC 14-65. On August 21, 2014, the Environmental Appeals Board issued an order denying review of the petitions, and on September 11, 2014, EPA issued a final Class II-D injection permit to PGE.

24. Pennsylvania also regulates injection wells and ancillary facilities under the authority of the Pennsylvania Oil and Gas Act, 58 Pa.C.S. §§ 2301 *et seq*., and other Pennsylvania environmental statutes.

25. On April 16, 2014, PGE applied to the Pennsylvania Department of Environmental Protection ("DEP") to reclassify the Yanity Well from a production well to an injection well.

26. PGE intends to, and will, use the Yanity Well to inject produced fluids from its other oil and gas development operations.

27. PGE also currently operates seven (7) other currently producing conventional hydrocarbon wells in Grant Township all with appropriate active DEP permits.

28. The operation of oil and gas wells unavoidably requires engaging in the activity of "disposing of waste from oil and gas extraction" since any producing hydrocarbon well will produce Oil and Gas Materials, such as production brine, which must be stored at the well site temporarily until they are removed by the well operator.

29. As a direct and proximate cause of Grant Township's adoption of the Community Bill of Rights Ordinance, PGE will be precluded from operating the Yanity Well for legally

permissible storage and injection purposes, along with the seven (7) conventional hydrocarbon wells, and will have to shut in the wells and seek more costly alternatives for managing produced fluids.

30. PGE has suffered and will continue to suffer injury and damages if the Community Bill of Rights Ordinance is deemed valid and enforceable.

COUNT I: 42 U.S.C. § 1983

Supremacy Clause Violation

31. PGE hereby incorporates Paragraphs 1 through 30 of this Complaint as if fully set forth herein.

32. The Community Bill of Rights Ordinance purports to divest corporations, such as PGE, of virtually all of their constitutional rights in that it strips corporations of: (1) their status as "persons" under the law; (2) their right to assert state or federal preemptive laws in an attempt to overturn the Community Bill of Rights Ordinance; and (3) their power to assert that Grant Township lacks the authority to adopt the Community Bill of Rights Ordinance. *See* Exhibit "1" at § 5(a).

33. The Supremacy Clause of the Sixth Amendment of the United States Constitution establishes that the United States Constitution and federal law generally is "the supreme Law of the Land", taking precedence over state laws, and even state constitutions. U.S. Const. Art. VI, Cl. 2.

34. Under the United States Constitution, corporations are considered persons for purposes of, among other things, the First and Fourteenth Amendments and the Contracts Clause of the United States Constitution.

35. Consequently, the Community Bill of Rights Ordinance conflicts with the United States Constitution in that it attempts to strip corporations of their status as "persons", divesting corporations of all of their constitutionally protected rights.

36. Accordingly, the Community Bill of Rights Ordinance violates the Supremacy Clause of the United States Constitution and, therefore, is invalid and unenforceable.

COUNT II: 42 U.S.C. § 1983

Equal Protection Clause Violation

37. PGE hereby incorporates Paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14, § 1.

39. The purpose of the Equal Protection Clause is to protect every person within a state's jurisdiction against arbitrary discrimination occasioned by the express terms of a statute or by its improper execution through duly constituted agents.

40. The Equal Protection Clause requires that the laws of the state treat persons in the same manner as others similarly situated.

41. Grant Township is required to act in conformance with the Fourteenth Amendment to the United States Constitution.

42. The Community Bill of Rights Ordinance, without any rational basis, treats corporations and governments seeking to inject and/or store Oil and Gas Materials within Grant Township differently than similarly situated natural persons, in that the Community Bill of Rights Ordinance only applies to corporations, such as PGE, and governments, and not natural persons.

43. Consequently, the Community Bill of Rights Ordinance violates the Equal Protection Clause of the United States Constitution by treating corporations and governments differently than similarly situated natural persons.

44. The United States Supreme Court has found that an equal protection claim can be successfully brought by a "class of one" where the claimant asserts being singled out for disparate treatment by a municipality.

45. The Community Bill of Rights Ordinance was initiated and enacted by Grant Township in direct response to the EPA's issuance of a UIC permit to PGE for the operation of a UIC well in Grant Township.

46. Accordingly, the Community Bill of Rights Ordinance violates the Equal Protection Clause of the United States Constitution.

COUNT III: 42 U.S.C. § 1983

First Amendment Violation

47. PGE hereby incorporates Paragraphs 1 through 46 of this Complaint as if fully set forth herein.

48. The First Amendment of the United States Constitution provides that no law shall abridge "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. 1 and Amend. 14, § 1.

49. The Community Bill of Rights Ordinance purports to divest corporations, such as PGE, of their constitutional right to petition the government for a redress of grievances in that it strips corporations of: (1) their status as "persons" under the law; (2) their right to assert state or federal preemptive laws in an attempt to overturn the Community Bill of Rights Ordinance; and

(3) their power to assert that Grant Township lacks the authority to adopt the Community Bill of Rights Ordinance. *See* Exhibit "1" at § 5(a).

50. Thus, the Community Bill of Rights Ordinance is aimed at suppressing PGE's right to make a complaint to, or seek the assistance of, the government for the redress of grievances related to the Community Bill of Rights Ordinance.

51. Accordingly, the Community Bill of Rights Ordinance violates the First Amendment of the United States Constitution.

COUNT IV: 42 U.S.C. § 1983

Substantive Due Process Violation

52. PGE hereby incorporates Paragraphs 1 through 51 of this Complaint as if fully set forth herein.

53. The doctrine of Substantive Due Process under the Fifth and Fourteenth Amendment of the United States Constitution prohibits, among other things, the government from abrogating a person's constitutional rights. U.S. Const. Amend. 5 and Amend. 14, § 1.

54. In enacting the Community Bill of Rights Ordinance, Grant Township intended to deny corporations, such as PGE, their legal and long-standing Constitutional rights, including, but not limited to, their rights under the First, the Fifth, and the Fourteenth Amendments and the Contract Clause of the United States Constitution.

55. Grant Township's conduct in abrogating PGE's interest in environmental and UIC permits at the Yanity Well is deliberate, arbitrary, irrational, exceeds the limits of governmental authority, amounts to an abuse of official power, and shocks the conscience.

56. Accordingly, in enacting the Community Bill of Rights Ordinance, Grant Township has denied PGE substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT V: 42 U.S.C. § 1983

Procedural Due Process Violation

57. PGE hereby incorporates Paragraphs 1 through 56 of this Complaint as if fully set forth herein.

58. The Due Process Clause of the United States Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law". U.S. Const. Amend. 5 and Amend. 14, § 1.

59. The prohibition of underground injection and storage of Oil and Gas Materials within Grant Township as a direct result of the enactment of the Community Bill of Rights Ordinance significantly and materially devalues PGE's legal rights and interests related to and/or held within Grant Township, including PGE's UIC permit.

60. The Community Bill of Rights Ordinance provides for no process or procedure which could be utilized by PGE to challenge the provision of the Community Bill of Rights Ordinance which purports to render invalid any permit that allows underground injection and/or storage of Oil and Gas Materials to be conducted within Grant Township and devalues any legal interests related thereto.

61. The fact that the Community Bill of Rights Ordinance purports to prohibit corporations, such as PGE, from petitioning the government for the redress of grievances makes clear that the Community Bill of Rights Ordinance provides for no process or procedure to which

PGE could avail itself to address the deprivation of its legal rights and interests caused by the Community Bill of Rights Ordinance.

62. Therefore, the Community Bill of Rights Ordinance deprives PGE of legal rights and interests protected by the Fifth and Fourteenth Amendments of the United States Constitution without providing due process of law.

COUNT VI: 42 U.S.C. § 1983

Contract Clause Violation

63. PGE hereby incorporates Paragraphs 1 through 62 of this Complaint as if fully set forth herein.

64. The Contract Clause of the United States Constitution provides that no state shall "pass any . . . Law impairing the Obligation of Contract . . ." U.S. Const. Art. I, § 10, Cl. 1.

65. The Community Bill of Rights Ordinance bans PGE from engaging in the injection and storage of Oil and Gas Materials within Grant Township. *See* Exhibit "1" at § 3(a).

66. If PGE is not permitted to engage in said injection and storage activities within Grant Township, it will be unable to realize the benefits of the contracts (i.e., lease) it has with the owners of the subsurface estates at great cost to PGE.

67. Accordingly, the Community Bill of Rights Ordinance violates the Contracts Clause of the United States Constitution.

COUNT VII

Impermissible Exercise of Police Power under the Second Class Township Code

68. PGE hereby incorporates Paragraphs 1 through 67 of this Complaint as if fully set forth herein.

69. Second Class Townships do not possess broad police powers. Rather, they possess only such powers that have been granted to them by the Pennsylvania General Assembly.

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70. Grant Township does not have a zoning ordinance, and the Community Bill of Rights Ordinance does not purport to be a zoning ordinance.

71. Consequently, any authority of Grant Township to regulate UIC wells or injection and storage of Oil and Gas Materials must originate from the Second Class Township Code, 53 P.S. §§ 65101 *et seq*., (the "Second Class Township Code").

72. The Second Class Township Code does not authorize Grant Township to regulate UIC wells or injection and storage activities related to oil and gas operations, and, therefore, the Community Bill of Rights Ordinance is not within the scope of the powers granted to Grant Township by the General Assembly under the Second Class Township Code.

73. Furthermore, the Community Bill of Rights Ordinance is not within the scope of the powers granted to Grant Township by the Second Class Township Code because the Community Bill of Rights Ordinance attempts to create a cause of action in Grant Township and its residents. *See* Exhibit "1" at §§ 4(b) and (c).

74. Specifically, the Community Bill of Rights Ordinance purports to vest in Grant Township and all of its residents the power to enforce and defend the rights and prohibitions of the Community Bill of Rights Ordinance, including the rights to recover all costs of litigation, experts, and attorney's fees, regardless of whether Grant Township and/or its residents succeed in such enforcement. *See* Exhibit "1" at §§ 4(b) and (c).

75. The Second Class Township Code does not authorize Grant Township to create a cause of action in itself or its residents.

76. Accordingly, the Community Bill of Rights Ordinance is an impermissible exercise of Grant Township's legislatively granted authority and is therefore invalid and unenforceable.

COUNT VIII

Preemption by the Second Class Township Code

77. PGE hereby incorporates Paragraphs 1 through 76 of this Complaint as if fully set forth herein.

78. Section 1506 of the Second Class Township Code, 53 P.S. § 66506, only allows Grant Township to adopt ordinances, bylaws, rules, and regulations that are "*not inconsistent with or restrained by the Constitution and laws of this Commonwealth* necessary for the proper management, care and control of the township and its finances and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers." (Emphasis added).

79. The Second Class Township Code directly regulates, among other things, the remedies that may be utilized to challenge the legality of an ordinance adopted by a Second Class Township. *See* 53 P.S. § 66601.

80. In relevant part, Section 1601(f) of the Second Class Township Code, 53 P.S. § 66601(f), provides that "[a]ny person aggrieved by the adoption of any ordinance may make complaint as to the legality of the ordinance to the court of common pleas."

81. The Community Bill of Rights Ordinance purports to strip corporations and governments of their right to make complaints to the court of common pleas with respect to the legality of the Community Bill of Rights Ordinance in that it prohibits corporations from asserting: (1) any "state or federal preemptive laws in an attempt to overturn [the Community Bill of Rights Ordinance]"; and (2) a claim that Grant Township and/or its governing body lacks the authority to adopt [the Community Bill of Rights Ordinance]." *See* Exhibit "1" at § 5(a).

82. The Community Bill of Rights Ordinance, by stripping corporations and governments of their right to make complaints to the court of common pleas, is in direct conflict with Section 1601(f) of the Second Class Township Code and, therefore, is preempted.

COUNT IX

Preemption by the Pennsylvania Oil and Gas Act

83. PGE hereby incorporates Paragraphs 1 through 82 of this Complaint as if fully set forth herein.

84. By prohibiting within Grant Township the injection and storage of Oil and Gas Materials, Grant Township is impermissibly regulating the development of oil and natural gas, which is exclusively and comprehensively regulated within the Commonwealth by DEP pursuant to the Pennsylvania Oil and Gas Act, 58 Pa.C.S. §§ 2301 *et seq*. (the "Oil and Gas Act").

85. Section 3302 of the Oil and Gas Act, 58 Pa.C.S. § 3302, provides, in pertinent part, as follows:

> Except with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32.

86. By its terms, Section 3302 preempts local ordinances that attempt to regulate oil and gas development except for ordinances adopted pursuant to the Municipalities Planning Code (the "MPC") or the Flood Plain Management Act (the "FPMA").

87. Even ordinances adopted pursuant to the MPC or the FPMA have significant limitations. An ordinance adopted pursuant to the MPC or the FPMA is preempted if: (1) the ordinance "contain[s] provisions . . . that accomplish the same purposes as set forth in" the Oil

and Gas Act; or (2) the ordinance "contain[s] provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by the [Oil and Gas Act]." 58 Pa.C.S. § 3302.

88. By its terms, the Community Bill of Rights Ordinance was not adopted pursuant to the MPC or the FPMA.

89. Moreover, even if Grant Township adopted the substance of the Community Bill of Rights Ordinance pursuant to the MPC or the FPMA, the purpose of the Community Bill of Rights Ordinance is virtually the same as the purpose set forth in the Oil and Gas Act and the Community Bill of Rights Ordinance imposes conditions, requirements, and limitations on the same features of oil and gas operations regulated by the Oil and Gas Act.

90. The purpose of the Community Bill of Rights Ordinance is to regulate underground injection and storage of Oil and Gas Materials in a manner that protects the health, safety, and welfare of Grant Township residents. The Oil and Gas Act's purpose is to permit the optimal development of oil and natural gas while protecting the health, safety, and welfare of Pennsylvanians and the environment. *See* 58 Pa.C.S. § 3202(1).

91. The Community Bill of Rights Ordinance imposes conditions, requirements, and limitations on the injection and storage, within Grant Township, of Oil and Gas Materials. The Oil and Gas Act directly regulates wells drilled or altered to provide for such injection.

92. Consequently, the Community Bill of Rights Ordinance is preempted by the Oil and Gas Act.

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COUNT X

Community Bill of Rights Ordinance is Exclusionary

93. PGE hereby incorporates Paragraphs 1 through 92 of this Complaint as if fully set forth herein.

94. It is a well settled principle of Pennsylvania land use law that a municipality must authorize all legitimate uses somewhere within its boundaries.

95. Section 603(i) of the MPC, 53 P.S. § 10603(i), provides that "zoning ordinances shall provide for the reasonable development of minerals in each municipality."

96. The outright ban on the injection and storage of Oil and Gas Materials within Grant Township excludes legally permitted uses within Grant Township.

97. Therefore, the Community Bill of Rights Ordinance is invalid as exclusionary.

COUNT XI

Preemption by the Pennsylvania Limited Liability Company Law

98. PGE hereby incorporates Paragraphs 1 through 97 of this Complaint as if fully set forth herein.

99. The Pennsylvania Limited Liability Company Law, 15 Pa.C.S. §§ 8901 *et seq*., (the "LLCL") provides that limited liability companies "have the legal capacity of natural persons to act." 15 Pa.C.S. § 8921.

100. In enacting the LLCL, the Commonwealth of Pennsylvania intended to, and in fact did, preempt municipal regulation of a limited liability company's status as a natural person.

101. The Community Bill of Rights Ordinance purports to strip corporations, such as PGE, of their status as natural persons and declares that corporations do not possess any other legal rights, privileges, power, or protections. *See* Exhibit "1" at § 5(a).

102. The Community Bill of Rights Ordinance has been preempted by the LLCL and is therefore invalid and unenforceable.

COUNT XII

Pennsylvania Sunshine Act Violation

103. PGE hereby incorporates Paragraphs 1 through 102 of this Complaint as if fully set forth herein.

104. On August 28, 2014, during a meeting open to the public, the chairman of the Board of Supervisors of Grant Township (the "Board of Supervisors") discussed an agreement that had previously been entered into by Grant Township and the Community Environmental Legal Defense Fund ("CELDF").

105. At that meeting, the Board of Supervisors of Grant Township declared that portions of the Agreement were confidential and not available for review by the public, and upon information and belief, the Agreement relates to the CELDF's defense of the Community Bill of Rights Ordinance (the "Agreement") or involvement in this lawsuit on behalf of Grant Township.

106. Upon information and belief, the Board of Supervisors voted to authorize Grant Township to enter into or execute the Agreement at a meeting that was not open to the public.

107. Grant Township is an "agency" subject to the requirements of the Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701, *et seq*., (the "Sunshine Act").

108. Pursuant to Section 704 of the Sunshine Act, 65 Pa.C.S. § 704, "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under Section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered)."

109. Pursuant to Section 713 of the Sunshine Act, 65 Pa.C.S. § 713, if a court determines that a meeting did not meet the requirements of the Sunshine Act, it may "find that any or all official action taken at the meeting shall be invalid."

110. "Official action" is defined under Section 703 of the Sunshine Act, 65 Pa.C.S. § 703, as, among other things, "[t]he vote taken by an agency on any motion, proposal, resolution, rule, regulation, ordinance, report, or order."

111. The Board of Supervisors' vote authorizing Grant Township to enter into and execute the Agreement constitutes an "official action".

112. The Board of Supervisors' vote authorizing Grant Township to enter into and execute the Agreement is not exempted from the Sunshine Act under Section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).

113. Thus, the Board of Supervisors violated Section 704 of the Sunshine Act, 65 Pa.C.S. § 704 by voting to authorize Grant Township to enter into and execute the Agreement at a meeting which was not open to the public.

COUNT XIII

Declaratory Judgment; Unconstitutional and Unenforceable Ordinance

114. PGE hereby incorporates Paragraphs 1 through 113 of this Complaint as if fully set forth herein.

115. As set forth above, the Community Bill of Rights Ordinance violates: (1) PGE's constitutional rights under the Supremacy Clause, the Equal Protection Clause, the First and Fourteenth Amendments, and the Contract Clause of the United States Constitution; (2) deprives PGE of substantive and procedural due process; and (3) is unenforceable under and/or preempted

by the Pennsylvania Second Class Township Code, the Pennsylvania Oil and Gas Act, the Pennsylvania Limited Liability Company Law, and Pennsylvania decisional law.

116. An actual controversy exists between PGE and Grant Township with respect to whether the Community Bill of Rights Ordinance is constitutional and enforceable.

117. Grant Township asserts that the Community Bill of Rights Ordinance is constitutional, while PGE maintains that the Community Bill of Rights Ordinance infringes on its constitutional and state law rights as set forth above.

118. The Community Bill of Rights Ordinance has created uncertainty regarding PGE's rights with respect to underground injection and storage of Oil and Gas Materials in Grant Township in which it has a legal interest.

119. Declaratory relief from this Court will terminate the dispute and controversy between PGE and Grant Township with respect to the constitutionality and validity of the Community Bill of Rights Ordinance.

120. A judicial declaration is necessary as to whether the Community Bill of Rights Ordinance: (1) violates the Supremacy Clause, the First and the Fourteenth Amendments, and the Contract Clause of the United States Constitution; (2) deprives PGE of substantive and procedural due process; and (3) is preempted by or is unenforceable under relevant Pennsylvania law.

WHEREFORE, Plaintiff Pennsylvania General Energy Company, L.L.C., respectfully requests a judgment in its favor and against Defendant Grant Township as follows:

a. Declaring that the Community Bill of Rights Ordinance is unconstitutional under the Supremacy Clause, the First and the Fourteenth Amendments, and the Contract Clause of the United States Constitution;

b. Declaring that the Community Bill of Rights Ordinance violates PGE's substantive and due process rights;

c. Declaring that the Community Bill of Rights Ordinance is invalid and unenforceable, and its remedy provisions are preempted by the Second Class Township Code, 53 P.S. §§ 65101 *et seq*.;

d. Declaring that the Community Bill of Rights Ordinance is preempted by the Pennsylvania Oil and Gas Act, 58 Pa.C.S. §§ 2301 *et seq*.;

e. Declaring that the Community Bill of Rights Ordinance is exclusionary and therefore unenforceable;

f. Declaring that the Community Bill of Rights Ordinance is preempted by the Pennsylvania Limited Liability Company Law, 15 Pa.C.S. §§ 8901 *et seq*.;

g. Declaring that the Agreement between Grant Township and the Community Environmental Legal Defense Fund is invalid, null, and void under the Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701, *et seq*.:

h. Permanently enjoining and restraining Grant Township from violating provisions of the Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701, *et seq*.:

i. Issuing an injunction prohibiting Grant Township from enforcing the Community Bill of Rights Ordinance;

j. Awarding PGE compensatory and consequential damages pursuant to 42 U.S.C. § 1983, including its legal rights taken as a result of the Community Bill of Rights Ordinance;

k. Awarding PGE all fees and costs incurred in this action, including all reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

l. Granting such other relief as this Court shall deem just and equitable under the circumstances.

Respectfully submitted,

By: /s/ Kevin J. Garber
Kevin J. Garber, Esquire
Pa. I.D. 51189
Blaine A. Lucas, Esquire
Pa. I.D. 35344
Alyssa E. Golfieri, Esquire
Pa. I.D. 314369

Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222
412-394-5400

Counsel for Plaintiff, Pennsylvania General Energy Company, L.L.C.

Dated: September 16, 2014

celdf.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served by certified mail, this 16th day of September, 2014 on the following:

Thomas Alan Linzey, Esq.
P.O. Box 360
Mercersburg, PA 17236

By: /s/ Kevin J. Garber
Kevin J. Garber

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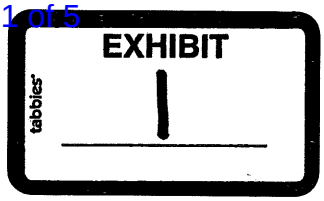

NOTICE
Grant Township, Indiana County, Pennsylvania
Community Bill of Rights Ordinance

ESTABLISHING A COMMUNITY BILL OF RIGHTS FOR THE PEOPLE OF GRANT TOWNSHIP, INDIANA COUNTY, PENNSYLVANIA, WHICH PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE THE BILL OF RIGHTS, AND WHICH PROVIDES FOR ENFORCEMENT OF THE BILL OF RIGHTS

Whereas, this community finds that the depositing of waste from oil and gas extraction is economically and environmentally unsustainable, in that it damages property values and the natural environment, and places the health of residents at risk, while failing to provide real benefits to the people of this community; and

Whereas, this community finds that the depositing of waste from oil and gas extraction violates the rights of Grant Township residents, including our right to make decisions about what happens to the places where we live; and

Whereas, private corporations engaged in the depositing of waste from oil and gas extraction are wrongly recognized by the federal and state government as having more "rights" than the people who live in our community, and thus, recognition of corporate "rights" is a denial of the rights of the people of Grant Township; and

Whereas, such denials violate the inherent right of people to local self-government; the guarantees of the Pennsylvania Constitution; and the guarantees of the Declaration of Independence and the United States Constitution; and

Whereas, the 1776 Pennsylvania Constitution recognized the inherent right of Pennsylvanians to local self-government by declaring that "all government ought to be instituted and supported for the security and protection of the community as such;" and

Whereas, that right to local self-government, now recognized and secured by Article 1, Section 2 of the current Pennsylvania Constitution, declares that "all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness;" and

Whereas, this ordinance establishes a Community Bill of Rights to further recognize the right to local self-government in Grant Township, and secures that right by prohibiting those activities that would violate this local bill of rights;

Therefore, We the People of Grant Township hereby adopt this Community Bill of Rights Ordinance.

Section 1 – Definitions

(a) "Corporations," for purposes of this Ordinance, shall include any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, business entity, or limited liability company organized under the laws of any state of the United States or under the laws of any country.

(b) "Depositing of waste from oil and gas extraction" shall include, but not be limited to the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "fract water," tailings, flowback or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

(c) "Extraction" shall mean the digging or drilling of a well for the purposes of exploring for, developing or producing shale gas, oil, or other hydrocarbons.

Section 2 – Statements of Law – A Community Bill of Rights

(a) Right to Local Self-Government. All residents of Grant Township possess the right to a form of governance where they live which recognizes that all power is inherent in the people and that all free governments founded on the people's consent. Use of the municipal corporation "Grant Township" by the people for the making and enforcement of this law shall not be deemed, by any authority, to eliminate, limit, or reduce that sovereign right.

(b) Right to Clean Air, Water and Soil. All residents of Grant Township, along with natural communities and eco-systems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.

(c) Right to Scenic Preservation. All residents of Grant Township possess a right to the scenic, historic and aesthetic values of the Township, including unspoiled vistas and a rural quality of life. That right shall include the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values, including the depositing of waste from oil and gas extraction.

(d) Rights of Natural Communities and Ecosystems. Natural communities and ecosystems within Grant Township, including but not limited to, rivers, streams, and aquifers, possess the right to exist, flourish, and naturally evolve.

(e) Right to a Sustainable Energy Future. All residents of Grant Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure this right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human or natural communities. That right shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.

(f) Right to Enforce. All residents of Grant Township possess the right to enforce the rights and prohibitions secured by this Ordinance, which shall include the right of Township residents to intervene in any legal action involving rights and prohibitions of this Ordinance.

(g) Rights as Self-Executing. All rights delineated and secured by this Ordinance are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. The rights secured by this Ordinance shall only be enforceable against actions specifically prohibited by this Ordinance.

Section 3 – Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

(b) No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Pennsylvania Constitution, the United States Constitution, or other laws, shall be deemed valid within Grant Township.

Section 4 – Enforcement

(a) Any corporation or government that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.

(b) Grant Township, or any resident of the Township, may enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the Township, in such an action, the Township or the resident shall be entitled to recover all costs of litigation, expert and attorney's fees.

(c) Any action brought by either a resident of Grant Township or by the Township to enforce or defend the natural rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possession jurisdiction over activities occurring within the Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Section 5 – Enforcement – Corporate Powers

(a) Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights, privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the municipality lack the authority to adopt this Ordinance.

(b) All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that the do not violate the rights or prohibitions of this Ordinance.

Section 6 – Effective Date and Existing Permit Holders

This Ordinance shall be effective immediately on the date of its enactment, at which point the Ordinance shall apply to any and all actions that would violate this Ordinance, regardless of the date of any applicable local, state, or federal permit.

Section 7 – People's Right to Self-Government

Use of the courts or the Pennsylvania legislature in attempts to overturn the provisions of this Ordinance shall require community meetings focused on changes to local governance that would secure the right of the people to local self-government.

Section 8 – State and Federal Constitutional Changes

Through the adoption of this Ordinance, the people of Grant Township call for amendment of the Pennsylvania Constitution and the federal Constitution to recognize a right to local self government free from and or nullification by corporate "rights."

Section 9 – Severability

The provisions of this Ordinance are severable. If any court decides that any section, clause, sentence, part, or provision of this Ordinance is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, parts, or provisions of the Ordinance.

Section 10 – Repealer

All inconsistent provisions of prior Ordinances adopted by Grant Township are hereby repealed, but only to the extent necessary to remedy the inconsistency.

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001 Public Notices

NOTICE
Grant Township,
Indiana County,
Pennsylvania
Community Bill of Rights
Ordinance

ESTABLISHING A COMMUNITY BILL OF RIGHTS FOR THE PEOPLE OF GRANT TOWNSHIPINDIANA COUNTY, PENNSYLVANIA, WHICH PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE THE BILL OF RIGHTS, AND WHICH PROVIDES FOR ENFORCEMENT OF THE BILL OF RIGHTS

Whereas, this community finds that the depositing of waste from oil and gas extraction is economically and environmentally unsustainable, in that it damages property values and the natural environment, and places the health of residents at risk, while failing to provide real benefits to the people of this community; and

Whereas, this community finds that the depositing of waste from oil and gas extraction violates the rights of Grant Township residents, including our right to make decisions about what happens to the places where were live; and

Whereas, private corporations engaged in the depositing of waste from oil and gas extraction are wrongly recognized by the federal and state government as having more "rights" than the people who live in our community, and thus, recognition of corporate "rights" is a denial of the rights of the people of Grant Township; and

Whereas, such denials violate the inherent right of people to local self-government; the guarantees of the Pennsylvania Constitution; and the guarantees of the Declaration of Independence and the United States Constitution; and

Whereas, the 1776 Pennsylvania Constitution recognized the inherent right of Pennsylvanians to local self-government by declaring that "all government ought to be instituted and supported for the security and protection of the community as such;" and

Whereas, that right to local self-government, now recognized and secured by Article 1, Section 2 of the current Pennsylvania Constitution, declares that "all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness;" and

Whereas, this ordinance establishes a Community Bill of Rights to further recognize the right to local self-government in Grant Township, and secures that right by prohibiting those activities that would violate this local bill of rights;

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(a) "Corporations," for purposes of this Ordinance, shall include any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, business entity, or limited liability company organized under the laws of any state of the United States or under the laws of any country.

(b) "Depositing of waste from oil and gas extraction" shall include, but not be limited to, the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "fract water," tailings, flowback or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

(c) "Extraction" shall mean the digging or drilling of a well for the purposes of exploring for, developing or producing shale gas, oil, or other hydrocarbons.

Section 2 - Statements of Law - A Community Bill of Rights

(a) Right to Local Self-Government. All residents of Grant Township possess the right to a form of governance where they live which recognizes that all power is inherent in the people and that all free governments are founded on the people's consent. Use of the municipal corporation "Grant Township" by the people for the making and enforcement of this law shall not be deemed, by any authority, to eliminate, limit, or reduce that sovereign right.

(b) Right to Clean Air, Water and Soil. All residents of Grant Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.

(c) Right to Scenic Preservation. All residents of Grant Township possess a right to the scenic, historic and aesthetic values of the Township, including unspoiled vistas and a rural quality of life. That right shall include the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values, including the depositing of waste from oil and gas extraction.

(d) Rights of Natural Communities and Ecosystems. Natural communities and ecosystems within Grant Township, including but not limited to, rivers, streams, and aquifers, possess the right to exist, flourish, and naturally evolve.

(e) Right to a Sustainable Energy Future. All residents of Grant Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure this right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human or natural communities. That right shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.

(f) Right to Enforce. All residents of Grant Township possess the right to enforce the rights and prohibitions secured by this Ordinance, which shall include the right of Township residents to intervene in any legal action involving the rights and prohibitions of this Ordinance.

(g) Rights as Self-Executing. All rights delineated and secured by this Ordinance are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. The rights secured by this Ordinance shall only be enforceable against actions specifically prohibited by this Ordinance.

Section 3 - Statements of Law - Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

(b) No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Pennsylvania Constitution, the United States Constitution, or other laws, shall be deemed valid within Grant Township.

Section 4 - Enforcement

(a) Any corporation or government that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.

(b) Grant Township, or any resident of the Township, may enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the Township. In such an action, the Township or the resident shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

(c) Any action brought by either a resident of Grant Township or by the Township to enforce or defend the rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possessing jurisdiction over activities occurring within the Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Section 5 - Enforcement - Corporate Powers

(a) Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights, privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the authority to adopt this Ordinance.

(b) All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions of this Ordinance.

Section 6 - Effective Date and Existing Permit Holders

This Ordinance shall be effective immediately on the date of its enactment, at which point the Ordinance shall apply to any and all actions that would violate this Ordinance, regardless of the date of any applicable local, state, or federal permit.

Section 7 - People's Right to Self-Government

Use of the courts or the Pennsylvania legislature in attempts to overturn the provisions of this Ordinance shall require community meetings focused on changes to local governance that would secure the right of the people to local self-government.

Section 8 - State and Federal Constitutional Changes

Through the adoption of this Ordinance, the people of Grant Township call for amendment of the Pennsylvania Constitution and the federal Constitution to recognize a right to local self government free from governmental preemption and or nullification by corporate "rights."

Section 9 -Severability

The provisions of this Ordinance are severable. If any court decides that any section, clause, sentence, part, or provision of this Ordinance is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the Ordinance.

Section 10 - Repealer

All inconsistent provisions of prior Ordinances adopted by Grant Township are hereby repealed, but only to the extent necessary to remedy the inconsistency.

5/24

001 Public Notices

NOTICE
NOTICE OF EXECUTOR
In the Estate of BURNELL J. MCCONNELL, Deceased, late of West Wheatfield Township, Indiana County, Pennsylvania.

Notice is hereby given that Letters Testamentary in the Estate of the above-named decedent have been granted to James M. McConnell. All persons indebted to said Estate are requested to make payment and those having claims with demands against the same will make them known without delay to:

c/o Michael T. Crum, Esquire
Attorney for Executor
ABOOD, RUSSELL, PAPPAS & ROZICH
South Street Station
Professional Building
709 Franklin Street, Suite 200
Johnstown, PA 15901
5/17, 5/24, 5/31

READ the Classified Public Notices and Sunshine Notices to learn about upcoming planning and budget meetings.

001 Public Notices

NOTICE
The Borough of Marion Center shall consider the passage of two Ordinances at its June meeting scheduled for Monday, June 2, 2014 at 7:00 p.m. in the Marion Center Borough Building located at 1000 Manor Street, Marion Center, Pennsylvania. The full text of the Ordinances may be examined in the office of Marion Center Borough Building at 1000 Manor Street, Marion Center, Pennsylvania by calling to schedule an appointment at (724) 397-0300 or at the Indiana County Law Library, Indiana County Courthouse, 825 Philadelphia Street, Indiana, Pennsylvania, between the hours of 9:00 a.m. and 12:00 Noon and 1:00 p.m. and 4:00 p.m. on regular business days. The following are summaries of the Ordinances:

ORDINANCE NO.

AN ORDINANCE OF THE BOROUGH OF MARION CENTER, COUNTY OF INDIANA, AND COMMONWEALTH OF PENNSYLVANIA, REQUIRING OWNERS OF RENTAL PROPERTIES TO SUBMIT A LIST OF TENANTS RESIDING IN THE PROPERTIES PERMITTING THE DESIGNEE OF MARION CENTER BOROUGH COUNCIL TO INSPECT NON-OWNER OCCUPIED BUILDINGS AND DWELLING UNITS FOR ALL APPLICABLE CODES AND ORDINANCES.

1. Any person owning any property within the Borough of Marion Center that is rented in whole or in part shall be required to file a Registration form with the Borough Secretary. The form will include the maximum number of tenants allowed for the property and registration shall be good for one (1) year.

2. A designee of the Marion Center Borough Council shall perform inspections related to this Ordinance and also any applicable Ordinance or Codes of Marion Center Borough.

3. The annual registration fee shall be $50.00, change to the registration shall be $5.00, the inspection fee shall be $30.00 per dwelling unit.

4. Any person violating the Ordinance shall pay a penalty of not less than $100.00 nor more than $500.00, together with costs. Each day shall constitute a separate violation.

5. Any person found in violation of any other Ordinance or Code shall be subject to administrative fine equal to $50.00, plus $50.00 per day for such violations if they are not remedied within twenty (20) days of the date of notice of violation.

ORDINANCE NO.

AN ORDINANCE OF THE BOROUGH OF MARION CENTER, COUNTY OF INDIANA, AND COMMONWEALTH OF PENNSYLVANIA ADOPTING THE 2009 EDITION OF THE INTERNATIONAL PROPERTY MAINTENANCE CODE.

1. This Ordinance adopts the 2009 Edition of the International Property Maintenance Code to regulate and govern the conditions and maintenance of all properties, buildings, and structures within the Borough of Marion Center.

2. In addition, the Ordinance provides for the prosecution of violations and penalties for violations, including an administrative fine of not less than $25.00 nor more than 100.00 per violation. Each day that a violation continues after due notice has been served shall be deemed a separate offense.

Both Ordinances shall take effect upon adoption.

5/24

001 Public Notices

NOTICE
Sealed proposals will be received by the: South Mahoning Township, 2nd Class of Indiana County, Pennsylvania at 244 Rossmoyne road, Home, PA 15747 until 4:30 p.m. on June 16, 2014, for the following:

2005 or newer grader with less than 6,000 hours. Successful bidder must accept trade of Wabco 555 Grader. Wabco 555 must be removed at time of delivery.

Proposals must be upon the forms furnished by the Municipality. The Municipality reserves the right to reject any or all bids.

South Mahoning Township
2nd Class
By Priscilla Lambing
Secretary

5/24, 5/28

TRUST. It's the reason 42% of area residents read The Indiana Gazette on a daily basis. Classifieds give you affordable access to those loyal readers. To place a Classified ad phone (724) 349-4946. To start a Gazette subscription, phone our Circulation Department at (724) 465-5555. Office hours are 8 a.m. to 5 p.m Monday - Friday.

002 Sunshine Notices

NOTICE OF INTENT TO ADOPT BUDGET

Notice is hereby given of the Intent of the Board of School Directors of the Marion Center Area School District, Indiana County, to adopt a budget for the school year commencing July 1, 2014 and ending June 30, 2015 at the regularly scheduled meeting on Monday, June 23, 2014. The proposed budget as prepared of said school district remains available for inspection by all interested persons, at the Central Office of the Marion Center Area Schools during regular business hours of 7:30 a.m. to 3:30 p.m. until June 23, 2014.

004 Memoriams

Gary Lee Stiles
5/23/49-10/18/12

Birthday Wishes
I wanted you to know you are greatly missed.
The memories I have of you will remain in my heart forever. I miss your strength and calmness.

Sadly missed by wife

006 Lost & Found

FOUND: Black female medium sized dog. Indiana Boro, N 9th St area. (724) 422-7928

FOUND: Dog, male in tact, Chow Shepherd mix golden color, found Hillsdale FFF (724) 349-1144

LOST Small English Setter, female, white with black marking & long feathered tail, had orange collar with tags & phone number. Call Bob (724) 840-2605. Reward offered.

012 Special Notices

A Divorce $219 Complete. Uncontested. No-Fault. Reisman & Davis, Pgh. No Travel. Free Info **1-800-486-4070, 24/7**

015 Houses For Sale

4608 SQ Ft home located on cul-da-sac. 3-4 bdrm, 4 baths, Formal living- dining rm, lrg family rm, man cave, heated glass enclosed porch overlooking park like yard. Room for boy toys, 2 car garage, & 2 bay 2 story detached garage. Amazing low price, $195,000. MUST SEE. Call (412) 289-0918 http://mysite.verizon.net/vze885po

INDIANA County near Vintondale, 2 bdr, 2 ba., 8.5 acres, country setting, public water & sewer, new carpeting, fresh paint, move in condition, $38,000 Neg. (814) 749-0156

MARION CENTER: East Main St. spacious, 4 bdr, 1 bath home w/ fireplace, lease or cash, $1,000 down, $526 per month. Call 877-553-5348

016 Condominiums For Sale

2 bdrs, 1.5 baths, all appliances, a/c, gas heat, 1 car garage & basement. $84,500. (724) 465-4635

017 Townhouses For Sale

FOR SALE BY OWNER Georgetown Village, 3 bdrm, 3.5 bath, finished basement, new carpet, fresh paint, end unit. Detached garage. Contact Larry (412) 289-2449 or Jeff (724) 422-7287 Selling price $189,500.

ACTION- Have you tried using the Gazette Classified Action ads yet? Join the growing number of satisfied sellers who got quick results at little or no cost to them. People are always looking for great bargains and Action ads bring sellers and buyers together. Items such as clothing, sporting equipment , musical, appliances and much much more can be sold through the Gazette Classifieds. Call (724) 349-4949 for details on our Class Action program

019 Lots & Acreage For Sale

STERLING HILLS Development, Indiana - Lots starting at $25,000 with Public Utilities. Call (724) 349-4914.

CLASSIFIED helpline: (724)349-4946. When your ad is published, specify the hours you can be reached. Some people never call back if they cannot reach you the first time. Our classified staff is available to serve you from 8 a.m. to 5 p.m Monday thru Friday.

021 Business Property For Sale

PRICE REDUCED! Retail Furniture Store or Commercial Building For Sale. 6th Street, Clymer. 724-254-5678

025 Commercial Property For Sale

APARTMENT Building & Car Wash, Yatesboro, PA, $197,000, (724) 954-7864

030 Furnished Apartments

2/3 BDRS, available for 2014-2015, close to campus, (724) 349-0152 or runcorental@verizon.net

2BDRM, full bath, washer/dryer, 10x10 kennel, util & trash incl. $650/mo. Robinson, only 20 mi. from Indiana, 15 mi. from Homer City, & 14 mi. from Blairsville. United School Dist. (804) 712-5794

030 Furnished Apartments

AFFORDABLE / CLEAN APARTMENTS
Indiana Area
Utilities included
Call (724) 388-4580

031 Unfurnished Apartments

2 bdrm, 1 bath close to Indiana schools, appl. Incluc. $650/mo plus util. No pets. (724) 349-1659

APARTMENTS: Indiana 1 bdrm. Blairsville 2 bdrm. No dogs. (724) 422-1484 mmetil@verizon.net

ATTRACTIVE, 1 bdrm unit, carpeting, appliances, air, on-site laundry, off st. parking. Rent incl water, garbage, sewage. No Pets. 10mo lease $475/mo (724) 463-1645

AULTMAN Area: Garage Apt. 4 rooms & 1 bath. Non-smoking, no pets. Sec Dep & Refs. $500/mo + utilities (724) 479-8824

AVAILABLE Immediately! nice 1 bdrm, 1st floor, all major appl included, Marion Center (724) 388-8520

APARTMENTS FOR RENT

Available Immediately: 2 bedroom, 2nd floor, 339 Grandview Ave,, $750/month Plus utilities A/C, Washer Dryer Hook Ups. Non smoking, no pets. (724) 388-2161

COLONIAL MANOR APARTMENTS
1 & 2 bedroom apartments. No pets. For info call (724) 463-9290 9am to 4pm Mon - Fri

COUNTRY Living min. from Ind. 2 bdrm, $500, 1 bdrm $425, 4394 Warren Rd. (724) 465-8522

CREEKSIDE: 1 Bedroom some utilities included, Pet friendly. Security dep. required. (724) 464-3105

HOMER CITY: 2 Bdrm, 1st floor, A/C, carpet, laundry room, priv. parking, $575/mo. heat incld, No pets. (724) 479-2294

INDIANA BORO: Beautiful, newly remodeled, 2 bdr, with all appliances, washer/dryer, A/C, front & rear porch & parking. $725/month plus utilities. Non-Smoking, No pets. (724) 388-2008

INDIANA: 1 bdrm, 1st flr, appliances, $500/mo. + elec & trash. We pay heat & water, Non smoking, no pets. (724) 465-6807

Advertise your employment ad in Classifieds.

SUDOKU

Difficulty: 4 (of 5)

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PREVIOUS SOLUTION

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HOW TO PLAY: Each row, column and set of 3-by-3 boxes must contain the numbers 1 through 9 without repetition.

031 Unfurnished Apartments

NICE 2 bdr apartment, appl, water/sewage incl., sec. & ref, Coral $465/mo. Pets? (724) 479-2541

ONE Bedroom, $500/mo. plus electric. 2 bedroom apts available. (724) 465-8982

ONE Bedroom. A/C, low traffic, laundry on-site, parking. No pets. One year lease. runcontal@verizon.net (724) 349-0152

TWO Bedroom apartment in Marion Center Area. No Pets! Available now! 724-397-9492

032 Business Property For Rent

FOR RENT

BUSINESS Rental or 1 bedroom apt, corner of Warren Rd & Briarwood Dr. Close to Indiana Mall. Ample parking. Rent & all utilities $650/mo. 724-349-7234/ 724-355-2368

HEATHERBRAE APARTMENTS
Located Between Indiana Mall & Wal★Mart
Upscale Apartment Living
Two Bedroom Units With 1 or 1½ Baths, Heat Included, Indoor Parking
724-463-6200

035 Houses For Rent

2 bdr, 1 bath, Marion Center SD, interior remodeled, $350/mo. Call (724) 465-2821

2 bdrm, newly renovated 1 yr ago, appliances included, $625/mo plus utilities. (724) 349-1669

BORO: 3 Bdrm 1.5 bath, family room, 2 decks, 2 car garage, kitchen appliances incl. C/A, gas fireplace. Avail. mid June. No Pets. (724) 422-4300

INDIANA: Clean, Modern 2 bdrm Condo, furnished or unfurnished, 1 car garage. (724) 388-4580

THREE Bedroom house near IUP $800 per month plus utilities. (724) 388-7605

036 Duplex For Rent

AVAIL. June 1, 1 yr lease, sm. 2 bdrm, furniture optional, No pets, $600/mo plus util. 724-465-8253

BORO: 2nd floor, one bedroom, $495 + electric. Includes heat & water. No pets. Call (724) 463-3996

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EXHIBIT 6

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner,	:	
and	:	NUMBER
PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., Intervenor,	:	126 M.D. 2017
v.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, Respondents.	:	

- - -

Thursday, August 26, 2021

- - -

Oral deposition of MELISSA TROUTMAN, taken remotely via Zoom, beginning at 1:00 p.m., and reported stenographically by Denise A. Ryan, a Professional Shorthand Reporter and Notary Public.

- - -

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street - Suite 1800
Philadelphia, Pennsylvania 19103

cejf.org

A. "Invisible Hand" was not about hydraulic fracturing.

Q. It was related to that, correct? It was related to at least Grant Township's actions with respect to the underground injection of hydraulic fracturing fluid, correct?

A. The film was about Grant Township's approach to dealing with an outside risk.

Q. Right. But the outside risk in that movie -- I've watched it.

A. Yes, it is.

Q. -- is about the outside risk that they believe was posed by the injection wells --

A. Of fracking waste, yes.

Q. All right. So I actually want to focus -- that movie is called "Invisible Hand," correct?

A. It is.

Q. Okay. And I wouldn't say the entire documentary is about that, but a large portion about that focuses on Grant Township,

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requests for interviews.

Q. Okay. So I want to read you a direct quote that you put into the documentary about the permits issued by the Yanity well, and just before I read this, I just want to make clear, nobody has ever told you, nobody has ever commented to you during the making of the documentary or after the documentary that any of these statements are false, correct?

A. No one has come to me and said, "Hey, that's not right," correct.

Q. All right. So this statement, and it's -- I don't have the exact second, but it's around minute 14 of the documentary, is from the executive director of CELDF at the time.

A. Okay.

Q. This is the quote: "Under the law that permit," and he is referring to the Yanity permit, "legally overrides anything the community can do. So if the community wants to ban the frac well, the community can't. They are legally prevented from doing so, and, in fact, if they move to ban the frac, they are

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acting not only illegally but they are acting unconstitutionally."

Do you recall that quote?

A. I do.

Q. And you put that in your documentary?

A. Yes.

Q. And you have no basis to question the truth or accuracy of that statement?

A. It is not my job to question the truth or accuracy, it's my job to document.

Q. Okay. So I want to go back and unwind a tiny bit here, a little bit about this Rights of Nature. So you didn't focus just on the Rights of Nature as it relates to Grant Township, you also did that for a community in Ohio, correct?

A. Correct. We -- we tried to give several examples of communities that were enacting Rights of Nature, including Tamaqua Borough, which was the first to do so in the United States.

Q. And was it Toledo, Ohio?

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A. I think individual is included in there. I think association of natural persons.

Q. Right, so it could be a group of individuals, as long as they're not, you know, a filed partnership or --

A. Oh, yes.

Q. -- corporation, these are individuals or groups of individuals?

A. Okay. Yes, yeah.

Q. And that would not be included within the definition of a "Corporation," correct?

A. Yeah, according to this, yes.

Q. Okay. So would you have the same concerns about an individual or group of individuals permitting or operating an underground injection well as you would if the operator and permittee was a corporation?

A. I think I understand you. Would I feel the same whether it was a sole proprietor individual or something -- a corporation?

Q. Yes.

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A. Yeah, I don't think that changes much. That doesn't change much, no. I think I would have the same concerns regardless of who was doing it.

Q. Thank you.

Okay. So you talked about your time that you worked for Earthworks, right?

A. Yes.

Q. So is one of the things that you did, publish the Pennsylvania Oil and Gas Waste Report?

A. Yes.

Q. You were the author of that report?

A. I was one of the authors, yes.

Q. Okay. So when you say you were one of the authors -- let's bring up PGE Exhibit 21 -- is that the report that we have identified as the Pennsylvania Oil and Gas Report (sic)?

A. It is.

Q. Okay. And if you go to the second page, just real briefly, it lists you as the author, correct?

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EXHIBIT 7

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IN RE PENNSYLVANIA GENERAL ENERGY COMPANY, LLC

UIC Appeal Nos. 14-63, 14-64, & 14-65

ORDER DENYING REVIEW

Decided August 21, 2014

Syllabus

This matter involves three consolidated petitions for review of an Underground Injection Control ("UIC") permit that U.S. Environmental Protection Agency Region 3 ("Region") issued to Pennsylvania General Energy Company for a Class II injection well on March 19, 2014. The Board received petitions from the following individuals: Ms. Suzanne Watkins (UIC Appeal No. 14-63), Ms. Judy and Mr. Paul Wanchisn and Ms. Stacy and Mr. Mark Long (UIC Appeal No. 14-64) ("Wanchisn/Long Petition"), and Mr. William J. Woodcock III (UIC Appeal No. 14-65). Petitioners contend that the Region failed to respond adequately to public comments submitted regarding the permit and question whether the permit conditions are adequate to protect the groundwater aquifer.

Held: The Board denies all three petitions for review. The Board denies Mr. Woodcock's petition for lack of standing. The Board finds that the Region provided thorough and well-reasoned responses during the public comment period to the questions and concerns raised in the Wanchisn/Long and Watkins petitions. The Board denies those petitions for failure to confront the Region's responses and failure to demonstrate that the Region made a clear error of law or fact or abused its discretion in issuing the permit.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge McCabe:

I. *STATEMENT OF THE CASE*

On March 19, 2014, the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 3 ("Region") issued an Underground Injection Control ("UIC") permit to Pennsylvania General Energy Company, LLC ("PGE") for a Class II injection well, referred to as the "Marjorie C. Yanity 1025." *See*

Injection Control Permit No. PAS2D013BIND Authorization to Operate Class II-D Injection Well (Mar. 19, 2014) ("Permit"). The Environmental Appeals Board ("Board") received three petitions for review of the permit from the following individuals: Ms. Suzanne Watkins (UIC Appeal No. 14-63), Ms. Judy and Mr. Paul Wanchisn and Ms. Stacy and Mr. Mark Long (UIC Appeal No. 14-64) ("Wanchisn/Long Petition"), and Mr. William J. Woodcock III (UIC Appeal No. 14-65). The Board consolidated these appeals on April 30, 2014. For the reasons explained below, the Board denies the petitions for review.

II. *PROCEDURAL AND FACTUAL HISTORY*

A. *The UIC Program*

Congress established the UIC program pursuant to Safe Drinking Water Act ("SDWA") section 1421, 42 U.S.C. § 300h, and EPA promulgated regulations at 40 C.F.R. parts 144 through 148 to protect underground sources of drinking water. The program is designed to protect underground water that "supplies or can reasonably be expected to supply any public water system." SDWA § 1421(d)(2), 42 U.S.C. § 300h(d)(2). The regulations specifically prohibit "[a]ny underground injection [] except into a well authorized by rule or except as authorized by permit issued under the UIC program." 40 C.F.R. § 144.11. The UIC permit application procedures are set forth in section 144.31, which provides: "all injection activities including construction of an injection well are prohibited until the owner or operator is authorized by permit." 40 C.F.R. § 144.31(a).[1]

The UIC regulations establish minimum requirements for state-administered permit programs. EPA administers the UIC program in those states

[1] Under 40 C.F.R. § 144.6, injection wells fall into five classes depending on the material being disposed of in the well. Class II wells are used to inject fluids:

> (1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.
>
> (2) For enhanced recovery of oil or natural gas; and
>
> (3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

40 C.F.R. § 144.6(b).

that, like Pennsylvania, are not yet authorized to administer their own programs. *See* 40 C.F.R. §§ 144.1(e), 147.1951.

B. *The PGE Permit*

The proposed permit authorizes PGE to convert an existing PGE production well into a Class II brine disposal injection well, and to inject fluids produced in association with PGE's oil and gas production operations. Permit at 1. The lowermost source of drinking water in the area surrounding the proposed well is located approximately 520 feet below surface elevation. *See* Statement of Basis for U.S. EPA's Underground Injection Control (UIC) Program Draft Class IID Permit No. PAS2D013BIND for Pennsylvania General Energy Company, LLC at 2 (Sept. 18, 2013) ("Statement of Basis"). The permit limits injection to an area referred to as the "Huntsville Chert Formation" in the interval between approximately 7,544 feet through 7,620 feet. *Id*. An interval of approximately 7,024 feet separates this injection area from the lowermost source of drinking water. *Id*. at 3. Immediately above the injection zone is a confining zone referred to as the "Onandoga Formation," comprised of approximately 180 feet of limestone and shale. *Id*. at 3; U.S. EPA Region 3, Responsiveness Summary for the Issuance of [a UIC] Permit for [PGE] at 10 (Mar. 19, 2014) ("Responsiveness Summary"). This geological formation has a low permeability, giving it the ability to confine and trap fluids and prevent upward migration. *Id*. As discussed below, the permit contains provisions designed to ensure both well integrity and the protection of drinking water.

III. *THRESHOLD REQUIREMENTS FOR BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of a UIC permit. In considering any petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements such as timeliness, standing, issue preservation and specificity. 40 C.F.R. § 124.19(a)(2)-(4); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). If the Board concludes that a petitioner satisfies all threshold pleading obligations, then the Board evaluates the merits of the petition for review. *See Indeck-Elwood*, 13 E.A.D. at 143. If a petitioner fails to meet a threshold requirement, the Board typically denies or dismisses the petition for review. *See, e.g.*, *In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-12 & 10-13, at 4-7 (EAB June 9, 2010) (Order Dismissing Two Petitions for Review as Untimely).

In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R.

§ 124.19(a)(4). The petitioner bears that burden even when the petitioner is unrepresented by counsel, as is the case here.[2] *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Encogen Cogen. Facility*, 8 E.A.D. 244, 249-50 (EAB 1999). With these principles in mind, the Board next considers the three petitions presented in this appeal.

IV. *ANALYSIS*

A. *Mr. Woodcock Lacks Standing*

In every appeal from a permit decision, a petitioner must demonstrate prior involvement in the public review process, *either* by filing written comments on the draft permit *or* by participating in a public hearing. 40 C.F.R. 124.19(a)(2).[3] A person who does not participate during the public review process may petition for review if changes are made between the draft and final permit, but may only challenge the decision with respect to those changes. *Id.*; *see, e.g.*, *In re Am. Soda LLP*, 9 E.A.D. 280, 288-89 (EAB 2000); *In re Envotech*, 6 E.A.D. 260, 267 (EAB 1996). The Board denies, for lack of standing, petitions for review that do not meet this threshold requirement. *E.g.*, *In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 & 08-03, at 4, 10-11 (EAB May 23, 2008) (Order Denying Review); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 (EAB 2002).

---

[2] The Board generally endeavors to construe liberally the issues presented by an unrepresented petitioner, so as to fairly identify the substance of the arguments being raised. The Board nevertheless "expect[s] such petitions to provide sufficient specificity to apprise the Board of the issues being raised." *In re Seneca Res. Corp.*, 16 E.A.D. 411, 412 n.1 (EAB 2014); *In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999). "The Board also expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." *Sutter*, 8 E.A.D. at 688; *accord In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994).

[3] This regulation provides in relevant part:

> Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review as provided in this section. Additionally, any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review of any permit conditions set forth in the final permit decision, but only to the extent that those final permit conditions reflect changes from the proposed draft permit.

40 C.F.R. § 124.19(a)(2).

Mr. Woodcock's petition does not indicate that he submitted comments on the draft permit, nor does the record reflect that he participated in any way. Further, the Region's response to the petitions states that Mr. Woodcock did not submit comments on the draft permit during the public comment period or participate in the public hearing. Region's Response at 14-15. Mr. Woodcock also does not challenge the Region's permit decision with respect to changes made between the draft and final permit. Based on all of the above, the Board concludes that Mr. Woodcock does not meet the threshold standing requirements of 40 C.F.R. § 124.19(a)(2) and, accordingly, denies Mr. Woodcock's petition for review.

B. *The Wanchisn/Long Petition Fails to Demonstrate That Review Is Warranted*

The part 124 regulations require that a petition demonstrate that the contested permit conditions are based on either a clear error of fact or law or an exercise of discretion or important policy consideration warranting Board review. The petitioner must explain, with factual and legal support, why the permit condition or other challenge warrants Board review, and why the Region's response to comment on the issue raised was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4).

The Wanchisn/Long petition fails to meet these requirements. The petition consists essentially of a series of questions and concerns pertaining to the UIC permit. The petitioners contend on appeal that the Region did not specifically answer all of their very detailed technical questions. The Board finds, to the contrary, that the Region provided thorough and well-reasoned responses to the questions and concerns.[4] As petitioners note, these same questions were submitted to the Region as comments on the draft permit. *See* Wanchisn/Long Petition at 3-4. Yet, the petition fails to reference the Region's responses or to

[4] In its response to comments, the Region grouped the specific questions into common categories, which enabled it to provide a clear and efficient response to the overarching concerns and questions that petitioners raised. This format for the response to comments is consistent with the regulations and the Board's case law. *See* 40 C.F.R. § 124.17(a) (requiring that the permit issuer briefly respond to all significant comments); *In re Kendall New Century Dev.*, 11 E.A.D. 40, 50 (EAB 2003) (stating that § 124.17(a) "'does not require a [permit issuer] to respond to each comment in an individualized manner,' nor does it require the permit issuer's response 'to be of the same length or level of detail as the comment'") (quoting *In re NE Hub Partners, LP*, 7 E.A.D. 561, 583 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999)).

explain why the Region's responses were clearly erroneous or otherwise warrant Board review.

The Region appropriately recognized the petitioners' legitimate and understandable concerns with respect to the safety of their drinking water, and explained in detail how its technical analysis supports the conclusion that the permit conditions for this Class II well protect the drinking water aquifer in accordance with the requirements of the federal UIC regulations. This satisfies the Region's obligations under the law. Simply repeating questions in a petition for review before the Board that have been previously presented to and answered by the permit issuer does not satisfy the regulatory requirement that petitioners confront the permit issuer's responses and explain why the responses were clearly erroneous or otherwise warrant Board review. *See* 40 C.F.R. § 124.19(a)(4)(ii).

Federal circuit courts of appeal have consistently upheld the Board's threshold requirement to demonstrate, with specificity, that review is warranted, including the requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *See, e.g.*, *Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012), *aff'g In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010) (Order Denying Review); *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, 310 F. App'x 770, 775 (6th Cir. 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why the permit issuer's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review); *see also* 78 Fed. Reg. at 5,282. The petition does not satisfy this requirement.

The questions and concerns raised in the Wanchisn/Long petition fall into the following general categories: (1) the calculation of the "area of review" and "zone of endangering influence" surrounding the injection well; (2) the potential for seismic activity; (3) well integrity, monitoring, and testing requirements; (4) the injection and confining zones; and (5) the plugging and abandonment of the well when operations cease. Petitioners and others, including the League of

Women Voters of Pennsylvania, raised these concerns in a virtually identical fashion during the public comment period.[5] The Board finds that the Region provided thorough and well-reasoned responses to each of these concerns, as described below.

1. *Area of Review*

Under 40 C.F.R. § 144.3, the "area of review" is defined as the area surrounding the injection well calculated according to the criteria set forth in 40 C.F.R. § 146.6. Section 146.6 calls for the area of review to be determined according to calculation of a "zone of endangering influence" or according to a "fixed-radius method" around the well of not less than one-fourth mile.[6] 40 C.F.R. § 144.6(b). The zone of endangering influence is defined as "the lateral distance in which the pressure in the injection zone may cause the migration of the injection and/or formation of fluid into an underground source of drinking water." *Id.* § 146.6(a)(1)(i). The zone of endangering influence is calculated based on a mathematical model, an example of which is provided in the regulations. *Id.* § 146.6(a)(2).[7] In the present case, as the Region explained in the Statement of Basis accompanying the draft permit, PGE initially chose a one-quarter mile fixed radius as the area of review surrounding the proposed injection well. Statement of Basis at 2. In considering PGE's permit application, the

[5] *Compare* Wanchisn/Long Petition *with* League of Women Voters of Pennsylvania, Comments Regarding General Energy Co., LLC (PGE) PAS2D013BIND (Oct. 28, 2013), *and* E-mail from Judy & Paul Wanchisn to Steve Platt, U.S. EPA Region 3, Re: Comments on Draft UIC Permit (Nov. 4, 2013).

[6] An important part of the application and approval process for Class II wells is identifying existing and abandoned injection and drinking water wells in the area of the proposed well and developing appropriate corrective action plans, as needed, for those wells. The regulations require applicants to submit a topographical map extending one mile beyond the property boundary depicting springs and other surface water bodies, as well as drinking water wells within a quarter mile of the property boundary. 40 C.F.R. § 144.31(e)(7). In addition, the Region must consider data on the operation, construction, and history of any water wells within the area of review. *Id.* § 146.24(a)(1)-(3); *see id.* § 144.55(a) (requiring applicants to identify, among other things, all wells within the area of review that penetrate the injection zone).

[7] The regulations provide a mathematical model, referred to as a modified Theis equation, which may be used for calculating the zone of endangering influence. The model includes the following parameters: thickness of injection zone, injection rate, duration of injection, specific gravity of fluid in the injection zone, and thickness of the injection zone. 40 C.F.R. § 146.6(a)(2).

Region "conducted a zone of endangering influence calculation (a modified Theis equation flow model) using geologic information pertinent to the injection zone as well as anticipated operational parameters" provided by PGE. *Id*. Based on its zone of endangering influence calculation, the Region extended the area of review beyond the one-quarter mile fixed-radius chosen by PGE. *Id*. As a result, PGE provided data on wells approximately 100 feet beyond the one-quarter mile radius. *Id*.

The Wanchisn/Long petition asserts that the Region failed to describe the assumptions and methodology underlying the zone of endangering influence calculation and failed to identify "many of the values" used in calculating the zone of endangering influence. Wanchisn/Long Petition at 3, 12-13. Thus, according to the petition, the Region did not provide the public with sufficient information to critique EPA's calculation. *Id*. In responding to the identical comments on this issue submitted during the public comment period, the Region explained:

> Calculation of the [zone of endangering influence] considers pressure build-up in the injection zone over a given period of time based on geologic and operational parameters. The [area of review] or [zone of endangering influence] analyses are conducted to make sure that if old wells exist, they would not allow fluids to migrate upwards into [underground sources of drinking water] during the injection well operation. If an applicant chooses to use a one-quarter mile [area of review], as PGE did, EPA Region III verifies that this is acceptable by calculating a [zone of endangering influence] around the injection well. EPA used information such as the porosity and permeability of the injection zone, the existing reservoir pressure, and operational parameters, such as the injection rate and volume to calculate the [zone of endangering influence]. When EPA calculated the [zone of endangering influence] it determined that, after a ten year period, the [zone of endangering influence] would be a distance of 1450 feet away from the injection well, approximately 130 feet greater than the one-quarter mile [area of review] [chosen by PGE]. This would mean that if any open conduits (i.e., abandoned wells) existed within this 1450 foot distance, they could potentially allow fluid to move upwards into [underground sources of drinking water] after injection for ten years. No wells were found to exist, that penetrated the injection zone, within 1450 feet of the proposed injection well.[8]

[8] Should any unplugged or abandoned wells that penetrate the injection zone within the area of review be identified at a later date, the permit requires that PGE

Responsiveness Summary at 3-4. The Board finds that the Region's response provided a rational and well-supported explanation of its zone of endangering influence analysis and the parameters considered in extending the area of review beyond the one-quarter mile radius PGE proposed. The Wanchisn/Long Petition does not discuss or "explain why the [Region's] response to the comment[s] was clearly erroneous or otherwise warrants review," as required by 40 C.F.R. § 124.19(a)(4)(ii).

2. *Seismic Activity*

The Wanchisn/Long Petition repeats concerns expressed during the comment period regarding the potential for seismic events in the area surrounding the well and the potential consequences of any such events. *See* Wanchisn/Long Petition at 7-8. The Region addressed these concerns extensively in its response to public comments.[9] The Region evaluated factors relevant to seismic activity, such as the existence of known faults and/or fractures and any history of, or potential for, seismic events in the area of the injection well. The Region explained that it found no geologic evidence of the existence of a fault in the location of the proposed PGE injection well or any recorded seismic activity originating in the county. Responsiveness Summary at 7. Although it acknowledged that injection of fluids has the potential to induce seismic activity, the Region stated that the conditions necessary to cause such activity (a fault in a near-failure state of stress, a "path of communication" between injected fluid and a fault, and sufficient pressure of injected fluids to cause movement along a fault line) are not present in this case. *Id*. (citing National Research Council, *Induced Seismicity Potential in Energy Technologies* 6 (Nat'l Academies Press 2013)).

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perform corrective action. *See* Permit pt. III.A.5 (prohibiting injection operations until the permittee has plugged all abandoned wells identified in the area of review).

[9] The Region's response includes: (1) a background discussion on induced seismic activity, citing a National Academy of Sciences report on induced seismic potential; (2) a discussion of known faults in the location of the proposed well, relying on data from the United States Geologic Survey and the Pennsylvania Department of Conservation and Natural Resources; (3) a discussion of the effects of earthquakes centered elsewhere, such as a seismic event in Youngstown, Ohio; (4) a discussion of factors affecting seismic activity and comparing the geology where such activity has occurred with the geology surrounding the proposed well; (5) a discussion of the effects of natural gas production at the proposed injection well and the general suitability of depleted oil, gas, or geothermal reservoirs for underground injection; and (6) a discussion of the potential for contamination of underground sources of drinking water resulting from seismic events. *See* Responsiveness Summary at 7-10.

With regard to the potential endangerment of underground sources of drinking water due to earthquakes, the Region explained:

> Of the hundreds of thousands of injection wells operating in the United States, EPA is not aware of any case where a seismic event caused an injection well to contaminate an [underground source of drinking water]. There have not been any reports of earthquakes having affected the integrity of injection wells in the cases of induced-seismicity in the United States. A number of factors help to prevent injection wells from failing in a seismic event and contributing to the contamination of an [underground source of drinking water]. Most deep injection wells, those that are classified as Class I or Class II injection wells[,] are constructed to withstand significant amounts of pressure. They are typically constructed with multiple steel strings of casing that are cemented in place. The casing in these wells is designed to withstand both significant internal and external pressure. * * * Furthermore, brine disposal injection wells are required to be mechanically tested to ensure integrity before they are operated and many are continuously monitored after testing to ensure that mechanical integrity is maintained. The well should shutdown if a seismic event that affects its mechanical integrity were to occur, because the well will be designed to automatically cease operation if there is a mechanical integrity failure. * * * Furthermore, there is no fault system present that would allow for the migration of fluid out of the injection zone.

Id. at 9-10. Further, as noted in the Statement of Basis, the permit establishes a maximum injection pressure designed to avoid over-pressurization and limit the potential for seismic events. Statement of Basis at 3.

The Board finds that the Region provided a thorough and rational response to the concerns raised about seismology. The Wanchisn/Long Petition does not address the Region's response to comments or explain why the response was clearly erroneous or otherwise warrants Board review.

3. *Well Integrity, Monitoring, and Testing Requirements,*

The Wanchisn/Long Petition raises concerns regarding the well's construction, including the pipe thickness and the cement around the well casings, the general integrity of the well, and its ability to withstand the fluid injection pressure. Petitioners also question the sufficiency of testing and monitoring requirements to ensure protection of underground sources of drinking water. *See* Petition at 5-6, 8-9, 15. The Region responded in detail to these concerns. For

example, the Region explained in detail why it found that the construction specifications provide adequate protection of drinking water:

> A provision of the UIC regulations, 40 C.F.R. Section 147.1955(b)(1), requires an injection well's surface casing to be placed 50 feet below the determined lowermost [underground source of drinking water]. The lowermost [underground source of drinking water] where the proposed PGE injection well is located is found at a depth of approximately 520 feet. The well is constructed with 11 ¾ inch surface casing, placed to a depth of 568 feet and cemented back to the surface. It also contains 8 5/8 inch intermediate casing which has been placed to approximately 1539 feet and cemented back to the surface. Both of these casing strings are designed to protect [underground sources of drinking water] as well as help prevent the rupture or collapse of the well. In addition 4 ½ inch long string casing has been placed to a depth of 7788 feet and has been cemented back to a depth of 6850 feet. The requirements of 40 C.F.R. § 147.1955(b)(5) outline the cementing provisions for the long string casing and do not require the long string casing to be cemented back to the surface. They were developed for the protection of [underground sources of drinking water] as well as the stability of the down-hole wellbore. This casing also helps to support the well and prevent rupture or collapse.

Responsiveness Summary at 2.

Similarly, the Region explained in detail why it has confidence in the well's integrity, in the well's ability to withstand the permit's maximum allowable injection pressure, and in the sufficiency of the permit's testing requirements to ensure mechanical integrity:

> EPA will also be conducting a mechanical integrity test. The mechanical integrity test is a pressure test, run at ten percent above the permitted maximum injection pressure and held for thirty minutes. The pressure test is conducted between the 4 ½ inch long string casing and the tubing and packer which will be installed in the well. This test will determine whether the long string casing, tubing and packer have integrity and whether it will be able to withstand the maximum injection pressure permitted for the injection well. After the mechanical integrity test is conducted and the results are successful, the permit requires continuous monitoring of the injection well during its operation to verify its on-going mechanical integrity.

Id. at 2-3. Finally, the Region explained why it believes the permit's monitoring requirements are adequate:

> The permit requires certain injection fluid constituents to be analyzed and the results submitted to EPA every two years and whenever the operator anticipates any change in the injection fluid. The parameters which will be analyzed are listed on page six of the permit. EPA believes that the conditions found in * * * the permit, are sufficient to adequately characterize and monitor the wastewater for injection purposes.[10] The purpose of this monitoring is to verify that the fluids injected in the well are the type of fluids authorized in the permit. In addition, many of the parameters that will be monitored in the injection fluid are also found in shallow ground water. Therefore, if any sample results show shallow ground water contamination, those results can be compared against the injection fluid analyses conducted by the injection well operator to determine whether the injection well may be the cause of that contamination.

Id. at 5. The petitioners fail to confront the Region's response on this issue or explain why the Region's responses were clearly erroneous or otherwise warrant Board review. Further, the Board finds that the permit sets forth detailed construction and operating requirements, as provided in the applicable regulations,that are designed to achieve the overarching purpose of the SDWA and UIC regulations – to protect underground sources of drinking water from contamination.[11]

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[10] The permit requires continuous and extensive monitoring of various parameters for the life of the well, such as surface injection pressure, annular pressure, flow rate and cumulative volume in the Injection Well. *See* Permit pt. II.B. The well must be equipped with a automatic shut-off device in the event of a mechanical integrity failure. *Id*. In addition, the permit requires monitoring of the nature and composition of the injection fluid. *Id*. II.B.3. The petition does not raise any specific objections to these or other permit conditions.

[11] For example, the permit allows injection "only into a formation which is separated from any underground source of drinking water by a confining zone, as defined in 40 C.F.R. § 146.3, that is free of known open faults or fractures within the Area of Review as required by 40 C.F.R. § 146.22." Permit pt. III.A.1. The permit specifically prohibits injection that initiates fractures in the confining zone adjacent to underground sources of drinking water or causes the movement of fluids into an underground source of drinking water. *Id*. pt. III.B.4. The well must be cased and cemented to prevent the movement of fluids into or between underground sources of drinking water for the life of the well. *Id*. pt. III.A.2. The permit prohibits injection until the permittee demonstrates

Overall, the record demonstrates that the Region imposed appropriate permit conditions regarding the well's construction and operating requirements and rationally concluded that these conditions are sufficiently protective of underground sources of drinking water in the vicinity of the well. Petitioners fail to demonstrate that the Region's determination regarding the well's construction, mechanical integrity, and testing and reporting requirements was clearly erroneous or otherwise warrants Board review. *See In re Bear Lake Props., LLC*, 15 E.A.D. 630, 646 (EAB 2012) (the Board typically defers to the permit issuer on fundamentally technical or scientific issues where the permit issuer adequately explains its rationale and supports its rationale in the record).

4. *Injection and Confining Zones*

The Wanchisn/Long Petition expresses concerns regarding the ability of the well's injection zone to contain the injected fluid. *See* Wanchisn/Long Petition at 6. In particular, petitioners ask whether injection will cause fractures or faults into which the injected fluids will flow and whether fluid might travel beyond the injection zone. *Id.* at 6, 8. As with the other issues, petitioners' concerns were raised in identical fashion during the comment period, and the Region provided a detailed response. In response, the Region explained that a confining zone, the Onondaga Formation, is immediately above the injection zone and has "very low permeability giving it the ability to confine and trap fluids from migrating upwards." Responsiveness Summary at 10. In addition, the Region cites other factors preventing migration out of the injection zone such as the permit's limit on injection pressure and the absence of abandoned wells or other penetrations of the injection zone. *Id.* at 11. The petition fails to confront the Region's responses to comments or explain why the responses are clearly erroneous or warrant Board review.

5. *Plugging and Abandonment*

The UIC regulations impose financial requirements for plugging and abandonment of Class II wells. Applicants are required to submit a plan for plugging and abandonment of the well that complies with 40 C.F.R. § 146.10. *See* 40 C.F.R. § 144.31(e)(10). Further, the applicant must "demonstrate and maintain financial responsibility and resources to close, plug, and abandon the

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the well's mechanical integrity and that it has plugged all abandoned wells identified within the area of review. *Id.* pt. III.A.4. Further, as noted above, the permit requires continuous monitoring and an automatic shut-off device in the event of mechanical integrity failure. *Id.* pt. II.B. Finally, the permit contains detailed reporting requirements for any noncompliance. *Id.* pt. II.D.

underground injection operation in a manner prescribed by the [Region] * * *." *Id*. § 144.52(a)(7). In the present case, the permit specifies that the permittee "shall maintain continuous compliance with the requirement to maintain financial responsibility and resources to close, plug and abandon the underground Injection Well in accordance with 40 C.F.R. § 144.52(a)(7) in the amount of at least $60,000." Permit pt. III.D.

The Wanchisn/Long Petition asks whether $60,000 is sufficient for plugging and abandonment. *See* Wanchisn/Long Petition at 9. The Region addressed this issue in responding to public comments as follows:

> The cost of plugging a well depends, among others things, upon the depth of the well and how the well was constructed. PGE has submitted a $60,000 letter of credit with a standby trust agreement for the plugging and abandonment of the injection well. The $60,000 cost to plug and abandon the well was determined by a third party plugging contractor. EPA Region III reviewed and approved this submission. In the future the Region under the permit terms can require the permittee to increase the financial responsibility if the Region determines the cost to plug and abandon the well has increased beyond what is currently projected.

Responsiveness Summary at 12. The petition fails to indicate why the Region's response was clearly erroneous or otherwise warrants Board review.[12]

[12] By motion filed with the Board on August 4, 2014, Ms. Wanchisn seeks to supplement the administrative record in this permitting matter with a report prepared by the Government Accountability Office ("GAO"), as well as a summary of that report compiled by Ms. Wanchisn. The Region filed a response to the motion on August 19, 2014. The GAO report, entitled *EPA Program to Protect Underground Sources from Injection of Fluids Associated with Oil and Gas Production Needs Improvement*, reviews EPA's regulations governing the UIC program for Class II injection wells and makes various recommendation for improved oversight. *See* GAO-14-555, Report to Congressional Requesters (June 2014). As this Board has explained, however, well-established principles of administrative law and EPA regulations governing permit proceedings significantly limit the materials that may be considered part of the administrative record. The part 124 regulations governing this proceeding specify the documents that must be included in the administrative record and expressly provide that the "record shall be complete on the date the final permit is issued." 40 C.F.R. § 124.18(c). Consistent with that regulation and general principles of administrative law, the Board generally declines requests to include in an administrative record materials that were not actually before the decisionmaker at the time he or she made the decision that is under review. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 516-19

In sum, petitioners Mr. and Ms. Wanchisn and Mr. and Ms. Long have failed to confront the Region's responses to their technical concerns and comments, and have failed to demonstrate that the Region made a clear error of law or fact or abused its discretion in issuing this permit. The Board therefore denies the Wanchisn/Long Petition for review. *See, e.g.*, *In re Seneca Resources Corp.*, 16 E.A.D. 411, 416 (EAB 2014) (denying review where petitioner failed to discuss the response to comments or specify why the response was clearly erroneous or otherwise warranted Board review).

C. *Suzanne Watkins' Petition for Review Fails to Demonstrate That Review Is Warranted*

Ms. Watkins' petition seeks Board review of the Region's permit decision on the following three issues: the potential adverse effect of a surface spill of injection fluids, the possibility that approval of any additional gas production wells could cause fluid to flow out of the injection zone, and the possibility that injected fluids will return to the surface after injection. *See* Watkins Petition at 1-2. For the following reasons, the Board concludes that the petition fails to demonstrate that review is warranted.[13]

The issues raised by Ms. Watkins were raised during the public comment period on the draft permits. The Region provided a substantive and reasoned response to each of these issues. In particular, in its response to public comments, the Region explained that the possibility of surface spills at the well site and possible future production wells in the area are outside the scope of the UIC permitting program. Responsiveness Summary at 1. As the Region stated, "when making the decision whether to issue a UIC permit for PGE, EPA's jurisdiction rests solely in determining whether the proposed injection operation will safely protect underground sources of drinking water * * * from the subsurface emplacement of fluids. Although these other concerns listed may be relevant to residents, EPA is not authorized under the [Safe Drinking Water Act] to address them within a UIC permit." *Id.* at 1-2. The Region stated further that "[t]he Pennsylvania Department of Environmental Protection is the agency responsible

(EAB 2006). Because the GAO report postdates the permit decision in this matter, the Board denies Ms. Wanchisn's request to supplement the record.

[13] Ms. Watkins also appears to question the integrity of the injection well and the Region's area of review/zone of endangering influence determination. *See* Watkins Petition at 2. However, as discussed above, the Region has responded to similar concerns raised during the comment period. *See* Responsiveness Summary at 3-4, 9-10. The petition fails to demonstrate that the Region's response to comments was clearly erroneous or otherwise warrants Board review.

for all surface construction at the proposed well site as well as for surface spill protection." *Id*. at 2. Similarly, the Region responded to concerns regarding the approval of additional production wells by pointing out that the State of Pennsylvania, not EPA, regulates production well development in Pennsylvania, including the issuance of drilling permits for any future production wells. *Id*. at 11.

In response to questions raised during the public comment period concerning the possibility of injected fluids returning to the surface, the Region explained:

> Some comments expressed concern that once the fluid is injected under pressure it will come back to the surface. There is a confining zone, the Onondaga formation * * * immediately above the injection zone. This geologic formation has a very low permeability giving it the ability to confine and trap fluids from migrating upwards.

Id. at 10. Further, as explained above, several other factors serve to keep injected fluids in place such as permit limits on injection pressure and the absence of other wells penetrating the injection zone within the area of review. *Id*. at 11.

Ms. Watkins' petition does not discuss or explain why the Region's responses to the comments were clearly erroneous or otherwise warrant review, as required by 40 C.F.R. § 124.19(a)(4)(ii) and Board precedent. Accordingly, the Board denies Mr. Watkins' petition for review of the Region's permit decision.

V. *CONCLUSION*

For all of the reasons stated above, the Board denies the petitions for review of the Region's permit decision filed by Ms. Suzanne Watkins (UIC Appeal No. 14-63), Ms. Judy and Mr. Paul Wanchisn and Ms. Stacy and Mr. Mark Long (UIC Appeal No. 14-64), and Mr. William J. Woodcock III (UIC Appeal No. 14-65).

So ordered.

EXHIBIT 8

celdf.org

Grant Township, Indiana County, Pennsylvania
Community Bill of Rights Ordinance

ESTABLISHING A COMMUNITY BILL OF RIGHTS FOR THE PEOPLE OF GRANT TOWNSHIP, INDIANA COUNTY, PENNSYLVANIA, WHICH PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE THE BILL OF RIGHTS, AND WHICH PROVIDES FOR ENFORCEMENT OF THE BILL OF RIGHTS

Whereas, this community finds that the depositing of waste from oil and gas extraction is economically and environmentally unsustainable, in that it damages property values and the natural environment, and places the health of residents at risk, while failing to provide real benefits to the people of this community; and

Whereas, this community finds that the depositing of waste from oil and gas extraction violates the rights of Grant Township residents, including our right to make decisions about what happens to the places where we live; and

Whereas, private corporations engaged in the depositing of waste from oil and gas extraction are wrongly recognized by the federal and state government as having more "rights" than the people who live in our community, and thus, recognition of corporate "rights" is a denial of the rights of the people of Grant Township; and

Whereas, such denials violate the inherent right of people to local self-government; the guarantees of the Pennsylvania Constitution; and the guarantees of the Declaration of Independence and the United States Constitution; and

Whereas, the 1776 Pennsylvania Constitution recognized the inherent right of Pennsylvanians to local self-government by declaring that "all government ought to be instituted and supported for the security and protection of the community as such;" and

Whereas, that right to local self-government, now recognized and secured by Article 1, Section 2 of the current Pennsylvania Constitution, declares that "all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness;" and

Whereas, this ordinance establishes a Community Bill of Rights to further recognize the right to local self-government in Grant Township, and secures that right by prohibiting those activities that would violate this local bill of rights;

Therefore, We the People of Grant Township hereby adopt this Community Bill of Rights Ordinance.

Section 1 – Definitions

(a) "**Corporations**," for purposes of this Ordinance, shall include any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, business entity, or limited liability company organized under the laws of any state of the United States or under the laws of any country.

(b) **"Depositing of waste from oil and gas extraction"** shall include, but not be limited to, the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "frack water," tailings, flowback or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

(c) **"Extraction"** shall mean the digging or drilling of a well for the purposes of exploring for, developing or producing shale gas, oil, or other hydrocarbons.

Section 2 – Statements of Law – A Community Bill of Rights

(a) *Right to Local Self-Government*. All residents of Grant Township possess the right to a form of governance where they live which recognizes that all power is inherent in the people and that all free governments are founded on the people's consent. Use of the municipal corporation "Grant Township" by the people for the making and enforcement of this law shall not be deemed, by any authority, to eliminate, limit, or reduce that sovereign right.

(b) *Right to Clean Air, Water and Soil*. All residents of Grant Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.

(c) *Right to Scenic Preservation.* All residents of Grant Township possess a right to the scenic, historic and aesthetic values of the Township, including unspoiled vistas and a rural quality of life. That right shall include the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values, including the depositing of waste from oil and gas extraction.

(d) *Rights of Natural Communities and Ecosystems*. Natural communities and ecosystems within Grant Township, including but not limited to, rivers, streams, and aquifers, possess the right to exist, flourish, and naturally evolve.

(e) *Right to a Sustainable Energy Future*. All residents of Grant Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure this right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human or natural communities. That right shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.

(f) *Right to Enforce.* All residents of Grant Township possess the right to enforce the rights and prohibitions secured by this Ordinance, which shall include the right of Township residents to intervene in any legal action involving the rights and prohibitions of this Ordinance.

(g) *Rights as Self-Executing*. All rights delineated and secured by this Ordinance are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private

and public actors. The rights secured by this Ordinance shall only be enforceable against actions specifically prohibited by this Ordinance.

Section 3 – Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

(b) No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Pennsylvania Constitution, the United States Constitution, or other laws, shall be deemed valid within Grant Township.

Section 4 – Enforcement

(a) Any corporation or government that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.

(b) Grant Township, or any resident of the Township, may enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the Township. In such an action, the Township or the resident shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

(c) Any action brought by either a resident of Grant Township or by the Township to enforce or defend the rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possessing jurisdiction over activities occurring within the Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Section 5 – Enforcement – Corporate Powers

(a) Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights, privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the authority to adopt this Ordinance.

(b) All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions of this Ordinance.

Section 6 – Effective Date and Existing Permit Holders

Petition Proof

This Ordinance shall be effective immediately on the date of its enactment, at which point the Ordinance shall apply to any and all actions that would violate this Ordinance, regardless of the date of any applicable local, state, or federal permit.

Section 7 – People's Right to Self-Government

Use of the courts or the Pennsylvania legislature in attempts to overturn the provisions of this Ordinance shall require community meetings focused on changes to local governance that would secure the right of the people to local self-government.

Section 8 – State and Federal Constitutional Changes

Through the adoption of this Ordinance, the people of Grant Township call for amendment of the Pennsylvania Constitution and the federal Constitution to recognize a right to local self-government free from governmental preemption and or nullification by corporate "rights."

Section 9 – Severability

The provisions of this Ordinance are severable. If any court decides that any section, clause, sentence, part, or provision of this Ordinance is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the Ordinance.

Section 10 – Repealer

All inconsistent provisions of prior Ordinances adopted by Grant Township are hereby repealed, but only to the extent necessary to remedy the inconsistency.

ENACTED AND ORDAINED this 3 day of June, 2014, by the Board of Supervisors of Grant Township, Indiana County, Pennsylvania.

By:

ceforg

EXHIBIT 9

celdf.org

Comparison of Grant Township Ordinance, Grant Township Home Rule Charter, and Highland Township Home Rule Charter

Grant Township Home Rule Charter	**Grant Township Community Bill of Rights Ordinance (struck down as unconstitutional)**	**Highland Township Home Rule Charter (struck down as unconstitutional)**
Section 301. Depositing of Waste from Oil and Gas Extraction. It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.	**Section 3(a).** It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.	**Section 401. Depositing of Waste from Oil and Gas Extraction.** It shall be unlawful within Highland Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.
Section 302. State and Federal Authority. No permit, license, privilege, charter, or other authorization issued to a corporation, by any State or federal entity, that would violate the prohibitions of this Charter or any rights secured by this Charter, shall be deemed valid within Grant Township	**Section 3(b).** No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Pennsylvania Constitution, the United States Constitution, or other laws, shall be deemed valid within Grant Township.	**Section 404. State and Federal Authority.** No permit, license, privilege, charter, or other authorization, issued by any state or federal governmental entity, that would enable any corporation or person to violate the rights or prohibitions of this Charter, shall be lawful within Highland Township.
Section 303. Summary Offenses. Any corporation or government that violates any provision of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate violation.	**Section 4(a).** Any corporation or government that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.	**Section 405. Offenses.** Any corporation or government that violates any provision of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate offense.
Section 306. Enforcement of State Laws. All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by	**Section 5(b). Enforcement – Corporate Powers.** All laws adopted by the legislature of the State of Pennsylvania, and rules	**Section 410. Enforcement of State Laws.** All laws adopted by the legislature of the State of Pennsylvania or by Congress, and

any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions recognized by this Charter.	adopted by any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions of this Ordinance.	rules adopted by any State or federal agency, shall be the law of Highland Township only to the extent that they do not violate the rights or prohibitions of this Charter, or limit the authority of Highland Township or the people of Highland Township to adopt and enforce greater protections for these rights than afforded by the Pennsylvania legislature or by Congress.
Section 401. Corporate Privileges. Corporations that violate this Charter or the laws of the Township, or that seek to violate the Charter or those laws, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by the Charter or those laws, including standing to challenge the Charter or laws, the power to assert State or federal preemptive laws in an attempt to overturn the Charter or laws, or the power to assert that the people of Grant Township lack the authority to adopt this Charter or other Township laws.	**Section 5(a). Enforcement – Corporate Powers.** Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights, privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the authority to adopt this Ordinance.	**Section 501. Corporate Privileges.** Corporations that violate this Charter or the laws of the Township, or that seek to violate this Charter or those laws, shall not be deemed to be "persons" to the extent that such treatment would infringe the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would infringe the rights or prohibitions enumerated by this Charter or those laws, including the power to assert state or federal preemptive laws in an attempt to overturn this Charter or those laws, or the power to assert that Highland Township, or the people of Highland Township, lack the authority to adopt this Charter or those laws, or the power to assert that Highland Township, its officials, or any resident of Highland Township are liable for damages to the corporation as a result of provisions of this Charter or Township laws.

EXHIBIT 10

celdn.org

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PETITIONER	:	
AND	:	NO. 126 M.D. 2017
PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., INTERVENOR	:	
VS	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, RESPONDENTS	:	

VIRTUAL
DEPOSITION OF: SCOTT PERRY

TAKEN BY: RESPONDENTS

BEFORE: TERESA K. BEAR, REPORTER
NOTARY PUBLIC

DATE: SEPTEMBER 13, 2021, 10:02 A.M.

cetdf.org

A That is correct.

Q And that was approximately 2015 you're talking about?

A Yes.

Q Okay. The second thing you testified to is with respect to EPA's program that regulates the underground injection wells disposal permits, correct?

A Yes.

Q Okay. And I think the term that you used was that EPA has primacy over the regulation of underground injection disposal wells, correct?

A That is correct.

Q Okay. So the regulations that we're talking to at the federal level, those are regulations under the Safe Drinking Water Act, correct?

A Correct.

Q And pursuant to that authority, EPA issues permits for Class II-D injection wells, correct?

A Correct.

Q And pursuant to that, they also monitor compliance with underground injection well permits that are issued, correct?

A Correct.

Q And they have the ability, under that

program, to take enforcement action as well, correct?

A Correct.

Q Okay. Now, you're aware that EPA does have the authority to delegate that program to states, correct?

A Yep.

Q And they have not delegated that program to the Commonwealth of Pennsylvania, correct?

A That is correct.

Q Now let's talk a little bit about the regulatory program in Pennsylvania. Am I correct that there are different authorities under which you regulate activities relating to oil and gas in Pennsylvania?

A Yes, we regulate it under a network of environmental laws.

Q And that would include the Oil and Gas Act?

A Act 13, the 2012 Oil and Gas Act, correct.

Q And it would also include the Solid Waste Management Act?

A Correct.

Q So when you're making a decision on whether to issue a permit for any underground

Geiger.org

EXHIBIT 11

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

INJECTION CONTROL PERMIT NUMBER PAS2D013BIND
AUTHORIZATION TO OPERATE CLASS II-D INJECTION WELLS

In compliance with provisions of the Safe Drinking Water Act, as amended, 42 U. S. C. §§ 300f et seq (SDWA) and the SDWA implementing regulations promulgated by the U. S. Environmental Protection Agency at Parts 144 -147 of Title 40 of the Code of Federal Regulations, this permit authorizes

Pennsylvania General Energy Company, LLC
120 Market Street
Warren, Pennsylvania 16365

to convert the Marjorie C. Yanity 1025 production well into a Class II-D brine disposal Injection Well (hereinafter, "Injection Well or Facility") and to operate the Injection Well for the purpose of injecting fluids produced in association with Pennsylvania General Energy's (PGE) oil and gas production operations into the Huntersville Chert Formation, in accordance with the provisions of this permit. The Injection Well will be located in Grant Township, Indiana County, Pennsylvania. The coordinates for the Injection Well are: Latitude 40° 44' 43.00" and Longitude -78° 55' 34.00".

All references to Title 40 of the Code of Federal Regulations are to all regulations that are in effect on the date that this permit is effective.

This permit shall become effective on September 11 ,2014.

This permit shall remain in effect until midnight September 11 ,2024.

Signed this 11th day of September, 2014.

Jon M. Capacasa, Director
Water Protection Division

PART 1

A. Effect of a Permit

Pennsylvania General Energy Company, LLC (the "Permittee") is allowed to engage in underground injection at the Injection Well in accordance with the conditions of this permit. The Permittee shall not allow the underground injection activity, otherwise authorized by this permit, to cause or contribute to the movement of fluid containing any contaminant into any underground source(s) of drinking water (USDW), if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR Part 141 or if it may otherwise adversely affect the health of persons. Any underground injection activity not authorized in this permit or otherwise authorized by permit or rule is prohibited. Issuance of this permit does not convey property rights or mineral rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of State or local law or regulations. Compliance with the terms of this permit does not constitute a defense to any action brought under Part C or D of the SDWA, 42 U.S.C. §§ 300f-300j-11, or any other common or statutory law for any breach of any other applicable legal duty.

B. Permit Actions

This permit can be modified, revoked and reissued, or terminated for cause or upon request as specified in 40 C.F.R. §§ 144.12, 144.39 and 144.40. Also, the permit is subject to minor modifications as specified in 40 C.F.R. § 144.41. The filing of a request for a permit modification, revocation and reissuance, or termination, or the notification of planned changes, or anticipated noncompliance on the part of the Permittee shall not stay the applicability or enforceability of any permit condition.

C. Severability

The provisions of this permit are severable, and if any provision of this permit or the Permittee's application, dated May 2, 2013, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.

D. General Requirements

1. Duty to Comply. The Permittee shall comply with all applicable UIC regulations, including 40 C.F.R. Parts 124, and 144-147, and with the conditions of this permit, except to the extent and for the duration that EPA authorizes any noncompliance in an emergency permit issued under 40 C.F.R. §144.34. Any permit noncompliance constitutes a violation of the SDWA and is grounds for enforcement action, permit termination, revocation and reissuance or modification, or for denial of a permit renewal application.

2. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3. Duty to Mitigate. The Permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

4. Proper Operation and Maintenance. The Permittee shall at all times properly operate and maintain all facilities and systems of treatment and control and related appurtenances which are installed or used by the Permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, adequate security to prevent unauthorized access and operation of the Injection Well and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of this permit.

5. Duty to Provide Information. The Permittee shall furnish to the Director of the Water Protection Division ("Director"), within a time specified by the Director, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The Permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit. If the Permittee becomes aware of any incomplete or incorrect information in the Permit Application or subsequent reports, the Permittee shall promptly submit information addressing these deficiencies.

6. Inspection and Entry. The Permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by the law to:

a. Enter upon the Permittee's premises where the Facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

c. Inspect at reasonable times the Facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

d. Sample or monitor at reasonable times any substances or parameters at any location for the purposes of assuring permit compliance or as otherwise authorized by the SDWA.

7. Penalties. Any person who violates a requirement of this permit is subject to administrative or civil penalties, fines and other enforcement actions under the SDWA. Any person who willfully violates conditions of this permit is subject to criminal prosecution.

8. Transfer of Permits. This permit is not transferable to any person except after notice is sent on EPA Form 7520-7, approval is received from the Director, and the requirements of 40 C.F.R. § 144.38 are satisfied. The Director may require modification or revocation of the permit to change the name of the Permittee and incorporate such other requirements as may be necessary under the SDWA or its implementing regulations. The transferee is not authorized to inject under this Permit unless and until the Director notifies the transferee that the transferee is so authorized through issuance of a revised permit identifying the transferee as the permittee.

9. Signatory Requirements.

a. The Permittee shall sign all reports required by this permit and other information requested by the Director as follows:

(1) for a corporation, by a responsible corporate officer of at least the level of vice-president;

(2) for a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

(3) for a Municipality, State, Federal, or other public agency by either a principal executive officer or a ranking elected official.

b. A duly-authorized representative of the person designated in paragraph a. above may also sign only if:

(1) the authorization is made in writing by a person described in paragraph a. above;

(2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated Facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or a position of equivalent responsibility. A duly authorized representative may thus be either a named individual or any individual occupying a named position; and

(3) the written authorization is submitted to the Director.

c. If an authorization under paragraph b. of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the

Facility, a new authorization satisfying the requirements of paragraph b. of this section must be submitted to the Director prior to or together with any reports, information or applications to be signed by an authorized representative.

d. Any person signing a document under paragraph a. or b. of this section shall make the following certification:

> "I certify under the penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person(s) who manage the system, or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

10. Confidentiality of Information.

a. In accordance with 40 CFR Parts 2 (Public Information), and § 144.5, any information submitted to the Director pursuant to this permit may be claimed as confidential by the submitter. Any such claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2.

b. EPA will deny any claims of confidentiality for the following information:

(1) The name and address of any permit applicant or permittee.

(2) Information which deals with the existence, absence, or level of contaminants in drinking water.

11. Reapplication. If the permittee wishes to continue an activity regulated by this permit after the expiration date of the permit, the permittee must submit a complete application for a new permit at least 100 days before this permit expires.

12. State Laws. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation.

PART II

A. General

The Permittee shall sign and certify copies of all reports and notifications required by this permit in accordance with the requirements of paragraph I.D.9 of this Permit and shall submit such information to the Director at the following address:

Ground Water & Enforcement Branch (3WP22)
Office of Drinking Water and Source Water Protection
U. S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103

B. Monitoring Requirements

1. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity. The Permittee shall obtain representative sample(s) of the fluid to be analyzed and conduct analysis(es) of the sample(s) in accordance with the approved methods and test procedures provided in 40 CFR § 136.3, or methods and test procedures otherwise approved by the Director. The Permittee shall identify in its monitoring records the types of tests and methods used to generate the monitoring data.

2. The Permittee shall continuously monitor and record surface injection pressure, annular pressure, flow rate and cumulative volume in the Injection Well beginning on the date the Injection Well commences operation and concluding when the Injection Well is plugged and abandoned. The Injection Well shall be equipped with an automatic shut-off device which would be activated in the event of a mechanical integrity failure. The Permittee shall compile the monitoring data monthly to complete the Annual Report referenced in paragraph II.D.8 of this permit.

3. The Permittee shall monitor the nature and composition of the injected fluid by sampling, analyzing and recording the injected fluid for the parameters listed below, at the initiation of the injection operation and every two years thereafter, and whenever the operator anticipates a change in the injection fluid.

- pH
- Specific Gravity
- Specific Conductance
- Sodium
- Chloride
- Iron
- Manganese
- Total Dissolved Solids
- Barium
- Hydrogen Sulfide
- Alkalinity
- Dissolved Oxygen

certified

- Magnesium - Hardness
-Total Organic Carbon (TOC)

4. The Permittee shall verbally report to the Director analytical results for specific gravity that are greater than 1.22 and for TOC that are greater than 250 mg/l within twenty-four hours of obtaining the results.

5. The Permittee shall make a demonstration of mechanical integrity in accordance with 40 CFR § 146.8 at least once every five years. In addition to the above requirement, the Permittee shall conduct a mechanical integrity test demonstration on the Injection Well when the protective casing or tubing is removed from the well, the packer is reseated, or a well failure is likely, or as requested by the Director. The Permittee may continue operation of the Injection Well only if the Permittee has demonstrated the mechanical integrity of the Injection Well to the Director's satisfaction. The Permittee shall cease injection operations if a loss of mechanical integrity becomes evident or if the Permittee cannot demonstrate mechanical integrity.

6. The Permittee shall perform all environmental measurements required by the permit, including, but not limited to; measurements of pressure, temperature, mechanical integrity (as applicable) and chemical analyses in accordance with EPA guidance on quality assurance.

C. Record Retention

1. The Permittee shall retain records of all monitoring and other information required by this permit, including the following (if applicable), for a period of at least five years from the date of the sample, measurement, report or application, unless such records are required to be retained for a longer period of time under paragraph IIC.2 below. This period may be extended by the Director at any time. If the period is extended, the Permittee shall comply with the new period.

a. All data required to complete the Permit Application form for this permit and any supplemental information submitted under 40 CFR § 144.31;

b. Calibrations and maintenance records and all original strip chart recordings for continuous monitoring instrumentation;

c. Copies of all reports required by this permit;

2. The Permittee shall retain records concerning the nature and composition of all injected fluids, as listed in paragraph II.C.3 of this permit, until at least three years after the plugging and abandonment procedures are complete. The Permittee shall continue to retain these records after the three year retention period unless he or she delivers the records to the Director or obtains written approval from the Director to discard the records.

3. Records of monitoring information shall include:

a. The date, exact place, and the time of sampling or measurements;

b. The individual(s) who performed the sampling or measurements;

c. A precise description of both sampling methodology and the handling (custody) of samples;

d. The date(s) analyses were performed;

e. The individual(s) who performed the analyses;

f. The analytical techniques or methods used;

g. The results of such analyses.

D. Reporting and Notification Requirements

1. Report on Permit Review. Within 30 days of receipt of this permit, the Permittee shall ensure the person designated pursuant to paragraph I.D.9 of this permit reports to the Director that he or she has read and is personally familiar with all terms and conditions of this permit.

2. Commencing Injection. The Permittee shall not commence injection until construction or well rework is complete and all of the following conditions have been satisfied:

a. The Permittee has submitted notice of completion of construction (EPA Form 7520-10) to the Director;

b. The Permittee has demonstrated to EPA that the Injection Well has mechanical integrity in accordance with 40 CFR § 146.8 and the Permittee has received written notice from the Director that such demonstration is satisfactory; and

c.(i) The Director has inspected or otherwise reviewed the Injection Well and finds it is in compliance with the conditions of this permit; or

c.(ii) The Permittee has not received notice from the Director of his or her intent to inspect or otherwise review the Injection Well within 13 days of the date of the notice in paragraph II.D.2.a of this permit, in which case, prior inspection or review is waived and the Permittee may commence injection.

Cellford

3. Twenty-four Hour Reporting.

a. The Permittee shall report to the Director any noncompliance which may endanger, or has endangered, health or the environment. The Permittee shall provide such report orally (phone numbers: (215) 814-5445 or (215) 814-5464) within 24 hours from the time the Permittee becomes aware of the circumstances. The Permittee shall include the following information in the oral report:

(1) Any monitoring or other information which indicates that any contaminant may endanger, or has endangered an underground source of drinking water.

(2) Any noncompliance with a permit condition, malfunction of the injection system which may cause, or has caused, fluid migration into or between underground sources of drinking water, or failure of mechanical integrity test demonstrations.

b. The Permittee shall provide a written submission within five days of the time the Permittee becomes aware of the circumstances described above. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

4. Anticipated Noncompliance. The Permittee shall give advance notice to the Director of any planned changes in the permitted Facility or activity which may result in noncompliance with permit requirements.

5. Other Noncompliance. The Permittee shall report all other instances of noncompliance to the Director in writing within ten (10) days of the time the Permittee becomes aware of the circumstances. The report shall contain the information listed in paragraph II.D.3 of this permit.

6. Planned Changes. The Permittee shall provide written notice to the Director as soon as possible of any planned physical alterations or additions to the permitted Facility.

7. Conversion. The Permittee shall provide written notice to the Director 30 days prior to the any conversion of the Injection Well to an operating status other than an injection well.

8. Annual Report. The Permittee shall submit a written Annual Report to the Director summarizing the results of the monitoring required in Permit Condition C of Part II of this permit. This report shall include monthly monitoring records of injected fluids, the results of

any mechanical integrity test(s), and any major changes in characteristics or sources of injected fluids. The Permittee shall complete and submit this information with its Annual Report EPA Form 7520-11 (Annual Disposal Injection Well Monitoring Report). The Permittee shall submit the Annual Report to the Director no later than January 31st of each year, summarizing the activity of the calendar year ending the previous December 31st.

9. Plugging and Abandonment Reports and Notifications.

a. The Permittee shall notify the Director in writing at least 45 days before plugging and abandonment of the Injection Well as described in condition in Part III.C of this permit. The Director may allow a shorter notice period upon written request.

b. The Permittee shall submit any revisions to the Plugging and Abandonment Plan attached to and incorporated into this permit (Attachment 1) to the Director no less than 45 days prior to plugging and abandonment on EPA Plugging and Abandonment Form 7520-14. The Permittee shall not commence plugging and abandonment until it receives written approval of the revisions to the Plan from the Director.

c. To the extent that any unforeseen circumstances occur during plugging and abandonment of the Injection Well that cause the Permittee to believe the Plugging and Abandonment Plan should be modified, the Permittee shall obtain written approval from EPA of any changes to the Plugging and Abandonment Plan prior to plugging the Injection Well.

d. Within 60 days after plugging the Injection Well, the Permittee shall submit a Plugging and Abandonment Report to the Director which shall consist of either:

(i) A statement that the Injection Well was plugged in accordance with the EPA approved Plugging and Abandonment Plan; or

(ii) Where actual plugging differed from the Plugging and Abandonment Plan previously submitted, the Permittee shall provide to the Director an updated version of form 7520-14 specifying the different procedures used.

e. The Permittee shall ensure that the Plugging and Abandonment Report is certified as accurate by the person who performed the plugging operation.

10. Compliance Schedules. The Permittee shall submit reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit no later than 30 days following each schedule date.

11. Mechanical Integrity Tests. The Permittee shall notify the Director in writing at least 30 days prior to conducting Mechanical Integrity Testing on the Injection Well.

12. Cessation of Injection Activity. After the Permittee has ceased injection into the Injection Well for two years, the Permittee shall plug and abandon the Injection Well in accordance with the Plugging and Abandonment Plan (Attachment 1 hereto) unless the Permittee:

a. Provides written notice to the Director describing actions and/or procedures, necessary to ensure that the Injection Well will not endanger any USDW during the period of temporary abandonment. These actions and procedures shall include compliance with the requirements of this permit applicable to active injection wells unless waived, in writing, by the Director;

b. Receives approval from the Director that the actions and/or procedures described in the notice are satisfactory; and

c. Implements such EPA approved actions and/or procedures.

E. Mechanical Integrity

1. Standards. The Permittee shall maintain the mechanical integrity of the permitted Injection Well pursuant to 40 CFR § 146.8.

2. Request from Director. The Director may by written notice require the Permittee to demonstrate mechanical integrity at any time during the term of this permit and the Permittee shall comply with the Director's request.

Part III

A. Construction Requirements

1. Confining Zone. Notwithstanding any other provision of this permit, the Permittee shall inject through the Injection Well only into a formation which is separated from any Underground Source of Drinking Water by a confining zone, as defined in 40 C.F.R. § 146.3, that is free of known open faults or fractures within the Area of Review as required in 40 C.F.R. § 146.22.

2. Casing and Cementing. The Permittee shall:

a. ensure the Injection Well is cased and cemented to prevent the movement of fluids into or between underground sources of drinking water and in accordance with 40 CFR §§ 146.22 and 147.1955(b);

b. ensure the casing and cement used in the Injection well is designed for the life expectancy of the well;

c. ensure the Injection Well has 11 ¾ inch surface casing installed from the surface to 568 feet below land surface and cemented back to the surface;

d. ensure the Injection Well has 8 5/8 inch intermediate casing string installed from the surface to 1539 feet below land surface and cemented back to the surface;

e. ensure the Injection Well has 4 ½ inch long string casing installed from the surface to 7788 feet and cemented back to approximately 6850 feet below land surface to isolate the injection zone; and

f. install in the Injection Well, and inject through, a tubing string set on a packer placed above the injection zone's perforated interval at approximately 7544 feet.

3. Logs and Tests. In accordance with 40 CFR § 146.22(f), the Permittee shall prepare logs and perform tests as follows during the drilling and construction or rework of the Injection Well: electric, gamma ray and caliper logs in the open hole, a cement bond, temperature or density log on the surface casing (if cement returns are not achieved), and a cement bond log/variable density log on the long string casing. The Permittee shall submit to the Director, for the Injection Well, cement records, a narrative report that interprets the well log(s) and test results, which specifically relate to the results of the cementing operation, and a detailed description of the rationale used to make these interpretations. The narrative report shall be prepared by a knowledgeable log analyst and submitted to the Director. The Director may prescribe additional logs or waive logging requirements in the future should field conditions so warrant.

4. Mechanical Integrity. The Permittee is prohibited from conducting injection operations in the Injection Well until it (i) demonstrates the mechanical integrity of the Injection Well in accordance with 40 C.F.R. § 146 and (ii) receives notice from the Director that such a demonstration is satisfactory in accordance with paragraph II.D.2 of this permit.

5. Corrective Action. The Permittee is prohibited from conducting injection operations in the Injection Well until it has plugged all abandoned wells identified within the area of review.

6. Completion Reports. The Permittee shall prepare a written Completion Report that summarizes the activities and the results of the testing required in Condition A.1 through 5 of Part III of this permit and submit the Completion Report to the Director prior to the commencement of injection operations.

B. Operating Requirements

1. Injection Formation. The Permittee shall inject only into the Huntersville Chert Formation located at the subsurface interval between approximately 7544 feet and 7620 feet.

2. Injection Fluid. The Permittee shall not inject any hazardous waste as defined in 40 CFR Part 261 or any fluid, other than the produced fluids solely from oil and gas production activity at PGE's oil and gas production operations.

3. Injection Volume Limitation. Injection volume shall not exceed 30,000 barrels per month.

4. Injection Pressure Limitation. The Permittee shall not exceed a surface injection pressure maximum of 2933 psi and a bottom-hole injection pressure maximum of 6918 psi. These pressures were calculated based on a maximum injection fluid specific gravity of 1.22. If the specific gravity of the injection fluid exceeds 1.22, then the Permittee shall reduce the surface injection pressure by an amount necessary to avoid exceeding the bottom-hole pressure maximum. The Permittee shall not inject fluid at a pressure which initiates fractures in the confining zone, as defined in 40 C.F.R. § 146.3, adjacent to underground sources of drinking water or causes the movement of injection or formation fluids into an underground source of drinking water.

5. The Permittee is prohibited from injecting between the outermost casing protecting USDW and the well bore, and also from injecting into any USDW.

C. Plugging and Abandonment.

1. Plugging and Abandonment. The Permittee shall plug and abandon the Injection Well as provided in the EPA approved Plugging and Abandonment Plan (EPA Form 7520-14) (Attachment 1).

2. The Permittee shall plug and abandon the Injection Well in such a manner that fluids shall not move into or between USDWs.

D. Financial Responsibility

1. The Permittee shall maintain continuous compliance with the requirement to maintain financial responsibility and resources to close, plug and abandon the underground Injection Well in accordance with 40 CFR § 144.52(a)(7) in the amount of at least $60,000. A well may not be constructed, reworked or operated if the financial responsibility for that well has not been established. The Permittee shall not substitute an alternative demonstration of financial responsibility from that which the Director has approved, unless it has previously submitted evidence of that alternative demonstration to the Director and the Director notifies him or her

that the alternative demonstration of financial responsibility is acceptable. The Director may require the Permittee to submit a revised demonstration of Financial Responsibility if the Director has reason to believe that the original demonstration is no longer adequate to cover the costs of plugging and abandonment.

2. Insolvency of Financial Institution. In the event of the bankruptcy of the trustee or issuing institution of the financial mechanism, or a suspension or revocation of the authority of the trustee institution to act as a trustee or the institution issuing the financial mechanism to issue such an instrument, the Permittee must immediately notify the Director and submit an alternative demonstration of financial responsibility acceptable to the Director within sixty days after such an event.

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Attachment 1

OMB No. 2040-0042 Approval Expires 11/30/2014

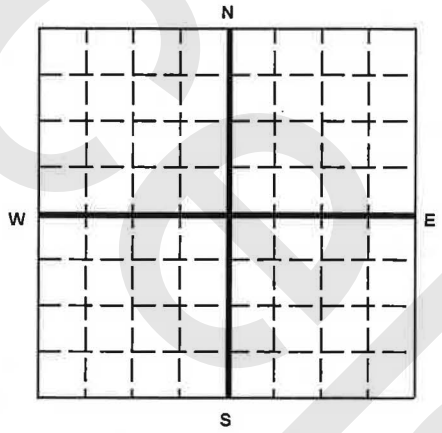
United States Environmental Protection Agency
Washington, DC 20460

PLUGGING AND ABANDONMENT PLAN

Name and Address of Facility
Marjorie C. Yanity, Well #1025

Name and Address of Owner/Operator
Pennsylvania General Company, L.L.C.
120 Market Street, Warren PA, 16365

Locate Well and Outline Unit on Section Plat - 640 Acres



State	County	Permit Number
Pennsylvania	Indiana	37-063-31807-00

Surface Location Description
___ 1/4 of ___ 1/4 of ___ 1/4 of ___ 1/4 of Section ___ Township ___ Range ___

Locate well in two directions from nearest lines of quarter section and drilling unit

Surface Location ___ ft. frm (N/S) ___ Line of quarter section
and ___ ft. from (E/W) ___ Line of quarter section.

TYPE OF AUTHORIZATION
- [x] Individual Permit
- [ ] Area Permit
- [ ] Rule

Number of Wells 1

Lease Name Marjorie C. Yanity

WELL ACTIVITY
- [ ] CLASS I
- [x] CLASS II
  - [x] Brine Disposal
  - [ ] Enhanced Recovery
  - [ ] Hydrocarbon Storage
- [ ] CLASS III

Well Number 37-063-31807

CASING AND TUBING RECORD AFTER PLUGGING

SIZE	WT (LB/FT)	TO BE PUT IN WELL (FT)	TO BE LEFT IN WELL (FT)	HOLE SIZE
16"		28	28	24"
11-3/4	42	569	569	15"
8-5/8"	24	1,540	1,540	11"
4-1/2"	11.6	7,788	7,788	7-7/8"

METHOD OF EMPLACEMENT OF CEMENT PLUGS
- [x] The Balance Method
- [ ] The Dump Bailer Method
- [ ] The Two-Plug Method
- [ ] Other

CEMENTING TO PLUG AND ABANDON DATA:	PLUG #1	PLUG #2	PLUG #3	PLUG #4	PLUG #5	PLUG #6	PLUG #7
Size of Hole or Pipe in which Plug Will Be Placed (inche	4.5	4.5/7.87	7.875	7.875	7.875		
Depth to Bottom of Tubing or Drill Pipe (ft	7,788	6,900	3,300	1,900	669		
Sacks of Cement To Be Used (each plug)	27.5	47	130	154	56		
Slurry Volume To Be Pumped (cu. ft.)	32.5	55.4	153.4	181.5	65.9		
Calculated Top of Plug (ft.)	7,450	6,700	2,950	1,490	504		
Measured Top of Plug (if tagged ft.)							
Slurry Wt. (Lb./Gal.)	15.6	15.6	15.6	15.6	15.6		
Type Cement or Other Material (Class III)	Class A	Class A	Class A	Class A	Class A		

LIST ALL OPEN HOLE AND/OR PERFORATED INTERVALS AND INTERVALS WHERE CASING WILL BE VARIED (if any)

From	To	From	To
7,544	7,564		

Estimated Cost to Plug Wells
$60,000

Certification

I certify under the penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. (Ref. 40 CFR 144.32)

Name and Official Title *(Please type or print)*	Signature	Date Signed
James Ashbaugh, V.P. Engineering		01/21/2013

EPA Form 7520-14 (Rev. 12-11)

EXHIBIT 12

celdf.org

139 F.Supp.3d 706
United States District Court,
W.D. Pennsylvania.

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC, Plaintiff
v.
GRANT TOWNSHIP, Defendant.

C.A. No. 14–209ERIE.
|
Signed Oct. 14, 2015.

Synopsis

Background: Oil and gas company brought action challenging the constitutionality, validity, and enforceability of a township ordinance purporting to establish a Community Bill of Rights, and seeking declaratory and injunctive relief. Township counterclaimed, arguing that by challenging the ordinance, company was violating the inalienable rights of the people of its township. Both parties moved for judgment on the pleadings.

Holdings: The District Court, Susan Paradise Baxter, United States Magistrate Judge, held that:

[1] township's claimed right to local community self-government did not allow it to enforce ordinance provision prohibiting the right to challenge ordinance in court;

[2] ordinance provision which prohibited the depositing of waste materials from oil and gas extraction and declared permits or licenses awarded by state or federal authorities invalid exceeded township's legislative authority;

[3] portion of ordinance purporting to create legal cause of action in township and its residents to enforce ordinance exceeded township's legislative authority;

[4] portion of ordinance which purported to divest corporations of their rights as persons was preempted;

[5] portion of ordinance providing that violators of the ordinance would not possess any other legal rights, including power to assert state or federal preemption in an attempt to overturn ordinance, was preempted; and

[6] portion of ordinance providing that rights and prohibitions within the ordinance would trump Pennsylvania law when there was a conflict between state and local law was preempted.

Motions granted in part and denied in part.

West Headnotes (28)

[1] **Federal Civil Procedure** Time for motion
Federal Civil Procedure Answer, effect of

Either motion for judgment on the pleadings or motion to dismiss for failure to state a claim upon which relief can be granted may be used to seek the dismissal of a complaint based on a plaintiff's failure to state a claim upon which relief can be granted; the only difference between the two motions is that a motion to dismiss must be made before a responsive pleading is filed, whereas a motion for judgment on the pleadings can be made after the pleadings are closed. Fed.Rules Civ.Proc.Rule 12(b, c), (b)(6), (h)(2)(B), 28 U.S.C.A.

[2] **Federal Civil Procedure** Matters considered

Court presented with a motion for judgment on the pleadings must consider the plaintiff's complaint, the defendant's answer, and any written instruments or exhibits attached to the pleadings. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

[3] **Federal Civil Procedure** Construction of pleadings
Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, court need not accept inferences drawn by a plaintiff if they are unsupported by the

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facts as set forth in the complaint or accept legal conclusions set forth as factual allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] **Federal Civil Procedure** Insufficiency in general

Plaintiff's factual allegations must be enough to raise a right to relief above the speculative level to survive motion to dismiss for failure to state a claim upon which relief can be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] **Federal Civil Procedure** Insufficiency in general

At the motion to dismiss stage, a plaintiff is required to make a showing rather than a blanket assertion of an entitlement to relief; this does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] **Municipal Corporations** Local legislation

Township's alleged right to local community self-government did not allow it to enforce, at motion for judgment on pleadings stage, provision of township ordinance prohibiting the right to challenge the ordinance in court. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

[7] **Corporations and Business Organizations** Extent and Exercise of Powers in General

Courts Supreme Court decisions

Federal district court would not invalidate doctrine that corporations have constitutional rights, on township's claim challenging the doctrine as violative of the rights of the people of the township to local community self-government; doctrine was established by United States Supreme Court precedent, and township provided no legal precedent to the contrary but only cited historical documents and events.

[8] **Municipal Corporations** Proceedings concerning construction and validity of ordinances

A movant for judgment on the pleadings cannot skip analyzing all of the provisions of an ordinance it seeks to invalidate as a whole. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

[9] **Federal Civil Procedure** Motion and proceedings thereon

Since court was not an advocate, it would not review those portions of an ordinance not challenged by movant for judgment on the pleadings in its own motion and arguments, which sought to invalidate ordinance as a whole. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

[10] **Constitutional Law** Resolution of non-constitutional questions before constitutional questions

Where a party raises both statutory and constitutional arguments in support of a judgment, a federal court should first consider whether plaintiff is entitled to full relief under a statute, and if so, should refrain from reaching the constitutional issue; if plaintiff is not entitled to statutory relief, then the constitutional claims are unavoidable and the federal court must address their merits.

[11] **Mines and Minerals** Waste

Municipal Corporations Concurrent and Conflicting Exercise of Power by State and Municipality

Under Pennsylvania law, township ordinance making it unlawful for any corporation or government to engage in depositing of waste from oil and gas extraction was not preempted by section of Pennsylvania Oil and Gas Act expressly superseding local ordinances

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purporting to regulate oil and gas operations, since state statute had been held unconstitutional. 58 Pa.C.S.A. § 3302.

[12] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Municipal Corporations Ordinances permitting acts which state law prohibits

Under Pennsylvania law, preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government and provides that local legislation cannot permit what a state statute forbids or prohibit what state enactments allow.

[13] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Under Pennsylvania law, while conflict preemption has traditionally been articulated to prohibit state laws from standing in the way of Congress's objectives, it applies with equal force to municipal laws whose operation might otherwise conflict with the objectives of the state legislature.

[14] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Under Pennsylvania law, "conflict preemption" is where a local municipal enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of a state statute.

[15] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Under Pennsylvania conflict preemption law, court must conduct an analysis of whether preemption of a local ordinance is implied in or implicit from the text of the whole state statute, which may or may not include an express preemption clause.

[16] **Mines and Minerals** Waste

Municipal Corporations Validity in General

Under Pennsylvania law, there was no legal basis to claim that, because people of township enacted ordinance in conjunction with municipal entity, ordinance, which prohibited the depositing of waste materials from oil and gas extraction and declared permits or licenses awarded by state or federal authorities invalid, was not regulated by Second Class Township Code. 53 P.S. § 65101 et seq.

[17] **Municipal Corporations** Relation to state

Municipal Corporations Powers and functions of local government in general

Under Pennsylvania law, a municipality is a creature of the state and thus necessarily subordinate to its creator, and can exercise only such power as may be granted to it by the legislature.

[18] **Municipal Corporations** Powers and functions of local government in general

Under Pennsylvania law, municipal corporations possess only such powers of government as are *expressly* granted to them by the state and as are necessary to carry the same into effect.

[19] **Mines and Minerals** Waste

Municipal Corporations Political Status and Relations

Municipal Corporations Ordinances permitting acts which state law prohibits

Under Pennsylvania law, township ordinance, which prohibited the depositing of waste materials from oil and gas extraction and declared permits or licenses awarded by state or federal authorities invalid, exceeded township's legislative authority and was invalid; there was

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no state authority expressly granting a municipal government or its people the authority to regulate the depositing of waste from oil and gas wells or to invalidate permits granted by the state or federal government.

[20] **Mines and Minerals** Waste

Zoning and Planning Complete prohibition of use within municipality

Zoning and Planning Mining and minerals; sand and gravel

Township ordinance, which prohibited the depositing of waste materials from oil and gas extraction, was de jure exclusionary in violation of Pennsylvania law requiring that a municipality authorize all legitimate uses somewhere within its boundaries; development of oil and gas, which necessarily included management of waste materials generated at a well site, was a legitimate business activity and land use within the state. 58 Pa.C.S.A. § 3301.

[21] **Zoning and Planning** Uses in general

Pennsylvania law requires that a municipality authorize all legitimate uses somewhere within its boundaries.

[22] **Municipal Corporations** Presumptions and burden of proof

Under Pennsylvania law, although an ordinance is presumed valid, the presumption disappears when an ordinance is de jure exclusionary.

[23] **Zoning and Planning** Complete prohibition of use within municipality

Under Pennsylvania law, a de jure exclusion exists where an ordinance, on its face, completely or effectively bans a legitimate use.

[24] **Zoning and Planning** Complete prohibition of use within municipality

Zoning and Planning Public health, safety, morals, or general welfare

Under Pennsylvania law, upon a showing that an ordinance is de jure exclusionary, the burden shifts to the municipality to show that the exclusionary regulation bears a substantial relationship to the public health, safety, morality, or welfare.

[25] **Municipal Corporations** Rights of action

Under Pennsylvania law, portion of township ordinance purporting to create legal cause of action in township and its residents to enforce ordinance exceeded township's legislative authority and was therefore invalid and unenforceable; local governments only possessed the power expressly granted to them by state government, and there was no authority for township to create a cause of action for its residents to enforce an ordinance written on their behalf. 53 P.S. § 65101 et seq.

[26] **Corporations and Business Organizations** In general; nature and status

Under Pennsylvania law, portion of township ordinance purporting to divest corporations of their rights as persons was preempted by section of Pennsylvania Limited Liability Companies Law that provided that LLCs had the legal capacity of natural persons to act. 15 Pa.C.S.A. § 8921(a).

[27] **Municipal Corporations** Proceedings concerning construction and validity of ordinances

Under Pennsylvania law, portion of township ordinance providing that violators of the ordinance would not possess any other legal rights, including power to assert state or federal preemption in an attempt to overturn ordinance, attempted to eliminate legal recourse to the court of common pleas and, therefore, was preempted by provision of Second Class

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Township Code specifically allowing legal challenges to ordinances. 53 P.S. § 66601(f).

[28] Municipal Corporations Conformity to constitutional and statutory provisions in general

Under Pennsylvania law, portion of township ordinance providing that rights and prohibitions within the ordinance would trump Pennsylvania law when there was a conflict between state and local law was diametrically opposed to state statute providing that township could adopt ordinances that were "not inconsistent with or restrained by the laws of this Commonwealth," and therefore, ordinance was preempted. 53 P.S. § 66506.

2 Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional
58 Pa.C.S.A. §§ 3302, 3303, 3304

Attorneys and Law Firms

***710** Kevin J. Garber, Alana E. Fortna, James V. Corbelli, Babst, Calland, Clements & Zomnir, Pittsburgh, PA, Lisa C. McManus, Pennsylvania General Energy Company, LLC, Warren, PA, for Plaintiff.

Thomas A. Linzey, Community Environmental Legal Defense Fund, Mercersburg, PA, for Defendant.

MEMORANDUM OPINION

SUSAN PARADISE BAXTER,[1] United States Magistrate Judge.

Plaintiff Pennsylvania General Energy Company, LLC, ("PGE") filed this action challenging the constitutionality, validity and enforceability of an ordinance adopted by Grant Township that established a so-called Community Bill of Rights. Plaintiff seeks injunctive and declaratory relief, as well as damages, against Defendant Grant Township on the grounds that the Ordinance purports to strip Plaintiff of its constitutional rights. Additionally, Plaintiff contends the Ordinance is in direct conflict with a number of Pennsylvania statutes and is therefore preempted. Defendant Grant Township has filed a counterclaim alleging that by challenging the Ordinance, PGE is violating the inalienable rights of the people of its Township to "local community self government." Presently before this Court are the cross motions for judgment on the pleadings, which have been fully briefed.

Plaintiff PGE is a Pennsylvania limited liability company with offices in Warren, Pennsylvania. ECF No. 5, Amended Complaint, ¶ 1. PGE is in the business of exploration and development of oil and gas. *Id.* PGE's exploration and development activities include drilling and operating oil and natural gas wells and managing brine and produced fluids generated from operating wells. *Id.* at 18. The operation of oil and gas wells unavoidably requires engaging in the activity of "disposing of waste from oil and gas extraction" since any producing hydrocarbon well produces oil and gas materials, such as production brine, which must be stored at the well site temporarily until they are removed by the well operator. *Id.* at ¶ 28.

In 1997, Pennsylvania General Energy Corp., PGE's predecessor in interest, put into production a deep gas well in Grant Township on property known as the Yanity Farm pursuant to Well Permit No. 37–063–31807–00–00 (hereinafter referred to as the "Yanity Well") issued by the Pennsylvania Department of Environmental Protection. *Id.* at ¶ 19. PGE currently has tanks located on the Yanity Well site used for the storage of oil and gas materials. *Id.* at ¶ 20. PGE intends to use the Yanity Well to inject produced fluids from its other oil and gas development operations. *Id.* at ¶ 26. PGE operates seven other currently producing conventional hydrocarbon wells in Grant Township, all of ***711** which have appropriate active DEP permits. *Id.* at ¶ 27.

Defendant Grant Township, a Second Class Township located in Indiana County, Pennsylvania (*Id.* at ¶ 2), adopted an Ordinance on June 3, 2014, that bears a title reading an ordinance "establishing a Community Bill of Rights for the people of Grant Township, Indiana County, Pennsylvania, which prohibits activities and projects that would violate the Bill of Rights and which provides for enforcement of the Bill of Rights" (hereinafter, the "Community Bill of Rights Ordinance" or "Ordinance"). *Id.* at 7. The Ordinance lays out the framers' beliefs that corporations should not have more rights than the people of its community and that the people

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have the right to regulate all activities pursuant to a right of local self government. ECF No. 5–1, page 1.[2] The Ordinance also enumerates "legal" rights of the people, including self government, a clean and sustainable environment and a right of enforcement, among others. ECF No. 5–1, page 2. Specific prohibitions under the Ordinance, including prohibiting the right to challenge it in the courts, are enumerated in the remaining sections of the Ordinance. ECF No. 5–1.

Standard of Review for Judgment on the Pleadings pursuant to Federal Rule 12(c)

Federal Rule of Civil Procedure 12(c) provides that "after the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Judgment on the pleadings is appropriate only when the movant " 'clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.' " *Minnesota Lawyers Mut. Ins. Co. v. Ahrens,* 432 Fed.Appx. 143, 147 (3d Cir.2011) *quoting Rosenau v. Unifund Corp.,* 539 F.3d 218, 221 (3d Cir.2008).

[1] **[2]** "The standard for deciding a motion for judgment on the pleadings filed pursuant to Federal Rule of Civil Procedure 12(c) is not materially different from the standard for deciding a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Zion v. Nassan,* 283 F.R.D. 247, 254 (W.D.Pa.2012). Either motion may be used to seek the dismissal of a complaint based on a plaintiffs "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6), (h)(2)(B). The only difference between the two motions is that a Rule 12(b) motion must be made before a "responsive pleading" is filed, whereas a Rule 12(c) motion can be made "[a]fter the pleadings are closed." A court presented with a motion for judgment on[3] the pleadings must consider the plaintiffs complaint, the defendant's answer, and any written instruments or exhibits attached to the pleadings. ***712** *Perelman v. Perelman,* 919 F.Supp.2d 512, 521 (E.D.Pa.2013). *See also* 2 James Wm. Moore et al., *Moore's Federal Practice–Civil* ¶ 12.38 (2010); *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.,* 998 F.2d 1192, 1196–97 (3d Cir.1993) (court should consider the allegations in the pleadings, the attached exhibits, matters of public record, and "undisputedly authentic" documents if plaintiffs claims are based on such documents). Therefore, a review of the standard for a motion to dismiss is in order here.

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) must be viewed in the light most favorable to the plaintiff and all the well-pleaded allegations of the complaint must be accepted as true. *Erickson v. Pardus,* 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). A complaint must be dismissed pursuant to Rule 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). *See also Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (specifically applying *Twombly* analysis beyond the context of the Sherman Act).

[3] **[4]** A Court need not accept inferences drawn by a plaintiff if they are unsupported by the facts as set forth in the complaint. *See California Pub. Employees' Ret. Sys. v. The Chubb Corp.,* 394 F.3d 126, 143 (3d Cir.2004) *citing Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir.1997). Nor must the Court accept legal conclusions set forth as factual allegations. *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955, *citing Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). *See also McTernan v. City of York, Pennsylvania,* 577 F.3d 521, 531 (3d Cir.2009) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). A plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955, *citing* 5 C. Wright & A. Miller, Federal *Practice and Procedure* § 1216, pp. 235–236 (3d ed.2004). Although the United States Supreme Court does "not require heightened fact pleading of specifics, [the Court does require] enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955.

[5] In other words, at the motion to dismiss stage, a plaintiff is "required to make a 'showing' rather than a blanket assertion of an entitlement to relief." *Smith v. Sullivan,* 2008 WL 482469, at *1 (D.Del. Feb. 19, 2008) *quoting Phillips v. County of Allegheny,* 515 F.3d 224, 231 (3d Cir.2008). "This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.' " *Phillips,* 515 F.3d at 234, *quoting Twombly,* 550 U.S. at 556 n. 3, 127 S.Ct. 1955.

The Third Circuit has expounded on the *Twombly/Iqbal* line of cases:

> To determine the sufficiency of a complaint under *Twombly* and *Iqbal,* we must take the following three steps:

> First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'

***713** *Burtch v. Milberg Factors, Inc.,* 662 F.3d 212, 221 (3d Cir.2011) *quoting Santiago v. Warminster Twp.,* 629 F.3d 121, 130 (3d Cir.2010).

Defendant's Motion for Judgment on the Pleadings

[6] **[7]** Defendant moves for judgment on the pleadings on its single counterclaim, which alleges that by bringing this lawsuit challenging the constitutionality, validity and enforceability of the Ordinance, PGE is violating the rights of the **people** of Grant Township to local community self-government as secured by the American Declaration of Independence, the Pennsylvania Constitution, the federal constitutional framework, and the Community Bill of Rights Ordinance itself. ECF No. 10 (emphasis added). Grant Township also alleges in this counterclaim that corporations are incapable of possessing constitutionally based rights because they are property, not persons; the doctrine of corporate rights violates the rights of the **people** of Grant Township to local community self-governance and violates provisions of the Community Bill of Rights Ordinance and is unconstitutional; and the doctrine of state preemption, when exercised to constrict the assertion of local community self government to expand **people's** rights, is unconstitutional. *Id.* at ¶ ¶ 41–42, 44 (emphasis added). As relief, Defendant seeks declaratory and injunctive relief, and fees. *Id.* at pages 29–30.

In its motion for judgment on the pleadings as to this counterclaim, Defendant summarizes its position:

> The right of local community self government is a fundamental individual political right—exercised collectively—of people to govern the local communities in which they reside. The right includes three component rights—first, the right to a system of government within the local community that is controlled by a majority of its citizens; second, the right to a system of government within the local community that secures and protects the civil and political rights of every person in the community; and third, the right to alter or abolish the system of local government if it infringes those component rights.
>
> The right of local community self government is inherent and inalienable. It derives necessarily from the fundamental principle that *all* political power is inherent in the people, is exercised by them for their benefit, and is subject to their control. The right is secured by the Pennsylvania Constitution, the American Declaration of Independence, state constitutional bills of rights, and the United States Constitution. Because the right is inherent and inalienable, no government can define, diminish, or otherwise control it.

ECF No. 53, page 4 (italics in original).

According to Defendant, the alleged right of local community self-government includes the right of the people to change their system of government if it has been rendered incapable of protecting their civil and political rights. Defendant explains that after "... recognizing the existence of [certain] constraints on their own municipal government, the people of Grant Township decided to change their system of government" and the people "did so through the adoption of the Ordinance, which envisions a new system of local governance free of those constraints." ECF No. 59, pages 1–2. Defendant further describes:

> The authority for the people of Grant Township to create that new system is rooted in their constitutional right to local community self government. Grounded in natural law, as well as the federal and state constitution, the right is most clearly described in the Pennsylvania Constitution when it recognizes ***714** that all political power 'is inherent in the people' who have an 'inalienable and indefeasible right to alter ... their government ... as they may think proper." *Driscoll v. Corbett,* 620 Pa. 494, 69 A.3d 197, 207–08 (Pa.2013) (*quoting* PA. Const. Art. I, § 2). The people of Grant Township have exercised that power by creating a local bill of rights, by prohibiting activities that would violate that bill of rights, and by protecting their bill of rights from competing corporate legal doctrines.

Id.

Defendant claims the right to local community self government is deeply rooted in our nation's history and tradition. ECF No. 53, page 9. In support of its alleged right to local community self government, Defendant undertakes a lengthy examination of historical documents such as the Mayflower Compact, the Exeter Compact of 1639, the Articles of Confederation for the United Colonies of 1643, and the Declaration of Independence, and analyzes historical events leading up to the American Revolution, such as

the Second Continental Congress, the British Parliament's enactment of the Currency Acts in 1764, the Stamp Act Riots in 1765, and the Boston Tea Party.

Defendant seeks judgment upholding its Ordinance based solely upon these historical events. Defendant provides no precedential statute or constitutional provision authorizing its action other than its assertion that Plaintiff has no rights —from contracting to do business in Grant Township to bringing a lawsuit to complain about an ordinance—because it is not a person. This view is contrary to over one hundred years of Supreme Court precedent that establishes that corporations are considered "persons" under the United States Constitution. In a remarkably similar case in this district, District Judge Donetta Ambrose held:

> "Indeed, even if a District Court felt that the principal rationale underlying Supreme Court decisions were no longer valid, a district court is nevertheless bound to follow that precedent. *See United States v. Extreme Assocs., Inc.,* 431 F.3d 150, 155 (3d Cir.2005) (reversing decision of district court based on district court's failure to follow Supreme Court precedent) *cert. denied,* 547 U.S. 1143, 126 S.Ct. 2048, 164 L.Ed.2d 806 (2006)."

Pennsylvania Ridge Coal LLC v. Blaine Township, C.A. No. 08–1452P, ECF No. 30 (April 8, 2009). More recently, a federal district court in New Mexico examined a local ordinance in the face of several constitutional challenges and held:

> "they urge the Court to ignore Supreme Court precedent [...] It is well established however, that corporations have constitutional rights, even if they are property. Supreme Court precedent well established these principles, and, as a United States District Court, this Court is bound to follow them. The Defendants' argument that corporations should not be granted constitutional rights, or that corporate rights should be subservient to people's rights, are arguments that are best made before the Supreme Court—the only court that can overrule Supreme Court precedent—rather than a district court."

Swepi, LP v. Mora County, New Mexico, 81 F.Supp.3d 1075, 1171–72 (D.N.M.2015) (some internal citations omitted).

Defendant has provided no legal precedent to the contrary. Without a legal basis for its actions, as opposed to historical documents and events, this Court cannot provide the relief Grant Township seeks. Defendant's motion for judgment on the pleadings will be denied.

715** ***Plaintiff's Motion for Judgment on the Pleadings

As laid out in the Amended Complaint, Plaintiff raises thirteen separate causes of action. Plaintiff claims the Ordinance, as a whole, violates the Supremacy Clause, the Equal Protection Clause, the Petition Clause of the First Amendment, the Contract Clause, and both the substantive and procedural components of the Due Process Clause of the United States Constitution. Plaintiff also claims the entire Ordinance is preempted by Pennsylvania's Second Class Township Code, the Oil and Gas Act, the Limited Liability Companies law, and the Sunshine Act and violates state law as an impermissible exercise of police power and because it is exclusionary. As relief, Plaintiff seeks declaratory judgments that the entire Community Bill of Rights Ordinance is unconstitutional, violates state law and is preempted. It also seeks injunctive relief against Grant Township, enjoining its enforcement of the full Ordinance. Finally, Plaintiff seeks compensatory and consequential damages, fees and costs.[4]

[8] In its motion for judgment, Plaintiff asks the Court to invalidate the entire Ordinance as a matter of law. *See* ECF No. 50–1, Proposed Order. Yet, when an analysis was made of Plaintiff's motion and arguments side-by-side with a copy of the Ordinance, the whole of the Ordinance was never attacked. Instead, the language of certain sections of the Ordinance was challenged repeatedly as invalid and unenforceable; however, much of the Ordinance was never mentioned or analyzed at all. A movant for judgment on the pleadings cannot skip analyzing all of the provisions of an ordinance it seeks to invalidate as a whole.

[9] Moreover, the Court is not an advocate. It will not review those portions of an ordinance not challenged by Plaintiff in its own motion and arguments. The Court did not undertake to analyze the sections of the Ordinance that were not part of Plaintiff's motion. Likewise, the Court did not transfer the ruling on the validity or invalidity of the analyzed provisions to cover the whole of the Ordinance. The rulings made are explained below the same way they were analyzed: first, the precise provision of the Community Bill of Rights Ordinance at issue is listed, with its full text; second, each of Plaintiff's legal theories challenging that exact provision is laid out; and third, the legal analysis as to the legality, enforceability and constitutionality (if necessary) of that provision is made.

[10] Before proceeding through the challenged provisions of the Ordinance and each of Plaintiff's attacks upon them, one additional issue must be addressed. Where a party raises

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both statutory and constitutional arguments in support of a judgment, a federal court should first consider whether the plaintiff is entitled to full relief under a statute, and if so, should refrain from reaching the constitutional issue. ***716** *See Spector Motor Service v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."). Only if a plaintiff is not entitled to statutory relief, then the constitutional claims are unavoidable and the federal court must address their merits. *See Department of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 343, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999) (concluding that the Census Act prohibited use of statistical sampling in calculating the population for purposes of apportionment, and "because we so conclude, we find it unnecessary to reach the constitutional question presented."); *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (constitutional questions should not be decided unless "absolutely necessary to a decision of the case"). Accordingly, this Court will conduct all the statutory analyses before proceeding, if necessary, to any constitutional analysis.

Section 3—Statements of Law—Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

(b) No permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Pennsylvania Constitution, the United States Constitution, or other laws, shall be deemed valid within Grant Township.

Plaintiff challenges Section 3 as:

1) unenforceable as it is preempted by Pennsylvania's Oil and Gas Act;

2) unenforceable because Grant Township exceeded the scope of its legislative authority under Pennsylvania's Second Class Township Code in enacting the Ordinance; and

3) unenforceable as it is exclusionary in violation of state law.

The Preemption Challenge to Section 3

[11] [12] [13] [14] [15] The preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government. *Huntley & Huntley v. Borough Council of Borough of Oakmont,* 600 Pa. 207, 964 A.2d 855, 862–63 (2009).[5] This doctrine provides that local legislation cannot permit what a state statute forbids or prohibit what state enactments allow. *Id. citing Liverpool Township v. Stephens,* 900 A.2d 1030 (Pa.Cmmw.Ct.2006). At issue here is conflict preemption which is "where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute." *Hoffman Mining Co. v. Zoning Hearing Board of Adams Township,* 612 Pa. 598, 32 A.3d 587, 593–94 (2011) (internal citations omitted). In such a case, the court must conduct "an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause." *Id.*

In the Amended Complaint, Plaintiff claims that the Ordinance is preempted by ***717** the Pennsylvania Oil and Gas Act which exclusively and comprehensively regulates the development of oil and gas within this Commonwealth. Plaintiff alleges that by the statute's terms, 58 Pa.C.S. § 3302 of the Oil and Gas Act expressly "supersedes" all local ordinances "purporting to regulate oil and gas operations" related to development unless those ordinances are adopted pursuant to the Flood Plain Management Act or the Municipalities Planning Code. ECF No. 5, Count IX, ¶ ¶ 83–92. This preemption analysis need not be undertaken as the statute to which Plaintiff directly links its preemption challenge (58 Pa.C.S. § 3302) was held to be unconstitutional by the Pennsylvania Commonwealth Court in *Robinson Township v. Commonwealth,* 96 A.3d 1104 (Pa.Cmmw.Ct.2014) after the Pennsylvania Supreme Court held 58 Pa.C.S. §§ 3303 and 3304 unconstitutional in *Robinson Township, Washington County v. Commonwealth,* 623 Pa. 564, 83 A.3d 901 (2013). Accordingly, this statutory provision of Pennsylvania's Oil and Gas Act cannot preempt Section 3 (or any other provision) of the Community Bill of Rights Ordinance. Plaintiff's motion for judgment on the pleadings will be denied as to Count IX of the Amended Complaint.

The Scope of Authority Challenge to Section 3

[16] Next, Plaintiff alleges that Grant Township exceeded the scope of its authority in violation of state law when it enacted the Ordinance prohibiting the depositing of waste materials from oil and gas extraction (at Section 3(a)) and declaring that no permits or licenses awarded by state or federal authorities will be deemed valid (at Section 3(b)). ECF No. 5, Count VII, ¶ ¶ 68–76. Plaintiff alleges that as a Second Class Township, Grant Township possesses only those powers granted to it by the Pennsylvania General Assembly. Plaintiff alleges that because Grant Township does not have a zoning ordinance, any authority to regulate UIC wells or injection of oil and gas materials must originate from the Second Class Township Code and the Code does not authorize Grant Township to take such action. *Id.* In its motion for judgment on the pleadings, Plaintiff argues that Sections 3(a) and (b) are beyond the scope of the powers granted to townships under the Code and, as such, the Ordinance is an impermissible exercise of Grant Township's legislative authority and is therefore invalid and unenforceable.[6]

***718** **[17]** **[18]** "A municipality is a creature of the state and thus necessarily subordinate to its creator, and can exercise only such power as may be granted to it by the legislature." *Twp. of Lyndhurst, New Jersey v. Priceline.com,* 657 F.3d 148, 156 (3d Cir.2011). Consequently, municipal corporations "possess only such powers of government as are *expressly* granted to [them] and as are necessary to carry the same into effect." *Appeal of Gagliardi,* 401 Pa. 141, 163 A.2d 418, 419 (1960) (emphasis added). *See also City of Philadelphia v. Schweiker,* 579 Pa. 591, 858 A.2d 75, 84 (2004).

[19] There is no state authority expressly granting a municipal government or its people the authority to regulate the depositing of waste from oil and gas wells or to invalidate permits granted by the state or federal government. Any provision enacted without underlying legislative authority is invalid and unenforceable. Grant Township exceeded its legislative authority under Pennsylvania's Second Class Township Code by enacting Sections 3(a) and (b) of the Community Bill of Rights Ordinance, and accordingly, these Sections are invalid and unenforceable.

The Exclusionary Challenge to Section 3

[20] Plaintiff also alleges that the Ordinance is exclusionary in violation of Pennsylvania law that requires that a municipality authorize all legitimate uses somewhere within its boundaries. Plaintiff argues that the Ordinance's outright ban on the injection and storage of oil and gas materials within Grant Township (at Section 3(a) of the Ordinance) excludes legally permitted uses within Grant Township. ECF No. 5, Count X, ¶ ¶ 93–97. Defendant has not contested Plaintiff's argument that the Ordinance is exclusionary in violation of state law.

[21] **[22]** **[23]** **[24]** Pennsylvania law requires that a municipality authorize all legitimate uses somewhere within its boundaries. *Beaver Gasoline Co. v. Osborne Borough,* 445 Pa. 571, 285 A.2d 501, 503–04 (1971) ("The constitutionality of a zoning ordinance which totally prohibits legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection."). Although an ordinance is presumed valid, the presumption disappears when an ordinance is *de jure* exclusionary. *Id.* at 504–05; *Tri–County Landfill v. Pine Twp. Zoning Hearing Bd.,* 83 A.3d 488, 518 (Pa.Cmmw.Ct.2014). A *de jure* exclusion exists where an ordinance, on its face, completely or effectively bans a legitimate use. *Tri–County Landfill,* 83 A.3d at 518. Upon a showing that an ordinance is *de jure* exclusionary, the burden shifts to the municipality to show that the "exclusionary regulation bears a substantial relationship to the public health, safety, morality, or welfare." *Twp. of Exeter v. Zoning Hearing Bd.,* 599 Pa. 568, 962 A.2d 653, 661 (2009).

Here, Section 3(a) of the Ordinance proclaims that "it shall be unlawful within Grant Township ... to engage in the depositing of waste from oil and gas extraction." ECF No. 5–1, page 2. Although Defendant wishes it were not so, the development of oil and gas (which necessarily includes the management of waste materials generated at a well site) is a legitimate business activity and land use within Pennsylvania. *See generally* Oil & Gas Act, 58 Pa.C.S. § 3301.

Because Section 3(a) of the Ordinance, on its face, completely bans a legitimate use, the Ordinance is *de jure* exclusionary. As Defendant has not opposed Plaintiff's motion in this regard, judgment will be granted in favor of Plaintiff on Count X.

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Section 4 Enforcement

***719 (a) Any corporation or government that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.**

(b) Grant Township, or any resident of the Township, may enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the Township, in such an action, the Township or the resident shall be entitled to recover all costs of litigation, expert and attorney's fees.

(c) Any action brought by either a resident of Grant Township or by the Township to enforce or defend the natural rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possession [sic] jurisdiction over activities occurring within the Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Plaintiff challenges Section 4(b) and (c) as unenforceable because Grant Township exceeded the scope of its legislative authority under the Pennsylvania Second Class Township Code by enacting the Ordinance.

The Scope of Authority Challenge to Section 4

[25] Plaintiff alleges that Grant Township exceeded the scope of its legislative authority in violation of state law when it enacted Section 4 of the Ordinance. Plaintiff alleges that Section 4(b) and (c) purport to vest in Grant Township and all of its residents the power to enforce and defend the rights and prohibitions of the Community Bill of Rights Ordinance, including the rights to recover all costs of litigation, experts, and attorney's fees, regardless of whether Grant Township and/or its residents succeed in such enforcement. Plaintiff alleges that Sections 4(b) and (c) of the Ordinance are not within the scope of the powers granted to Grant Township by the Code because the Ordinance attempts to create a legal cause of action in Grant Township and its residents. Plaintiff alleges that as a Second Class Township, Grant Township possesses only those powers granted to it by the Pennsylvania General Assembly and the statute does not authorize Grant Township to create any cause of action in itself or its residents. ECF No. 5, Count VII, ¶ ¶ 68–76. In its motion for judgment on the pleadings, Plaintiff argues that Sections 4(b) and (c) of the Ordinance are an impermissible exercise of legislative authority and are therefore invalid and unenforceable.

Because local governments only possess the power "expressly granted" to them by state government (*Appeal of Gagliardi,* 163 A.2d at 419) and because there is no authority for Grant Township to create a cause of action for its residents to enforce an ordinance written on their behalf, Section 4(b) and (c) were enacted beyond the scope of Grant Township's legislative authority. ***720** Accordingly, these Sections are invalid and unenforceable.

Section 5 Enforcement–Corporate Powers

(a) Corporations that violate this Ordinance, or that seek to violate this Ordinance, shall not be deemed to be a "person," nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights, privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the municipality lack the authority to adopt this Ordinance.

(b) All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that the [sic] do not violate the rights or prohibitions of this Ordinance.

Plaintiff challenges Section 5 as:

1) unenforceable as it is preempted by Pennsylvania's Limited Liability Companies Law;

2) unenforceable as it is preempted by the Second Class Township Code;

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3) violative of the Supremacy Clause of the U.S. Constitution;

4) violative of the Equal Protection Clause; and

5) violative of the Petition Clause of the First Amendment.

The Preemption Challenge to Section 5(a)

Pennsylvania's Limited Liability Companies Law

[26] Plaintiff alleges that the Ordinance, which purports to divest corporations of their rights as "persons" is preempted by the Pennsylvania Limited Liability Companies Law. Plaintiff alleges that by enacting the statute, the Commonwealth of Pennsylvania intended to preempt municipal regulation of a company's status as a natural person. Plaintiff alleges that Section 5(a) purports to strip companies of their status as natural persons. ECF No. 5, Count XI, ¶ ¶ 98–102.[7]

Pennsylvania's 15 Pa.C.S. § 8921(a) provides that LLCs "shall have the legal capacity of natural persons to act," while Section 5(a) of the Ordinance purports to divest corporations of their rights as "persons." The language of the two sections is precisely opposite of the other. There is a direct conflict between these two provisions. Because it irreconcilably conflicts with the Limited Liability Companies Law, Section 5(a) of the Community Bill of Rights Ordinance cannot stand. *See Western Pa. Restaurant Ass'n v. City of Pittsburgh,* 366 Pa. 374, 77 A.2d 616, 620 (1951) ("It is of course self-evident that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute."). Accordingly, Section 5(a) is unenforceable as preempted by state law.

The Preemption Challenge to Sections 5(a) and (b)

Second Class Township Code

[27] **[28]** Next, Plaintiff alleges that Sections 5(a) and (b) of the Ordinance are ***721** preempted by the Second Class Township Code at 53 P.S. § 66506 which allows township supervisors to adopt ordinances that are "not inconsistent with or restrained by the ... laws of this Commonwealth." ECF No. 5, Count VIII, ¶ 78, *quoting* 53 P.S. § 66506. Plaintiff alleges that the Second Class Township Code regulates the remedies that may be utilized to challenge the legality of an ordinance, providing that "any person aggrieved by the adoption of any ordinance may make complaint as to the legality of the ordinance to the court of common pleas." *Id.* at ¶ ¶ 79–80, *citing* 53 P.S. § 66601(f). Plaintiff alleges that by purporting to strip violators of the Ordinance of their right to make complaints to the court of common pleas, Sections 5(a) and (b) of the Ordinance are in direct conflict with 53 P.S. § 66601(f) of the Second Class Township Code. *Id.* at ¶ 82.

Pennsylvania's 53 P.S. § 66601(f) provides that those aggrieved by the adoption of any local ordinance may challenge the legality of the ordinance to the court of common pleas. Here the language of the Second Class Township Code is clear in its intent to provide legal recourse in the courts of common pleas to those aggrieved by a local ordinance. Meanwhile, Section 5(a) of the Community Bill of Rights Ordinance provides that violators of the Ordinance will not "possess any other legal rights" including "the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance." By attempting to eliminate legal recourse to the court of common pleas, Section 5(a) of the Ordinance is in direct conflict with the Second Class Township Code and is therefore preempted.

Section 5(b) of the Community Bill of Rights Ordinance provides that the rights and prohibitions within the Ordinance shall trump "laws adopted by the legislature of the state of Pennsylvania, and rules adopted by any State agency" in situations where there is a conflict between state and local law. The can be no doubt that here the state statute at § 66506 and the local provision are diametrically opposed to each other. In such a situation, the state law preempts the local Ordinance. Therefore, Section 5(b) of the Ordinance cannot stand as it is preempted by the state law.

The Federal Constitutional Challenges to Section 5(a)

Plaintiff moves for judgment on the pleadings on its Supremacy Clause, Equal Protection Clause, and Petition Clause challenges to the constitutionality of Section 5(a) of the Community Bill of Rights Ordinance. However, because Section 5(a) of the Ordinance is preempted by both Pennsylvania's Limited Liability Companies Act and the Second Class Township Code, this Court need not undertake an analysis as to whether Section 5(a) also violates the

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Supremacy Clause, the Equal Protection Clause or the First Amendment. *See Spector Motor,* 323 U.S. at 105, 65 S.Ct. 152.

Conclusion

For the reasons stated in this Memorandum Opinion, Defendant's motion for judgment on the pleadings will be denied.

Plaintiff's motion for judgment on the pleadings will be granted in part and denied in part. Plaintiff's motion will be denied on the basis of preemption under the Oil & Gas Act. Judgment will be granted in favor of Plaintiff in the following regards:

— Because Sections 3(a) and (b) of the Community Bill of Rights Ordinance were enacted without legal authority in violation of the Second Class Township Code, these sections are invalid;

— Because Sections 3(a) and (b) of the Community Bill of Rights Ordinance ***722** are exclusionary in violation of Pennsylvania law, they are invalid;

— Because Sections 4(b) and (c) of the Community Bill of Rights Ordinance were enacted without legislative authority in violation of the Second Class Township Code, these Sections are invalid;

— Because Section 5(a) of the Community Bill of Rights Ordinance is preempted by the Limited Liability Companies Law, this Section is invalid; and

— Because Sections 5(a) and (b) of the Community Bill of Rights Ordinance are preempted by the Second Class Township Code, they are invalid.

Based on the foregoing, Grant Township will be enjoined from enforcing Sections 3(a) and (b), Sections 4(b) and (c), and Sections 5(a) and (b) of the Community Bill of Rights Ordinance.

An appropriate order will be entered.

All Citations

139 F.Supp.3d 706, 184 Oil & Gas Rep. 664

Footnotes

1 This civil action was originally assigned to District Judge Frederick J. Motz and then assigned to District Judge Arthur J. Schwab for settlement purposes. Thereafter, in accordance with the provisions of 28 U.S.C. § 636(c)(1), the parties voluntarily consented to having a United States Magistrate Judge conduct proceedings in this case, including the entry of a final judgment.

2 The entirety of the Ordinance is also attached to this Memorandum Opinion.

3 *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (listing cases) ("[T]he Court has recognized that First Amendment protection extends to corporations."); *Metro. Life Ins. Co. v. Ward,* 470 U.S. 869, 881 n. 9, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) ("It is well established that a corporation is a 'person' within the meanings of the Fourteenth Amendment."); *Minneapolis & St. Louis Ry. Co. v. Beckwith,* 129 U.S. 26, 28, 9 S.Ct. 207, 32 L.Ed. 585 (1889) (applying Due Process Clause of the Fourteenth Amendment) ("Corporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation affecting it."); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (holding corporations entitled to First Amendment protections); *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629 (1819) (applying Contract Clause to corporations).

4 Plaintiff moves for partial judgment on the pleadings. Plaintiff argues for judgment on its federal claims that the Ordinance violates the Supremacy Clause (Count I), the Equal Protection Clause of the Fourteenth Amendment (Count II), and the Petition Clause of the First Amendment (Count III). Plaintiff moves for judgment on its state law claims that the Ordinance is preempted by Pennsylvania's Limited Liability Companies Law (Count XI), Pennsylvania's Oil and Gas Act (Count IX), Pennsylvania's Second Class Township Code (Count VIII), that the Ordinance is exclusionary (Count X) in violation of state law and that the Township exceeded its legislative authority in enacting the Ordinance (Count VII). Plaintiff also moves for judgment on its Declaratory Judgment claim (Count XIII). Plaintiff does not move for judgment as to its substantive due process claim (Count IV), procedural due process claim (Count V), Contract Clause claim (Count VI) or Sunshine Act claim (Count XII).

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5 While conflict preemption, at issue herein, has traditionally been articulated to prohibit state laws from standing in the way of Congress's objectives, it applies with equal force to municipal laws whose operation might otherwise conflict with the objectives of the state legislature. *Huntley,* 964 A.2d at 863 n. 6.

6 While Defendant argues that it is the people of Grant Township who enacted the Ordinance in *conjunction* with the municipal entity of Grant Township, Defendant cites no authority for such a proposition. Defendant argues that because the "people" of Grant Township enacted the Community Bill of Rights Ordinance, rather than Grant Township itself, the Second Class Township Code is irrelevant to the power of the people to enact legislation. Defendant contends:

> "The people's right of local community self government is not limited by the powers granted to municipal corporations. The limited power of municipal corporations is based on a legal doctrine known as Dillon's Rule, which declares that *municipal corporations* derive their powers and rights wholly from state government. Dillon's Rule thus applies only to the specific relationship between *municipal corporations* and the State. In this case, Dillon's Rule is inapplicable because the people of Grant Township adopted the Ordinance directly, in tandem with the Grant Township municipal corporation. The Ordinance provides: 'We the People of Grant Township hereby adopt this Community Bill of Rights Ordinance.' This Ordinance also specifically established that the 'use of the municipal corporation 'Grant Township' by the people for the making and enforcement of this law shall not be deemed, by any authority, to eliminate, limit, or reduce [the people's] sovereign right [to local self government].' "

ECF No. 59, page 12 (internal citations omitted). As there is no legal basis for this argument, it is rejected here.

7 In opposition to the motion for judgment, Defendant makes the same argument as it has made to each of Plaintiffs preemption claims: the doctrine of preemption should be ignored because the source of the Ordinance is not municipal corporate power, but the alleged natural and inherent right of local community self government. The Court has already rejected this unsupported notion.

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EXHIBIT 13

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GRANT TOWNSHIP CHARTER
Presented to the People of Grant Township
By The
GRANT TOWNSHIP
GOVERNMENT STUDY COMMISSION
August 25, 2015

HOME RULE CHARTER OF THE TOWNSHIP OF GRANT, INDIANA COUNTY, PENNSYLVANIA

ARTICLE I – BILL OF RIGHTS

Section 101. All legitimate governments in the United States owe their existence to the people of the community that those governments serve, and governments exist to secure and protect the rights of the people and those communities. Any system of government that becomes destructive of those ends is not legitimate, lawful, or constitutional.

Section 102. The people of Grant Township possess both the collective and individual right of self-government in their local community, the right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

Section 103. The people of Grant Township possess the right to use their local government to make law, and the making and enforcement of law by the people through a municipal corporation, or any other institution, shall not eliminate, limit, or reduce their sovereign right of local community self-government.

Section 104. All residents of Grant Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.

Section 105. All residents of Grant Township possess the right to the scenic, historic, and aesthetic values of the Township, including unspoiled vistas and a rural quality of life. That right

shall include the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values, including from the depositing of waste from oil and gas extraction.

Section 106. Natural communities and ecosystems within Grant Township, including, but not limited to, rivers, streams, and aquifers, possess the right to exist, flourish, and naturally evolve.

Section 107. All residents of Grant Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure this right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human communities, natural communities, or ecosystems. The right to a sustainable energy future shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.

Section 108. All residents of Grant Township possess a right to be fairly taxed, which includes property tax assessments and rates that are commensurate with the needs of the Township and the Township's residents, and the services required to meet those needs. Protection of that right shall require the Board of Township Supervisors to review Indiana County's administration of property taxation for Grant Township residents at least once every three years. If the Board of Supervisors deems the administration of property taxation to be unfair, unjust, or burdensome to the residents of Grant Township, the Board of Supervisors shall have the authority, through the adoption of an Ordinance, to change the administration of property taxation.

Section 109. All residents of Grant Township possess the right to enforce the rights and prohibitions secured by this Charter, which shall include the right of Township residents to intervene in any legal action involving the rights and prohibitions recognized by this Charter.

Section 110. All rights secured by this Charter are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. Further implementing legislation shall not be required for Grant Township, the residents of Grant Township, or the ecosystems and natural communities protected by this Charter, to enforce all of the provisions of this Charter. The rights secured by this Charter shall only be enforceable against actions specifically prohibited by this Charter, unless otherwise specifically noted.

ARTICLE II - GENERAL POWERS OF THE MUNICIPALITY

Section 201. ***Status and Title.*** The name of the municipality created by this Home Rule Charter shall be "Grant Township" and it shall operate as a Home Rule municipality, and possess the powers and authority of a Home Rule municipality.

Section 202. ***Boundaries.*** The boundaries of the Township shall be the actual boundaries of the Township at the time this Charter takes effect and as they may be lawfully changed thereafter.

Section 203. ***Governing Body.*** The governing body of the municipal Home Rule corporation shall be the Board of Supervisors, acting under the authority of, and with the consent of, the people of Grant Township.

Section 204. ***Rules of Operation.*** Unless expanded or altered as provided by this Charter, the rules of operation for the Grant Township Home Rule municipal corporation shall be the ones provided to second class Townships pursuant to the Second Class Township Code of the Commonwealth of Pennsylvania.

Section 205. ***Repeals.*** The Articles, sections, policies, and provisions of this Charter hereby repeal the provisions of any prior Ordinances, laws, or rules of the Township that are inconsistent with this Charter.

Section 206. ***Legal Claims and Liabilities of the Township.*** Upon enactment of this Charter, the Township shall continue to own, possess, and control all legal claims, power, and property of every kind and nature, owned, possessed, or controlled by it prior to when this Charter takes effect, and shall be subject to all its debts, obligations, liabilities, and duties.

Section 207. ***Pending Actions and Proceedings.*** No enforcement action or proceeding, civil or criminal, which was brought by the Township or any office, department, agency, or officer thereof, pending at the time this Charter takes effect, shall be affected by the adoption of this Charter or by anything herein contained. Any action or proceeding, civil or criminal, filed against the Township or any office, department, agency, or officer thereof, pending at the time this Charter takes effect, shall be evaluated by appropriate legal counsel and, if the transformation to a Home Rule municipality is deemed to transform the nature and character of the proceeding, the Township Board of Supervisors shall instruct legal counsel to request a dismissal of those proceedings.

Section 208. ***Continuation of Ordinances.*** All Ordinances, resolutions, rules, and regulations, or portions thereof in force when this Charter takes effect, which have been directly incorporated into this Charter, shall be deemed to have been repealed or amended to the extent that they duplicate provisions of this Charter. Other Ordinances, resolutions, rules, and regulations, or portions thereof in force when this Charter takes effect, shall temporarily be continued in force and effect until the Board of Supervisors has reviewed them, and determined to re-adopt them as Ordinances of the Home Rule municipality, or determined that they should be repealed or amended.

Section 209. ***Authority of Existing Officers.*** The Supervisors in office at the time this Charter takes effect shall remain in office for the full terms for which they were originally elected, and shall receive the same compensation until their terms expire. However, they shall have the responsibilities, duties, and authority only as set forth in and pursuant to this Charter. All other elected officials of the Township in office at the time this Charter takes effect shall remain in office for the full term for which they were elected, and shall receive the same compensation which they received prior to the adoption of this Charter.

ARTICLE III – PROHIBITIONS AND ENFORCEMENT

Opposed

Section 301. ***Depositing of Waste from Oil and Gas Extraction.*** It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

Section 302. ***State and Federal Authority.*** No permit, license, privilege, charter, or other authorization issued to a corporation, by any State or federal entity, that would violate the prohibitions of this Charter or any rights secured by this Charter, shall be deemed valid within Grant Township.

Section 303. ***Summary Offenses.*** Any corporation or government that violates any provision of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate violation.

Section 304. ***Standing for Township and Residents.*** Grant Township, or any resident of Grant Township, may enforce the rights and prohibitions of the Charter through an action brought in any court possessing jurisdiction over activities occurring within Grant Township. In such an action, Grant Township or the resident shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

Section 305. ***Enforcement of Natural Community and Ecosystem Rights.*** Ecosystems and natural communities within Grant Township may enforce their rights, and this Charter's prohibitions, through an action brought by Grant Township or residents of Grant Township in the name of the ecosystem or natural community as the real party in interest. Actions may be brought in any court possessing jurisdiction over activities occurring within Grant Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to Grant Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Section 306. ***Enforcement of State Laws.*** All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions recognized by this Charter.

ARTICLE IV - CORPORATE POWERS

Section 401. ***Corporate Privileges.*** Corporations that violate this Charter or the laws of the Township, or that seek to violate the Charter or those laws, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by the Charter or those laws, including standing to challenge the Charter or laws, the power to assert State or federal preemptive laws in an attempt to overturn the Charter or laws, or the power to assert that the people of Grant Township lack the authority to adopt this Charter or other Township laws.

ARTICLE V - EMERGENCY TOWN MEETING

Section 501. ***Emergency Town Meeting.*** In the event of a substantial public emergency affecting the health, safety, and welfare of the residents of Grant Township, or an event or activity that would infringe on the rights of the residents of Grant Township, the electors of the Township may call an Emergency Town Meeting whereby the electors of the Township may adopt a proposed Ordinance. If adopted, that Ordinance shall remain valid until the next available election at which the electors of the Township shall have the opportunity to make the Ordinance permanent by amending the Township's Home Rule Charter with the substance of the Ordinance.

Section 502. ***Initiation and Petition Form.*** To call an Emergency Town Meeting, a petition must be created by the petition filer. Each petition shall bear the name of the petition filer. The petition filer shall deliver written notice, along with a copy of the proposed Ordinance, to the Township Secretary during the hours that the Township office is officially open, and the Township Secretary shall post a copy of that notice and the proposed Ordinance at the Township Building the same day upon receiving that notice. No signatures may be affixed to the petitions until notice of the petition is posted at the Township Building. Each signature shall be in ink and shall be accompanied by the signer's address, signer's printed name, and the date of signing. Only registered electors who are residents of the Township are eligible to sign the petition. The petition shall contain the full text of the proposed Ordinance if that text can fit on a single page. If the text cannot fit on a single page, then circulators shall have full copies of the proposed Ordinance in their possession for inspection by potential signers, and the petition shall identify the Ordinance by declaring that "The signers below call for an Emergency Town Meeting to be held to consider the adoption of the Ordinance filed with the Secretary of the Township on [date] by [petition filer]." On the back of each page of the petition there shall be an attached affidavit executed by the circulator verifying the authenticity of the signers, and that the signers are registered electors who are residents of the Township to the best of the circulator's knowledge. Only registered electors who are residents within the Township may circulate petitions.

Section 503. ***Timeline.*** Petition circulators shall have 15 (fifteen) calendar days to collect the required signatures, commencing on the date that the Township Secretary posts the petition. The date that the Township Secretary posts the petition shall be included as 1 (one) of the 15 (fifteen) days that circulators may collect signatures. Petition circulators must gather valid signatures equal to at least 30% (thirty percent) of the number of registered electors within the Township. Petitions bearing the requisite number of signatures must then be filed with the Secretary of the Township during the hours that the Township office is officially open, and the Secretary shall issue a written notice of receipt, and then send the signatures to the Emergency Town Meeting Committee for verification. If the 15 (fifteen) day window for signature gathering expires on a day that the Township office is not officially open, the signatures may be submitted to the Township Secretary on the next day that the Township office is officially open; no signatures

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shall be gathered on the day(s) that fall between the date that the signature gathering window expires and the next day the Township office is officially open.

Section 504. ***Verification and the Emergency Town Meeting Committee.*** The Emergency Town Meeting Committee shall verify the accuracy and sufficiency of the petition signatures within 10 (ten) days of the date upon which the petitions are submitted to the Township Secretary, and the Committee shall issue a final determination based on its review. Upon receipt of the petitions from the Secretary, the Chairman of the Board of Supervisors shall schedule and advertise, as a special meeting, a meeting of the Emergency Town Meeting Committee. The Emergency Town Meeting Committee shall consist of the Township Secretary, the Chairman of the Board of Supervisors, the Township Auditor who has served for the longest period of time in the capacity of Auditor within the Township, the petition filer, and the Township Tax Collector. A quorum of the Emergency Town Meeting Committee shall consist of three of those individuals. The number of required signatures shall be calculated using current records from the County Board of Elections; the validity of signatures shall be verified using current records from the County Board of Elections. Disputes over the validity of any individual signature shall be resolved by a majority vote of the Emergency Town Meeting Committee in attendance.

Section 505. ***Court Review.*** The petition filer shall be notified of the final determination of the Emergency Town Meeting Committee within one day of the final determination. The final determination of whether the petition satisfies the requirements for the calling of an Emergency Town Meeting shall be subject to judicial review. An appeal of the final determination of the Emergency Town Meeting Committee shall be filed to the Indiana County Court of Common Pleas, and such appeal must be filed within 10 (ten) days of the final determination of the Emergency Town Meeting Committee. Filing of the appeal shall not prejudice the ability of the original petition filer to create, circulate, and qualify a new petition, following the procedures contained within this Charter.

Section 506. ***Emergency Town Meeting Preparation.*** If the Emergency Town Meeting Committee determines that the petitions meet the requirements imposed by this Article of the Charter, it shall issue a final determination to that effect, and the Committee must set a date for the Emergency Town Meeting, which must occur no later than 15 (fifteen) days after the Emergency Town Meeting Committee has made its final determination. Notices shall be sent via U.S. Mail to all registered electors who are residents of the Township, informing those electors of the date of the Emergency Town Meeting. The Notices shall contain a brief summary of the proposed Ordinance, and also a brief overview of the nature of the Emergency Town Meeting, including informing electors that they will have the opportunity to cast a vote on the proposed Ordinance. The Notices shall be sent out no later than 7 (seven) days before the date of the Emergency Town Meeting. Two advertisements, containing the summary of the proposed Ordinance and the date of the Emergency Town Meeting, shall also be published on 2 (two) consecutive days in a newspaper of general circulation within the Township before the meeting is held.

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Section 507. ***Running of the Meeting.*** The Chairman of the Board of Supervisors shall facilitate the Emergency Town Meeting. All Township electors will be issued a ba llot upon arrival at the Emergency Town Meeting. The ballots shall be created and printed by the Emergency Town Meeting Committee. The ballot shall contain the summary of the proposed Ordinance, the question "Shall this Ordinance become law within Grant Township?" and a space for the elector to vote "yes" or "no" on the question. Sufficient copies of the full text of the Ordinance shall be available for inspection at the Emergency Town Meeting. The Chairman of the Board of Supervisors shall call the meeting to order. The petition filer shall have ten minutes to present the proposed Ordinance. Public comment shall follow, with registered Township electors having three minutes each to speak. Following public comment, electors shall individually deliver their ballots to the Chairman of the Board of Supervisors; and the Chairman, upon receiving each ballot, shall direct the Township Secretary to verify the name of the elector on records obtained from the County Board of Elections. Once verified, the Chairman shall place the ballot into a container overseen by the Emergency Town Meeting Committee.

Section 508. ***Ballot Counting.*** When all the votes have been cast, the Emergency Town Meeting Committee shall, in the open, immediately sort and count the ballots. Only the Emergency Town Meeting Committee shall be involved in the sorting and counting of ballots; no other person shall in any manner interfere. After counting, the Emergency Town Meeting Committee shall make a public declaration of the outcome of the vote. No ballot shall be received and counted after the outcome of the vote has been declared. A tie vote shall be resolved by a majority vote of the Emergency Town Meeting Committee in attendance. In the event of a tie vote of the Emergency Town Meeting Committee in attendance, the Ordinance shall be deemed to have been defeated.

Section 509. ***Effect of the Vote.*** If a majority of registered electors casting votes at the Meeting vote "no," the proposed Ordinance shall not take effect in Grant Township. If a majority of registered electors casting votes at the Meeting vote "yes," the proposed Ordinance shall immediately take effect in Grant Township. If a majority of registered electors casting votes at the Meeting vote "yes," the Township Board of Supervisors shall then take the necessary steps for the Ordinance to appear as a proposed amendment to the existing Grant Township Home Rule Charter at the next available general, municipal, or primary election. If a majority of registered electors casting votes at the Meeting vote "yes," the Ordinance shall remain in effect only until the electors in Grant Township have the opportunity to vote on whether or not to amend the existing Charter with the Ordinance.

ARTICLE VI - CHARTER AMENDMENT

Section 601. ***Amendment.*** No proposed amendment to this Charter shall be withheld from the people's consideration on the basis that existing legal authority may consider the substance of the amendment to be "illegal" or "unconstitutional." Proposed amendments may only be withheld from the people's consideration if they have the effect of denying, abridging, or removing the rights of people, natural communities, or ecosystems, as recognized by this Charter. Amendments to this Charter shall be adopted pursuant to Pennsylvania law governing the amendment of Home Rule Charters.

Section 602. ***Severability.*** All provisions, sections, and subsections of this Charter are severable, and if any sub-section, clause, sentence, part, or provision thereof shall be held illegal, invalid, or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of this Charter. It is hereby declared to be the intent of the people that this Charter would have been adopted if such illegal, invalid, or unconstitutional section, clause, sentence, part, or provision had not been included herein.

ARTICLE VII – CALL FOR CONSTITUTIONAL CHANGES

Section 701. ***State and Federal Constitutional Changes.*** Through the adoption of this Charter, the people of Grant Township call for amendment of the Pennsylvania Constitution and the federal Constitution to recognize a right of local community self-government free from governmental preemption and nullification by corporate "rights" and powers.

ARTICLE VIII – DEFINITIONS

The following terms shall have the meanings defined in this section wherever they are used in this Charter:

"Charter" means the Grant Township Home Rule Charter.

"Corporation" for purposes of this Charter, includes any corporation, or other business entity, organized under the laws of any State or country.

"Depositing of waste from oil and gas extraction" includes, but is not limited to, the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "frack water," tailings, flowback, or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities. This phrase shall not include temporary storage of oil and gas waste materials in the Township at existing well sites.

"Extraction" means the digging or drilling of a well for the purposes of exploring for, developing, or producing shale gas, oil, or other hydrocarbons.

"Person" means a natural person, or an association of natural persons, that does not qualify as a corporation under this Charter.

"Township" means Grant Township in Indiana County, Pennsylvania, its Township Board of Supervisors, or its representatives or agents.

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EXHIBIT 14

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2017 WL 4354710
United States District Court, W.D. Pennsylvania.

SENECA RESOURCES CORPORATION, Plaintiff
v.
HIGHLAND TOWNSHIP, et al., Defendants.

C.A. No. 16-cv-289 Erie
|
Filed 09/29/2017

Attorneys and Law Firms

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MEMORANDUM OPINION[1]

Plaintiff's Motion for Judgment on the Pleadings

SUSAN PARADISE BAXTER, United States Magistrate Judge

I. Introduction

***1** Plaintiff Seneca Resources Corporation ("Seneca Resources") brought this action to challenge the constitutionality, enforceability, and validity of the Home Rule Charter (the "Charter") in Highland Township. Named as Defendants to this action are: Highland Township and the Township's Board of Supervisors.

Pending before the Court is Plaintiff's motion for judgment on the pleadings. ECF No. 26. For the following reasons, the motion will be GRANTED IN PART AND DENIED IN PART.

II. Relevant Procedural History

Seneca Resources is a Pennsylvania corporation engaged in oil and natural gas exploration and production in various locations within the Commonwealth of Pennsylvania, including Highland Township in Elk County. In January of 2014, Seneca Resources received a permit from the United States Environmental Protection Agency to convert an existing natural gas well into an underground injection control well (UIC). The company began work soon thereafter on securing a permit from the Pennsylvania Department of Environmental Protection. An application was submitted to the DEP in November of 2014.

While Seneca Resources was engaged in the permitting process, Highland Township adopted an ordinance which, among other things, made it unlawful for corporations to deposit, store, treat, inject or process waste water, "produced" water, "frack" water, brine or other materials, chemicals or by-products that have been used in the extraction of shale gas onto or into the land, air, or waters within Highland Township. This prohibition specifically applied to UICs. Ordinance 1-9 of 2014, § 4(a). In January of 2015, Township supervisors notified the state DEP of the Township's position that the federal EPA permit was invalid as a result of this ordinance and that any permit the DEP issued would be equally unfounded. For its part, Seneca Resources notified the DEP of its contention that the ordinance was unconstitutional and invalid under federal and state law. The DEP, however, suspended its review of Seneca's application[2] and, to date, has not issued a permit to Seneca Resources.

***2** Seneca Township challenged the Ordinance in February of 2015 in this Court. SeeSeneca Resources Corp. v. Highland Township, Elk County, Pennsylvania, C.A. No. 15-60Erie. The parties reached a settlement and this Court entered a Stipulation and Consent Decree. The parties stipulated that the Ordinance was unconstitutional and unenforceable. In August of 2016, this Court adopted the findings of the consent decree, adjudging the Ordinance to be unconstitutional, invalid, and unenforceable. That was not the end of the matter, however.

By referendum vote in November of 2016, Highland Township adopted a Home Rule Charter which, among other things, enshrined the provisions of the Ordinance previously invalidated by this Court. Section 401 of the Home Rule Charter prohibits any corporation from engaging in the depositing of waste water from oil and gas extraction within the Township. Further, Section 404 of the Charter provides that "No permit, license, privilege, charter, or other authorization, issued by any state or federal entity, that would enable any corporation or person to violate the rights or

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prohibitions of this Charter, shall be lawful within Highland Township." Other sections of the Charter provide for fines for any violations of its provisions and create standing for entities such as ecosystems and "natural communities." Section 410 of the Charter declares that Highland Township will only recognize a federal or state law to the extent it does not violate the rights and prohibitions outlined in the Charter.[3]

Seneca Resources initiated this action on November 30, 2016, challenging the Township's Home Rule Charter which directly precludes its ability to create and operate an injection well within the Township. Seneca Resources has moved to invalidate the entire Home Rule Charter, and to both temporarily and permanently enjoin Highland Township and the Board of Supervisors (the "Board") from enforcing the Charter. More specifically, the company alleges that the Home Rule Charter is preempted by the federal Safe Drinking Water Act; the Pennsylvania Oil and Gas Act; and is an impermissible exercise of police power and legislative authority. Seneca Resources also alleges that the Charter offends the Constitution's Supremacy Clause and the First Amendment, as well as violates the company's rights to both substantive and procedural due process. As relief, Plaintiff seeks a declaratory judgment, *inter alia*, that the Home Rule Charter as a whole is a) preempted by federal and state law; b) is an impermissible exercise of police power by the Township; c) is a violation of the Supremacy Clause; d0) constitutes illegal exclusionary zoning; e) constitutes an impermissible exercise of legislative authority; f) is a violation of Seneca's First Amendment rights; and g) is a violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. ECF No. 1, pages 22-23.

The Township Defendants filed an Answer to the Complaint wherein they admitted the majority of Seneca Resource's claims, including the unconstitutionality and unenforceability of the Charter. Specifically, Defendants acknowledged that they

> "are constrained to acknowledge that §§ 109-110, 401, and 404-411***o***f the HRC are invalid and unenforceable as an impermissible exercise of the Township's legislative authority and/or police powers, and that § 501 of the HRC is unconstitutional. The Defendants further respectfully requests that this Honorable court limit any relief afforded to Seneca Resources Corporation to relief that is declaratory in nature and with specific regard to those portions of the Home Rule Charter (identified above) that are properly subject to invalidation on the basis of (where appropriate) preemption by state or federal law; an improper exercise of municipal police or legislative authority; or unconstitutionality, and that it award Seneca no damages, costs, or counsel fees as against Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania."

***3** ECF No. 15, page 15.

Given these admissions, Seneca has moved for a judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). Seneca moves for judgment on the pleadings at all nine counts of the Complaint claiming the Home Rule Charter in its entirety is invalid, unenforceable, or unconstitutional. However, the motion's "Wherefore clause" requests that this Court enter judgment only on §§ 103-106, 109-110, 401, 404-411, and 501 of the Home Rule Charter. ECF No. 26.

The Township Defendants submitted a short responsive filing to this motion wherein they concurred[4] with Plaintiff that the Charter is unconstitutional, preempted, and unenforceable. ECF No. 31; ECF No. 32. They concurred in Seneca Resources request for a judgment on the pleadings in favor of the corporation on certain specific provisions of the Home Rule Charter.[5]

III. Standard of Review for Motions for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) provides that "after the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Judgment on the pleadings is appropriate only when the movant "clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." Rosenau v. Unifund Corp., 539 F.3d 218, 221 (3d Cir. 2008). A motion under Rule 12(c) is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6). Turbe v. Government of the Virgin Islands, 938 F.2d 427, 427 (3d Cir. 1991). The Court is therefore required to "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306 (3d Cir. 2007).

***4** Here, as noted above, the Township Defendants do not oppose the motion. In some situations, courts have granted such motions without discussion or analysis. See, e.g., Spann

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v. Midland Credit Management and Midland Funding, LLC, 2016 WL 5390671 at *4 (E.D. Pa. Sep. 27, 2016). However, the Court of Appeals for the Third Circuit has instructed that a court is nevertheless required to address a defendant's motion for judgment on the pleadings on the merits even if it is unopposed by a plaintiff. Stackhouse v. Mazurkiewicz, 951 F.2d 29, 30 (3d Cir. 1991); Anchorage Assocs. v. V.I. Bd. of Tax Review, 922 F.2d 168, 174 (3d Cir. 1990). This Court could not locate precedent for situations such as this case where a *plaintiff* has filed the motion and *defendants* do not oppose, and indeed, actively concur in the plaintiff's motion. Therefore, out an abundance of caution, the Court will review the merits of the motion.

IV. Analysis of Plaintiff's Claims

A. Count I—Preemption by the Safe Drinking Water Act

At Count I, Seneca Resources alleges that the Home Rule Charter is preempted by the federal Safe Drinking Water Act, 42 U.S.C. § 300f etseq. (SDWA). More specifically, the corporation contends that § 401 of the Township's Charter presents a clear obstacle to the congressional purpose and procedures embodied in the Act. ECF No. 1, ¶¶ 48-54.

"Preemption is a corollary of the Supremacy Clause of the United States Constitution, and in general, provides that any municipal or state law that is inconsistent with federal law is without effect." King Cty. v. City of Sammamish, 2017 WL 3424972, at *2 (W.D. Wash. Aug. 8, 2017). Seneca Resources alleges that § 401 of the Township's Charter is preempted by federal law. Further, the Township's Answer to the Complaint, and its response to the motion for judgment on the pleadings admit that § 401 of the Charter is preempted by the Constitution as well as federal and state laws. The Third Circuit recently provided important and relevant background on the preemption doctrine:

> The doctrine of preemption is a necessary but precarious component of our system of federalism under which the states and the federal government possess concurrent sovereignty, subject to the limitation that federal law is "the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Consistent with this principle, Congress has the power to enact legislation that preempts state law. At the same time, with due respect to our constitutional scheme built upon a "compound republic," with power allocated between "two distinct governments," there is a strong presumption against preemption in areas of the law that States have traditionally occupied. For that reason, all preemption cases "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Congressional intent is the "ultimate touchstone" of a preemption analysis. Thus, when confronted with the question of whether state claims are preempted, as we are here, we look to the language, structure, and purpose of the relevant statutory and regulatory scheme to develop a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."

Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 687 (3d Cir. 2016) (internal citations omitted). Seneca Resources argues that the Township's Charter is subject to conflict preemption. There are two types of conflict preemption: (1) where "compliance with both federal and state duties is simply impossible," and (2) where "compliance with both laws is possible, yet state law poses an obstacle to the full achievement of federal purposes." MD Mall Assocs. v. CSX Transp., Inc., 715 F.3d 479, 495 (3d Cir. 2013). Seneca Resources relies on "obstacle" conflict preemption. Thus, the Court will examine § 401 in order to determine whether it poses an obstacle to achieving Congress's goals under various federal statutes and, more broadly, the Constitution itself.

***5** The federal SDWA, 42 U.S.C. § 300f etseq. applies to "each public water system in each State," 42 U.S.C. § 300g, sets out a comprehensive regime to protect America's drinking water, and authorizes the federal EPA to set standards for drinking water contaminants therein. 42 U.S.C. § 300g-1; seealsoWyoming et al. v. Zinke, 871 F.3d 1133 (10th Cir. 2017). In particular, it protects "public water systems" and underground water sources. See42 U.S.C. §§ 300g etseq.,300h etseq. (respectively).

Among other things, the SDWA establishes a national program ("the UIC program") for regulating injection wells in order to protect underground sources of drinking water. See42 U.S.C. §§ 300g, 300h. In order to protect underground sources of drinking water, the SDWA authorizes EPA to issue regulations establishing standards for UIC programs, and allows each state to seek approval to administer its own UIC program based on those federal requirements. See42 U.S.C. §§ 300h(a), 300h–1(b); EQT Production Co. v. Wender, 870 F.3d 322 (4th Cir. 2017). Part C of the SDWA requires that the Administrator of the United States Environmental Protection

Agency establish underground injection control regulations in order to protect underground sources of drinking water from contamination by underground injection of wastes. 42 U.S.C. § 300h-1(a), (d). As has been explained,

> The goals of the SDWA are achieved through cooperative federalism. The Environmental Protection Agency (EPA) sets national minimum standards, but the States implement those standards. *See id.*§§ 300f(7)-(8), 300g–2 (providing for State regulation satisfying a national standard). Section 300h–300h–8 of the SDWA (also called Part C) describes the underground injection program. As set forth in the SDWA, the EPA cannot directly regulate underground injections; it can only recommend that a State do so. *Id.* § 300h–1(a). States may regulate underground injections of any substance, including garbage and waste. *See* H.R. 93–1185 (1974). In 2005, Congress excluded non-diesel fracking from the definition of "underground injection." Energy Policy Act of 2005, 109 P.L. 58, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(1)(B)(ii)). This amendment to the SDWA came after a ruling of the Eleventh Circuit, which held that the EPA had authority to regulate fracking under the statute as then written. *See Legal Envtl. Assistance Found. (LEAF), Inc. v. EPA*, 118 F.3d 1467, 1470 (11th Cir. 1997).

Wyoming, 871 F.3d at 1139–40. Section 401 of the Charter states that "it shall be unlawful within Highland Township for any corporation or government to engage in the depositing of waste from oil and gas extraction." This provision creates a direct obstacle to Congress' intentions to create a cooperative system, based on principles of federalism, to regulate and protect drinking water and any underground processes which might endanger that resource. The Court notes, for example, that § 300h(a)(1) of the SDWA directs the Administrator of the federal EPA to promulgate regulations which set out minimum requirements for state underground injection control (UIC) programs. SeeE.O.R. Energy L.L.C., et al. v. Messina, Director of Illinois Environmental Protection Agency, 2017 WL 4181346 (C.D. Il. Sept. 19, 2017). By prohibiting the deposit of waste from oil and gas extraction in the Township, § 401 of the Township's Charter creates a clear obstacle to the Congressional objectives and procedures as embodied in the SDWA. As such, that provision is preempted by federal law. The Charter interferes, impedes, and opposes Congress' goals. Consequently, the Commission lacks the power to legislate in conflict with the state in this area. Section 401 of the Charter stands as an obstacle to federal law, and hence is void. The motion for judgment on the pleadings will be granted in this regard.

B. Count II—Preemption by Pennsylvania Oil and Gas Act

***6** Plaintiff alleges that the Home Rule Charter's prohibition on brine disposal (referencing § 401) within the Township is expressly preempted by § 3302 of the Pennsylvania Oil and Gas Act, otherwise known as Act 13. Plaintiff claims that this provision of the Home Rule Charter is preempted by Act 13 which exclusively and comprehensively regulates the development of oil and gas within this Commonwealth. Plaintiff alleges that by the statute's terms, 55 Pa.C.S. § 3302 expressly "supersedes" all local ordinances "purporting to regulate oil and gas operations" related to development unless those ordinances are adopted pursuant to the Flood Plain Management Act or the Municipalities Planning Code. ECF No. 1, ¶¶ 56-66.[6]

Act 13 has been characterized by the courts of this Commonwealth as "the first significant overhaul of state statutes governing oil and gas drilling in thirty years, constitut[ing] a 'land use revolution respecting oil and gas operations' within this Commonwealth." Robinson Township v. Commonwealth, ("Robinson IV"), 147 A.3d 536, 559 (Supreme Court of Pennsylvania 2016)quotingRobinson Township v. Commonwealth, ("Robinson II"), 623 Pa. 564, 83 A.3d 901, 974 (Supreme Court of Pennsylvania 2013). Act 13 has been the subject of intense litigation, so much so that many of its provisions have been ruled unconstitutional. Id.

Plaintiff alleges that the Home Rule Charter is expressly preempted by a provision of Act 13 that remains in effect. The relevant portion of § 3302 provides: "Except with respect to local ordinances adopted pursuant to the Municipalities Planning Code ["MPC"] and the act of Ocotber 4, 1978 known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded." 58 Pa.C.S. § 3302.

The preemption doctrine establishes priority between potentially conflicting laws enacted by various levels of government. Huntley & Huntley v. Borough Counsel of Borough of Oakmont, 600 Pa. 207, 964 A.2d 855, 862-63 (Pa. 2009). Local legislation cannot permit that which a state statute forbids or prohibit that which state enactments allow. Id.citingLiverpool Township v. Stephens, 900 A.2d 1030 (Pa. Cmmw. Ct. 2006). SeealsoRange Resources-Appalachia, LLC v. Salem Township, 600 Pa. 231 n.7, 964 A.2d 869 (2009) (finding a direct conflict between state law and a local

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ordinance where the ordinance forbade what the state law allowed).

Here, the plain terms of Act 13 indicate that a local ordinance purporting to regulate oil and gas operations must be adopted pursuant to the MPC and the Flood Plain Management Act. Seneca alleges that the adoption of the Home Rule Charter was not in compliance with either the MPC or the Flood Plain Management Act [ECF No. 1, ¶ 63] and Defendants do not deny this allegation.

Accordingly, Plaintiff is entitled to judgment on the pleadings on this claim as the Home Rule Charter violates § 3302 of the Oil and Gas Act and is therefore preempted.

C. Counts III and VI—Impermissible Use of Police and Legislative Powers

"A municipality is a creature of the state and thus necessarily subordinate to its creator, and can exercise only such power as may be granted to it by the legislature." Twp. of Lyndhurst, New Jersey v. Priceline.com, 657 F.3d 148, 156 (3d Cir. 2011). Consequently, municipal corporations "possess only such powers of government as are expressly granted to [them] and as are necessary to carry the same into effect." Appeal of Gagliardi, 401 Pa. 141, 163 A.2d 418, 419 (Pa. 1960). The Township's "ability to exercise municipal functions is limited only by its home rule charter, the Pennsylvania Constitution, and the General Assembly." City of Philadelphia v. Schweiker, 579 Pa. 591, 605, 858 A.2d 75 (2004).

***7** When analyzing a home rule township's "exercise of power ... [courts] begin with the view that it is valid absent a limitation found in the Constitution, the acts of the General Assembly, or the charter itself, and [courts] resolve ambiguities in favor of the municipality." Nutter v. Dougherty, 595 Pa. 340, 357, 938 A.2d 401 (2007) (citations omitted). Seealso53 Pa. Cons. Stat. Ann. § 2961 ("All grants of municipal power to municipalities governed by a home rule charter under this subchapter ... shall be liberally construed in favor of the municipality.").

Plaintiff alleges that portions of Highland Township's Charter were enacted beyond the authority granted to a township by the Pennsylvania Home Rule Charter and Optional Plans Law. At Count III, Seneca alleges that Highland Township acted beyond the scope of its **police** power because:

> The Home Rule Charter is unduly oppressive, arbitrarily interferes with private business, and imposes unnecessary restrictions upon lawful business activities based on the mere allegation and speculation that all disposal and storage of brine adversely affects the health, safety, and welfare of the residents of the Township.

ECF No. 1, ¶ 73. Plaintiff does not identify any specific provision of the Home Rule Charter at this claim. This Court construes this claim as attacking the Home Rule Charter in its entirety.

As to Count VI, Seneca alleges that the Home Rule Charter is an illegal exercise of **legislative** authority in that:

> The Home Rule Charter purports to regulate the location of uses within the Township and is, therefore, a zoning ordinance.
>
> The Home Rule Charter's provisions attempting to create municipal zoning and land use regulation violates the limitations of the MPC.

Id. at ¶¶ 93, 98. Although not specified, presumably this is a challenge to § 401 of the Home Rule Charter.

Plaintiff's brief discusses both of these claims together and the Home Rule Charter as a whole, but then shifts its focus to §§ 406-408. In this regard, Plaintiff's moving papers are both too broad (in that there are not sufficient allegations and arguments for this Court to determine that the entire Home Rule Charter was enacted beyond the authority granted to a township by the Pennsylvania Home Rule Charter and Optional Plans Law) and too narrow (in that no challenges to §§ 406-408 are alleged or referenced in the Complaint).

As to Count VI, § 401 of the Home Rule Charter is an illegal exercise of legislative authority as the Home Rule Charter and Optional Plan Act does not authorize a home rule community to engage in zoning decisions. See53 Pa.Con.Stat. § 2962(a)(10); Delaware County v. Middletown Township, 511 Pa. 66, 511 A.2d 811 (Pennsylvania Supreme Court 1986). By prohibiting a legitimate use within its borders, Highland Township has exceeded its authority.

Accordingly, the motion for judgment on the pleadings is denied as to Count III and granted as to Count VI.

D. Count IV—The Supremacy Clause Challenge

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Plaintiff claims that § 501 of the Home Rule Charter violates the Supremacy Clause because it purports to divest corporations of virtually all of their constitutional rights. ECF No. 1, ¶¶ 79-84.

In Armstrong v. Exceptional Child Ctr., Inc., the Supreme Court held that "[T]he Supremacy Clause ... does not create a cause of action," is not the "source of any federal rights," but instead "instructs courts what to do when state and federal law clash." —— U.S. ——, 135 S.Ct. 1378, 1383, 191 L.Ed.2d 471 (2015). The Armstrong Court further explained, "If the Supremacy Clause includes a private right of action, then the Constitution requires Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law ... a limitation unheard-of with regard to state legislatures." Id. at ——, 135 S.Ct. 1378, 1384. Therefore, since Plaintiff is a private actor, Plaintiff cannot seek to enforce or otherwise bring a cause of action under the Supremacy Clause. SeeDavis v. Shah, 821 F.3d 231, 246 (2d Cir. 2016) (holding that Armstrong forecloses plaintiff's claim of a private right of action under the Supremacy Clause). SeealsoAlliance v. Alt. Holistic Healing, LLC, 2016 WL 223815, at *2 (D. Colo. 2016) (agreeing that there is no private right of action under the Supremacy Clause and explaining that parties cannot use it as a basis for equitable relief); Tohono O'odham Nation v. Ducey, 130 F.Supp.3d 1301, 1315 (D. Ariz. 2015) (explaining that the Tohono O'odham Indian Nation cannot seek relief under the Supremacy Clause since no private cause of action exists); Mercer County Children's Medical Daycare, LLC v. O'Dowd, 2015 WL 5335590, at * 2 (D.N.J. 2015) ("The Supreme Court's analysis of the Supremacy Clause [in Armstrong] appears standalone, not tied to or in any way affected by its analysis of § 30(A).").

***8** Accordingly, Plaintiff's motion for judgment on the pleadings will be denied and Count IV will be dismissed.

E. Count V—Exclusionary Zoning

Plaintiff alleges that the Home Rule Charter's prohibition on the storage and disposal of brine anywhere in the Township (again, referencing § 401) violates Pennsylvania law which requires that a municipality authorize all legitimate uses somewhere within its boundaries. ECF No. 1, ¶¶ 86-90.

It is true that Pennsylvania law requires that a municipality authorize all legitimate uses somewhere within its boundaries. Beaver Gasoline Co. v. Osborne Borough, 445 Pa. 571, 285 A.2d 501, 503-04 (Pa. 1971) ("The constitutionality of a zoning ordinance which totally prohibits legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection."). Although an ordinance is presumed valid, the presumption disappears when an ordinance is *de jure* exclusionary. Id. at 504-05; Tri-County Landfill v. Pine Twp. Zoning Hearing Bd., 83 A.3d 488, 518 (Pa. Cmmw. Ct. 2014). A *de jure* exclusion exists where an ordinance, on its face, completely or effectively bans a legitimate use. Tri-County Landfill, 83 A.3d at 518. Upon a showing that an ordinance is *de jure* exclusionary, the burden shifts to the municipality to show that the "exclusionary regulation bears a substantial relationship to the public health, safety, morality, or welfare." Twp. of Exeter v. Zoning Hearing Bd., 599 Pa. 568, 962 A.2d 653, 661 (Pa. 2009).

Here, § 401 of the Home Rule Charter proclaims that "it shall be unlawful within Highland Township for any corporation or government to engage in the depositing of waste from oil and gas extraction," despite the fact that the development of oil and gas (which necessarily includes the management of waste materials generated at a well site) is a legitimate business activity and land use within Pennsylvania. Seegenerally Oil & Gas Act, 58 Pa.C.S. § 3301. Because § 401, on its face, completely bans a legitimate use, it is *de jure* exclusionary. *De jure* exclusionary ordinances can only be justified by a "substantial relationship" to public health, safety, or welfare. Township of Exeter v. Zoning Hearing Bd., 599 Pa. 568, 579-80, 962 A.2d 653 (Supreme Court of Pennsylvania 2009) ("a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality."). Because no such relationship has been shown here by Defendants, the motion succeeds. It is not the Court's burden to assume or substantiate a connection to public health, safety, morals, and general welfare.

Judgment will be granted in favor of Plaintiff on Count V.

F. Count VII—The Petition Clause Challenge

At Count VII, Plaintiff alleges that § 501 of the Home Rule Charter suppresses Seneca Resources' right to make a complaint to, or seek the assistance of, the government for the redress of grievances in violation of Seneca Resources' First Amendment right to do so. ECF No. 1, ¶¶ 101-105. The Home Rule Charter purports to divest corporations, such as Seneca, of their constitutional right to petition the government

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for redress of grievances in that it strips corporations of: 1) their status as "persons" under the law; 2) their right to assert state or federal preemptive laws in an attempt to overturn the Home Rule Charter; and 3) their power to assert that the Township lacks the authority to adopt the Home Rule Charter. Id. at ¶ 103.

***9** The First Amendment protects "the right of the people ... to petition the Government for a redress of grievances." Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 382, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011). "The threshold question in a right-to-petition case ... is ... whether the plaintiff's conduct deserves constitutional protection." EJS Properties, LLC v. City of Toledo, 698 F.3d 845, 863 (6th Cir. 2012)quotingHolzemer v. City of Memphis, 621 F.3d 512, 520 (6th Cir. 2010). The petition clause protects a citizen's right of access to governmental mechanisms for the redress of grievances, including the right of access to the courts for that purpose. SeeBieregu v. Reno, 59 F.3d 1445, 1453 (3d Cir. 1995); Citizens United v. Federal Election Comm'n, 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) ("... First Amendment protection extends to corporations.").

The Home Rule Charter's § 501 provides that:

> Corporations that violate this Charter or the laws of the Township, or that seek to violate this Charter or those laws, shall not be deemed to be "persons" ... nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would infringe the rights or prohibitions enumerated by this Charter or those laws, including the power to assert that Highland Township, or the people of Highland Township, lack the authority to adopt this Charter or those laws, or the power to assert that Highland Township, its officials, or any resident of Highland Township are liable for damages to the corporation as a result of provisions of this Charter or Township laws.

The Home Rule Charter attempts to eliminate the ability of corporations to access the courts, which it cannot constitutionally do. Therefore, as a matter of law, § 501 of the Home Rule Charter violates the Petition Clause of the First Amendment. Plaintiff's motion for judgment on the pleadings will be granted in this regard.

G. Count VIII—The Substantive Due Process Challenge

At Count VIII, Seneca alleges that by enacting the Home Rule Charter, Highland Township "intended to deny corporations, such as Seneca, their legal and long-standing constitutional rights, including, but not limited to, their rights under the First, the Fifth, and the Fourteenth Amendments ..." and that "the Township's conduct in abrogating Seneca's interest in environmental and UIC permits at Well No. 38268 is deliberate, arbitrary, irrational, exceeds the limits of governmental authority, amounts to an abuse of official power, and shocks the conscience." ECF No. 1, ¶¶ 108-109. In its Complaint, Plaintiff fails to identify any specific provision of the Home Rule Charter in its substantive due process challenge, but only refers to the Home Rule Charter generally; yet, in its brief in support, Plaintiff identifies §§ 401, 404, and 501 as the offending sections. Nonetheless, because the Home Rule Charter was attacked generally as violative of substantive due process in the Complaint, it is appropriate to focus on any of its provisions in the Court's analysis, including the specific sections cited in Plaintiff's motion and brief in support.

The Due Process Clause of the Fourteenth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. 14 § 1. Although the face of the provision speaks only to the adequacy of procedures, the Supreme Court has held that the Due Process Clause contains a substantive, as well as a procedural, component. Nicholas v. Pennsylvania State University, 227 F.3d 133, 138-39 (3d Cir. 2000)citingPlanned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 846-47, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

***10** Substantive due process review is no straightforward matter. As the Third Circuit explained in Nicholas, substantive due process "is an area of law 'famous for controversy, and not known for its simplicity.' " Id. at 139, quotingDeBlasio v. Zoning Bd. Of Adjustment, 53 F.3d 592, 598 (3d Cir. 1995). Although courts have attempted to define a "test," a bright line review has not been possible because of the very different nature of the underlying facts and rights involved in each case. "Each new claim to [substantive due process] protection must be considered against a background of constitutional purposes, as they have been rationally perceived and historically developed." Id. at 140, (quotingRegents of Univ. of Michigan v. Ewing, 474 U.S. 214, 229 *1985, 106 S.Ct. 507, 88 L.Ed.2d 523) (Powell, J., concurring).

The Nicholas Court identified two separate threads woven into the "fabric of substantive due process" and then attempted to "untwist this tangled skein." Id. at 139. The first thread of substantive due process arises when a plaintiff challenges the validity of a legislative act, while the second thread arises out of non-legislative action. Id. The legislative/non-legislative "distinction is significant because it determines the appropriate standard of review for substantive due process challenges." RHJ Medical Center, Inc. v. City of DuBois, 754 F.Supp.2d 723, 767 (W.D. Pa. 2010). Each separate thread requires a separate analysis, although many courts and parties conflate the two and their corresponding levels of review. Careful attention must be paid.

Here, the challenged Home Rule Charter is a legislative act. Id.SeealsoCounty Concrete Corp., 442 F.3d at 169. So then, the Charter is properly analyzed under the first thread of substantive due process. In this first thread, a plaintiff does not need to establish a " 'protected property interest to which the Fourteenth Amendment's due process protection applies' as this standard only applies in a 'non-legislative substantive due process claim.' " RHJ Medical Center, 754 F.Supp.2d at 768-69, citingNicholas, 227 F.3d at 139–40 and County Concrete Corp, 442 F.3d at 169. ("For Plaintiff's facial substantive due process challenge to the Ordinance to be successful, [it] must 'allege facts that would support a finding of arbitrary or irrational legislative action ...' ").

When reviewing legislative acts on their face, the courts have looked for arbitrary or irrational legislation that impermissibly goes beyond serving a legitimate state interest. County Concrete Corp., 442 F.3 at 169-70. Even under this lesser standard, the Home Rule Charter fails to survive a substantive due process review. The language of the Charter itself runs afoul of constitutional protections afforded corporations and attempts to immunize Highland Township from clashes with current federal and state law:

> **§ 401. Depositing of Waste from Oil and Gas Extraction.** It shall be unlawful within Highland Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.
>
> **§ 404. State and Federal Authority.** No permit, license, privilege, charter, or other authorization, issued by any state or federal governmental entity, that would enable any corporation or person to violate the rights or prohibitions of this Charter, shall be lawful within Highland Township.
>
> **§ 501.Corporate Privileges.** Corporations that violate this Charter or the laws of the Township, or that seek to violate this Charter or those laws, shall not be deemed to be "persons" to the extent that such treatment would infringe the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would infringe the rights or prohibitions enumerated by this Charter or those laws, including the power to assert that Highland Township, or the people of Highland Township, lack the authority to adopt this Charter or those laws, or the power to assert that Highland Township, its officials, or any resident of Highland Township are liable for damages to the corporation as a result of provisions of this Charter or Township laws.

***11** Because the actual language of the Home Rule Charter highlights irrational and arbitrary behavior *de facto*, Seneca's motion for judgment on the pleadings on this claim is granted as violative of Plaintiff's substantive due process rights.

H. Count IX—The Procedural Due Process Challenge

At Count IX, Plaintiff alleges that the Home Rule Charter's prohibition of underground injection within the Township "significantly and materially devalues Seneca's legal rights and interest related to and/or held within the Township, including Seneca's UIC permit" without any due process in violation of the procedural due process clause of the Fifth and Fourteenth Amendments. ECF No. 1, ¶¶ 113-118.

In order to trigger the protections of the procedural aspects of the Due Process Clause, a plaintiff must demonstrate a property or liberty interest. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). SeealsoMathews v. Eldridge, 425 U.S. 319 (1976); Mudric v. Attorney Gen. of U.S., 469 F.3d 94, 98 (3d Cir. 2006) ("It is axiomatic that a cognizable liberty or property interest must exist in the first instance for a procedural due process claim to lie.").[7]

The Fourteenth Amendment's "procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." Bd. of Regents v. Roth, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). For purposes of procedural due process, property interests are "... not created by the Constitution." Id. at 577, 92 S.Ct. 2701. Instead, these property interests "are created and their dimensions are defined by existing rules or

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understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [She] must have more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement to it." Id.

Seneca argues that it has a property interest in its Underground Injection Control ("UIC") permit issued by the EPA. As a property interest is an element of its procedural due process claim, it is Seneca's burden to produce evidence of that requisite property interest. EJS Properties, 698 F.3d at 855. Seneca has not produced the UIC permit in support of its complaint or its motion for judgment on the pleadings.[8]

***12** Accordingly, the motion for judgment on the pleadings will be denied as to this claim.

I. Severability of Other Provisions Related to Invalid Sections

Plaintiff argues that many other provisions of the Home Rule Charter are inextricably intertwined with §§ 401, 404, and 501 so that they should be severed from the Home Rule Charter. Defendants agree that these provisions should be severed.

Sections 103-106, 109 and 110 relate to the prevention of oil and gas activities and intend to create "rights" and "standing" in residents of the Township, ecosystems, and the Township. These sections are incapable of execution by themselves without §§ 401, 404, and 501.

Sections 405-408 provide for the enforcement the Home Rule Charter: § 405 makes it an offense to violate the Home Rule Charter, while §§ 406-408 create the mechanism by which the Home Rule Charter should be enforced. These sections are inextricably intertwined with § 401, 404, and 501.

Sections 409, 410, and 411 are also inextricably intertwined with the offending sections. These sections provide for: the enforcement and intervention to enforce or defend the Home Rule Charter (§ 409); the elevation of the Home Rule Charter over existing state and federal laws (§ 410); and instructions to courts to liberally interpret the provisions of Article One of the Home Rule Charter (§ 411).

Because all of these provisions cannot stand on their own, these will be invalidated. See1 Pa. C.S. § 1925; Robinson Township v. Commonwealth, 96 A.3d 1104, 1119-20 (Pa. Cmwlth. 2014)overruledonothergroundsbyRobinson IV, 147 A.3d 536.

An appropriate Order follows.

Attachment

PROPOSED

HOME RULE CHARTER OF THE TOWNSHIP OF HIGHLAND, ELK COUNTY, PENNSYLVANIA

WE THE PEOPLE OF HIGHLAND TOWNSHIP, IN ORDER TO SECURE AND PROTECT OUR CIVIL RIGHTS AND THE RIGHTS OF OUR COMMUNITIES, AND TO SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS HOME RULE CHARTER FOR THE TOWNSHIP OF HIGHLAND:

ARTICLE I – BILL OF RIGHTS

Section 101. ***Governmental Legitimacy.*** All legitimate governments in the United States owe their existence to the people of the community that those governments serve, and governments exist to secure and protect the rights of the people and those communities. Any system of government that becomes destructive of those ends is not legitimate, lawful, or constitutional, and the people have the right to change, alter, or abolish that system of government.

Section 102. ***Right of Local Community Self-Government.*** The people of Highland Township possess both a collective and individual right of self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, political, civil, and environmental rights.

Section 103. ***Right to Exercise the Right of Self-Government.*** The people of Highland Township possess the right to exercise their right of local community self-government in any manner as to them seems effective. This includes the right to use their municipal corporation, home rule charter, initiative lawmaking, and other institutions or mechanisms to make and enforce law. The making and enforcement of law by the people through such institutions and mechanisms shall not nullify, infringe, or otherwise affect the people's right of local community self-government. This right shall include the right of the people of Highland Township, their government, and their elected officials to be free from civil and criminal liability for making and enforcing laws pursuant to their right of local community self-government.

Section 104. ***Right to Clean Air, Water, and Soil.*** All residents of Highland Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil; and that right shall include the right to be free from activities that may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.

Section 105. ***Rights of Ecosystems and Natural Communities.*** Ecosystems and natural communities within Highland Township possess the right to exist, flourish, and naturally evolve; and that right shall include the right to be free from activities that may pose potential risks to that right, including the depositing of waste from oil and gas extraction.

Section 106. ***Right to a Sustainable Energy Future.*** All residents of Highland Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy

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from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure that right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human communities, natural communities, or ecosystems. The right to a sustainable energy future shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.

Section 107. *Right to Fair and Equal Taxation.* All residents of Highland Township possess the right to be fairly and equally taxed. That right shall include, but not be limited to, the right to be assessed taxes that do not exceed the rates previously established for the Township by the Local Tax Enabling Act and the Second Class Township Code; and Township Supervisors shall not possess any additional authority or power under this Charter to levy taxes at rates that exceed those limitations.

Section 108. *Right to Public Control of Municipal Water Supplies.* The residents of Highland Township possess the right to publicly control all municipal water supplies and the infrastructure for the delivery of those water supplies; and that right shall include the right not to have those supplies or infrastructure sold, leased, or otherwise transferred to any non-governmental entity.

Section 109. *Right to Enforce.* All residents of Highland Township possess the right to enforce the rights and prohibitions secured by this Charter; and that right shall include the right of natural persons domiciled in Highland Township to intervene on behalf of themselves and on behalf of ecosystems and natural communities to assert and defend the validity of this Charter in judicial or other governmental proceedings.

Section 110. *Rights as Self-Executing.* All rights secured by this Charter are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. Further implementing legislation shall not be required for Highland Township, natural persons domiciled in Highland Township acting either individually or collectively, or the ecosystems and natural communities protected by this Charter, to enforce all of the provisions of this Charter. The rights secured by Article One of this Charter shall only be enforceable against actions specifically prohibited by this Charter.

ARTICLE II – GENERAL POWERS OF THE MUNICIPALITY

Section 201. *Status and Title.* The name of the municipality created by this Home Rule Charter shall be "Highland Township" and it shall operate as a Home Rule municipality, and possess the powers and authority of a Home Rule municipality. The creation of the new municipality, through the popular adoption of this Charter, terminates the existence of the prior municipality and supersedes it in all respects.

Section 202. *Boundaries.* The boundaries of the Township shall be the actual boundaries of the Township at the time this Charter takes effect and as they may be lawfully changed thereafter.

Section 203. *Rules of Operation.* Unless expanded, altered, or otherwise changed by the provisions of this Charter, the rules of operation for the Highland Township Home Rule municipal corporation shall be the ones provided to second class Townships pursuant to the Second Class Township Code of the Commonwealth of Pennsylvania.

Section 204. *Legal Claims of the Township.* Upon enactment of this Charter, the Township shall continue to own, possess, and control all legal claims, power, and property of every kind and nature, owned, possessed, or controlled by it prior to when this Charter takes effect.

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Section 205. *Pending and Past Actions and Proceedings.* No enforcement action or proceeding, civil or criminal, which was brought by the Township or any office, department, agency, or officer thereof, pending at the time this Charter takes effect, shall be affected by the adoption of this Charter or by anything herein contained. No prior rulings or decisions by any court, or consent decrees or other settlement agreements entered into between any party and the prior municipality – or the elected or appointed officials of the prior municipality – shall bind the new government established by this Charter, nor shall those rulings, decisions, consent decrees, or other settlement agreements limit the ability, authority, or power of the residents of Highland Township to enforce the rights and prohibitions secured by their Charter.

Section 206. *Repeals and Continuation of Ordinances.* All Ordinances, resolutions, rules, and regulations, or portions thereof in force when this Charter takes effect, which have been directly incorporated into this Charter, shall be deemed to have been repealed or amended to the extent that they duplicate provisions of this Charter. Other Ordinances, resolutions, rules, and regulations, or portions thereof in force when this Charter takes effect, shall temporarily be continued in force and effect until the Board of Supervisors has reviewed them, and determined to re-adopt them as Ordinances of the Home Rule municipality, or determined that they should be repealed or amended.

Section 207. *Adoption of Budget.* The Board of Supervisors shall be required to adopt a budget in accordance with the provisions of Section 3202 of the Pennsylvania Second Class Township Code (or the relevant sections of any future code). In the event the Board of Supervisors are unable to adopt an annual budget, the annual budget from the previous fiscal year shall serve as the operating budget until the Board of Supervisors fulfills its duty to adopt a new annual budget.

ARTICLE III – GOVERNING BODY

Section 301. *Board of Supervisors.* The governing body of the Highland Township Home Rule municipality shall be a Board of Supervisors, acting under the authority of, and with the consent of, the people of Highland Township. The Board of Supervisors shall consist of three Supervisors, elected from the Township at-large.

Section 302. *Vacancies.* If a vacancy occurs on the Board of Supervisors, the remaining Supervisors shall appoint a successor who is an elector of Highland Township, who has resided within the Township continuously for at least one year prior to the appointment, and who appeared on the ballot for the position of Supervisor in Highland Township at the most recent election for Supervisor within the Township. The appointment of any Supervisor shall only be effective until the next available primary, municipal, or general election, at which point a new Supervisor shall be elected to fill the original vacancy for the remainder of the term. If the Board of Supervisors fails to make an appointment within thirty days after a vacancy occurs, the vacancy shall be filled at the next available primary, municipal, or general election, in accordance with regular election procedures, provided that there has been time for the completion of such election procedures.

Section 303. *Term of Office.* The term of office for newly-elected Supervisors shall be four years.

Section 304. *Authority of Existing Officers.* The Supervisors in office at the time this Charter takes effect shall remain in office for the full terms for which they were originally elected, and shall receive the same compensation until their terms expire. However, they shall have the responsibilities, duties, and authority only as set forth in, and pursuant to, this Charter. All other elected officials of the Township in office at the time this Charter takes effect shall remain in office for the full term for which they were elected, and shall receive the same compensation that they received prior to the adoption of this Charter.

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ARTICLE IV – PROHIBITIONS AND ENFORCEMENT

Section 401. *Depositing of Waste from Oil and Gas Extraction.* It shall be unlawful within Highland Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

Section 402. *Limitations on Taxation.* It shall be unlawful within Highland Township for taxes to be levied at rates that exceed the rates previously established for the Township by the Local Tax Enabling Act and the Second Class Township Code.

Section 403. *Public Control of Municipal Water Supplies.* It shall be unlawful within Highland Township for municipal water supplies, and the infrastructure for the delivery of those water supplies, to be sold, leased, or otherwise transferred to any non-governmental entity.

Section 404. *State and Federal Authority.* No permit, license, privilege, charter, or other authorization, issued by any state or federal governmental entity, that would enable any corporation or person to violate the rights or prohibitions of this Charter, shall be lawful within Highland Township.

Section 405. *Offenses.* Any corporation or government that violates any provision of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate offense.

Section 406. *Standing for Township Residents.* Highland Township, or any natural person domiciled in Highland Township, may enforce all the provisions of this Charter through an action brought in any court possessing jurisdiction over activities occurring within Highland Township. In such an action, Highland Township, or the natural person, shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

Section 407. *Enforcement of Natural Community and Ecosystem Rights.* Ecosystems and natural communities within Highland Township may enforce all the provisions of this Charter through an action brought by Highland Township, or any natural person domiciled in Highland Township, in the name of the ecosystem or natural community as the real party in interest. Actions may be brought in any court possessing jurisdiction over activities occurring within Highland Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to Highland Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Section 408. *Right to Direct Enforcement.* If a court fails to uphold this Charter's limitations on corporate power, or otherwise fails to uphold the rights secured by Article One of this Charter, the rights and prohibitions secured by this Charter shall not be affected by that judicial failure, and any natural person may then enforce the rights and prohibitions of this Charter through nonviolent direct action. If enforcement through nonviolent direct action is commenced, this Charter shall prohibit any private or public actor from bringing criminal charges or filing any civil or other criminal action against anyone participating in nonviolent direct action. If an action is filed in violation of this provision, the applicable court must dismiss the action promptly, without further filings being required of nonviolent direct action participants. "Nonviolent direct action" as used by this provision shall mean any nonviolent activities or actions carried out to directly enforce the rights and

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prohibitions contained within this Charter, provided that those nonviolent activities or actions do not impede or obstruct the movement of emergency vehicles, such as fire trucks or ambulances.

Section 409. *Intervention in Lawsuits.* As the Highland Township government might be subject to political forces beyond the control of natural persons domiciled in Highland Township or natural communities and ecosystems located within Highland Township, the Highland Township government's support for, or defense of, this Charter in any lawsuit shall not be deemed to render the Highland Township municipal corporation adequate to represent fully the interests of persons, natural communities, or ecosystems seeking intervention, and so shall not be a ground upon which to deny such intervention by such persons or by ecosystems or natural communities.

Section 410. *Enforcement of State Laws.* All laws adopted by the legislature of the State of Pennsylvania or by Congress, and rules adopted by any State or federal agency, shall be the law of Highland Township only to the extent that they do not violate the rights or prohibitions of this Charter, or limit the authority of Highland Township or the people of Highland Township to adopt and enforce greater protections for these rights than afforded by the Pennsylvania legislature or by Congress.

Section 411. *Interpretation.* Any reviewing court shall liberally interpret this Charter's provisions to protect the rights secured in Article One. Nothing in this Charter shall be interpreted to restrict fundamental rights of individuals, their communities, or nature already secured by the Pennsylvania constitution, the United States constitution, or international law; and nothing in this Charter shall be interpreted to weaken protections for individuals, their communities, or nature, as provided by state, federal, international, or constitutional law.

ARTICLE V – CORPORATE POWERS

Section 501. *Corporate Privileges.* Corporations that violate this Charter or the laws of the Township, or that seek to violate this Charter or those laws, shall not be deemed to be "persons" to the extent that such treatment would infringe the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would infringe the rights or prohibitions enumerated by this Charter or those laws, including the power to assert state or federal preemptive laws in an attempt to overturn this Charter or those laws, or the power to assert that Highland Township, or the people of Highland Township, lack the authority to adopt this Charter or those laws, or the power to assert that Highland Township, its officials, or any resident of Highland Township are liable for damages to the corporation as a result of provisions of this Charter or Township laws.

ARTICLE VI – EMERGENCY TOWN MEETING

Section 601. *Emergency Town Meeting.* In the event of a substantial public emergency affecting the health, safety, and welfare of the residents of Highland Township, or an event or activity that would infringe on the rights of the residents of Highland Township, the electors of the Township may call an Emergency Town Meeting whereby the electors of the Township may adopt a proposed Ordinance. If adopted, that Ordinance shall remain valid until the next available election at which the electors of the Township shall have the opportunity to make the Ordinance permanent by amending the Township's Home Rule Charter with the substance of the Ordinance.

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Section 602. *Initiation and Petition Form.* To call an Emergency Town Meeting, a petition must be created by the petition filer. Each petition shall bear the name of the petition filer. The petition filer shall deliver written notice, along with a copy of the proposed Ordinance, to the Township Secretary during the hours that the Township office is officially open, and the Township Secretary shall post a copy of that notice and the proposed Ordinance at the Township Building the same day upon receiving that notice. No signatures may be affixed to the petitions until notice of the petition is posted at the Township Building. Each signature shall be in ink and shall be accompanied by the signer's address, signer's printed name, and the date of signing. Only registered electors who are residents of the Township are eligible to sign the petition. The petition shall contain the full text of the proposed Ordinance if that text can fit on a single page. If the text cannot fit on a single page, then circulators shall have full copies of the proposed Ordinance in their possession for inspection by potential signers, and the petition shall identify the Ordinance by declaring that "The signers below call for an Emergency Town Meeting to be held to consider the adoption of the Ordinance filed with the Secretary of the Township on [date] by [petition filer]." On the back of each page of the petition there shall be an attached affidavit executed by the circulator verifying the authenticity of the signers, and affirming that the signers are registered electors who are residents of the Township to the best of the circulator's knowledge. Only registered electors who are residents within the Township may circulate petitions.

Section 603. *Timeline.* Petition circulators shall have fifteen calendar days to collect the required signatures, commencing on the date that the Township Secretary posts the petition. The date that the Township Secretary posts the petition shall be included as one of the fifteen days that circulators may collect signatures. Petition circulators must gather valid signatures equal to at least thirty percent of the number of registered electors within the Township. Petitions bearing the requisite number of signatures must then be filed with the Secretary of the Township during the hours that the Township office is officially open, and the Secretary shall issue a written notice of receipt, and then send the signatures to the Emergency Town Meeting Committee for verification. If the fifteen day window for signature gathering expires on a day that the Township office is not officially open, the signatures may be submitted to the Township Secretary on the next day that the Township office is officially open; no signatures shall be gathered on the day(s) that fall between the date that the signature gathering window expires and the next day that the Township office is officially open.

Section 604. *Verification and the Emergency Town Meeting Committee.* The Emergency Town Meeting Committee shall verify the accuracy and sufficiency of the petition signatures within ten days of the date upon which the petitions are submitted to the Township Secretary, and the Committee shall issue a final determination based on its review. Upon receipt of the petitions from the Secretary, the Chairman of the Board of Supervisors shall schedule and advertise, as a special meeting, a meeting of the Emergency Town Meeting Committee. The Emergency Town Meeting Committee shall consist of the Township Secretary, the Chairman of the Board of Supervisors, the Township Auditor who has served for the longest period of time in the capacity of Auditor within the Township, the petition filer, and the Township Tax Collector. A quorum of the Emergency Town Meeting Committee shall consist of three of those individuals. The number of required signatures shall be calculated using current records from the County Board of Elections; the validity of signatures shall be verified using current records from the County Board of Elections. Disputes over the validity of any individual signature shall be resolved by a majority vote of the Emergency Town Meeting Committee.

Section 605. *Judicial Review.* The petition filer shall be notified of the final determination of the Emergency Town Meeting Committee within one day of the final determination. The final determination of whether the petition satisfies the requirements for the calling of an Emergency Town Meeting shall be subject to judicial review. An appeal of the final determination of the Emergency Town Meeting Committee shall be filed to the

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Elk County Court of Common Pleas, and such appeal must be filed within ten days of the final determination of the Emergency Town Meeting Committee. Filing of the appeal shall not prejudice the ability of the original petition filer to create, circulate, and qualify a new petition, following the procedures contained within this Article.

Section 606. *Emergency Town Meeting Preparation.* If the Emergency Town Meeting Committee determines that the petitions meet the requirements imposed by this Article of the Charter, it shall issue a final determination to that effect, and the Committee shall set a date for the Emergency Town Meeting, which must occur no later than fifteen days after the Emergency Town Meeting Committee has made its final determination. Notices shall be sent via U.S. Mail to all registered electors who are residents of the Township, informing those electors of the date of the Emergency Town Meeting. The Notices shall also contain a brief summary of the proposed Ordinance, and also a brief overview of the nature of the Emergency Town Meeting, including informing electors that they will have the opportunity to cast a vote on the proposed Ordinance. The Notices shall be sent out no later than seven days before the date of the Emergency Town Meeting. Two advertisements, containing the summary of the proposed Ordinance and the date of the Emergency Town Meeting, shall also be published on two consecutive days in a newspaper of general circulation within the Township before the meeting is held.

Section 607. *Running of the Meeting.* The Chairman of the Board of Supervisors shall facilitate the Emergency Town Meeting. All Township electors shall be issued a ballot upon arrival at the Emergency Town Meeting. The ballots shall be created and printed by the Emergency Town Meeting Committee. The ballot shall contain the summary of the proposed Ordinance, the question "Shall this Ordinance become law within Highland Township?" and a space for the elector to vote "yes" or "no" on the question. Sufficient copies of the full text of the Ordinance shall be available for inspection at the Emergency Town Meeting. The Chairman of the Board of Supervisors shall call the meeting to order. The petition filer shall have ten minutes to present the proposed Ordinance. Public comment shall follow, with registered Township electors having three minutes each to speak. Following public comment, electors shall individually deliver their ballots to the Chairman of the Board of Supervisors; and the Chairman, upon receiving each ballot, shall direct the Township Secretary to verify the name of the elector on records obtained from the Elk County Board of Elections. Once verified, the Chairman shall place the ballot into a container overseen by the Emergency Town Meeting Committee.

Section 608. *Ballot Counting.* When all the votes have been cast, the Emergency Town Meeting Committee shall, in the open and during the Emergency Town Meeting, immediately sort and count the ballots. Only the Emergency Town Meeting Committee shall be involved in the sorting and counting of ballots; no other person shall in any manner interfere. After counting, the Emergency Town Meeting Committee shall make a public declaration of the outcome of the vote. No ballot shall be received and counted after the outcome of the vote has been declared. A tie vote shall be resolved by a majority vote of the Emergency Town Meeting Committee. In the event of a tie vote of the Emergency Town Meeting Committee, the Ordinance shall be deemed to have been defeated.

Section 609. *Effect of the Vote.* If a majority of registered electors casting votes at the Emergency Town Meeting vote "no," the proposed Ordinance shall not take effect in Highland Township. If a majority of registered electors casting votes at the Meeting vote "yes," the proposed Ordinance shall immediately take effect in Highland Township. If a majority of registered electors casting votes at the Meeting vote "yes," the Township Board of Supervisors shall then take the necessary steps for the Ordinance to appear as a proposed amendment to the existing Highland Township Home Rule Charter at the next available general, municipal, or

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primary election. If a majority of registered electors casting votes at the Meeting vote "yes," the Ordinance shall remain in effect only until the electors in Highland Township have the opportunity to vote on whether or not to amend the existing Charter with the Ordinance.

ARTICLE VII – CHARTER AMENDMENT

Section 701. *Amendment.* No proposed amendment to this Charter shall be withheld from the people's consideration on the basis that existing legal authority may consider the substance of the amendment to be "illegal" or "unconstitutional." Proposed amendments may only be withheld from the people's consideration if they have the effect of denying, abridging, or removing the rights of people, natural communities, or ecosystems, as recognized by this Charter. Amendments to this Charter shall be adopted pursuant to Pennsylvania law governing the amendment of Home Rule Charters.

Section 702. *Severability.* The provisions of this Charter are severable. If any court decides that any section, clause, sentence, part, or provision of this Charter is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the Charter. This Charter would have been enacted without the invalid sections.

ARTICLE VIII – CALL FOR CONSTITUTIONAL CHANGES

Section 801. *State and Federal Constitutional Changes.* Through the adoption of this Charter, the people of Highland Township call for amendment of the Pennsylvania Constitution and the federal Constitution to expressly recognize a right of local community self-government free from governmental restriction, certain types of governmental preemption, or nullification by corporate "rights" and powers.

ARTICLE IX – DEFINITIONS

The following terms shall have the meanings defined in this section wherever they are used in this Charter:

"Charter" means the Highland Township Home Rule Charter.

"Corporation" includes any corporation, or any other business entity, organized under the laws of any State or country.

"Depositing waste from oil and gas extraction" includes, but is not limited to, the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "frack water," tailings, flowback, or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities. This phrase shall not include temporary storage of oil and gas waste materials in the Township at existing well sites.

"Person" means a natural person, or an association of natural persons that is not a corporation.

"Township" means Highland Township in Elk County, Pennsylvania, its Township Board of Supervisors, or its representatives or agents.

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All Citations

Not Reported in Fed. Supp., 2017 WL 4354710, 85 ERC 1943

Footnotes

1 In accordance with the provisions of 28 U.S.C. § 636(c)(1), the parties have voluntarily consented to have a United States Magistrate Judge conduct proceedings in this case, including the entry of a final judgment.

2 By letter dated August 12, 2015, the Pennsylvania DEP informed Seneca:

> This letter is to inform you that the Department has suspended its review of your permit application ... [A] conflict between this project and an ordinance adopted by Highland Township entitled Community Bill of Rights Ordinance

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> (Highland Township Ordinance) has been brought to our attention.... The Department is aware that you are disputing the validity of this local ordinance in the United States District Court for the Western District of Pennsylvania (Dkt. No. 1:15-60). The Department also recognizes that there is a serious question regarding the constitutional validity of the Highland Township Ordinance, and that a similar local ordinance enacted by Blaine Township was determined to be invalid ... However, as part of its permit application review, the Department has an obligation to consider applicable local ordinances related to environmental protection and the Commonwealth's public natural resources. In the event of a conflict between a permit application and a local ordinance the department may suspend its review of the application until the conflict has been resolved. As a result of the conflict between your application and the Highland Township Ordinance, and the potential for legal action against Department employees being brought pursuant to this local ordinance, the Department has decided to suspend its review of your permit application pending a court decision concerning the validity of the Highland Township Ordinance. The Department will take a final action regarding issuance of the permit once a court ruling has been rendered determining the validity of the local ordinance.
>
> ECF No. 1-3, page 1.

3 A copy of the Township's Proposed Home Rule Charter, which was attached to the complaint, is attached to this Memorandum Opinion as Addendum 1.

4 Defendants concur: "WHEREFORE, the Defendants, Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania, are constrained to acknowledge that §§ 109-110, 401, and 404-411 of the HRC are invalid and unenforceable as an impermissible exercise of the Township's legislative authority and/or police powers; that § 501 of the HRC is unconstitutional; and that §§ 103-106 of the HRC are unconstitutional, invalid, and unenforceable because they are inextricably intertwined with §§ 109-110, 401, 404-411, and 501 of the HRC. The Defendants further agree that Seneca Resources Corporation is entitled to relief that is declaratory in nature and with specific regard to those portions of the Home Rule Charter (identified above) that are properly subject to invalidation on the basis of (where appropriate) preemption by state or federal law; an improper exercise of municipal police or legislative authority; or unconstitutionality." ECF No. 31.

5 The Township Defendants also argue that the Township Board of Supervisors is not a proper defendant to this action as the Board of Supervisors is not a legally recognized entity separate and apart from the Township itself and that any judgment against such an entity would be improper. ECF No. 32. Seneca Resources has not responded to this argument.

6 In its brief in support of its motion for judgment on the pleadings, Plaintiff expands its argument on preemption by Act 13 to include a challenge to § 404 of the Home Rule Charter. ECF No. 27, page 16. Because the present dispositive motion is a motion for judgment on the pleadings, and neither the text of § 404 nor any reference to § 404 appears in the Complaint, the Court will limit its review to the complaint and the answer only.

7 Once a protected interest has been identified, a court must examine the process that accompanies the deprivation of that protected interest and decide whether the procedural due process safeguards built into the process, if any, are constitutionally adequate. Zinermon v. Burch, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

8 In a similar case, this Court reviewed a UIC permit and concluded that permit, standing alone, did not demonstrate a property interest sufficient to trigger the protections of procedural due process. Pennsylvania Gen. Energy Co., LLC v. Grant Twp., 2017 WL 1215444, at *18 (W.D. Pa. Mar. 31, 2017) ("The UIC permit is issued by the U.S. Environmental Protection Agency and serves as an "Authorization to Operate Class II-D Injection Wells" in compliance with the provisions of the Safe Drinking Water Act and its corresponding regulations." ECF No. 170-2. The federal regulations indicate that neither the permit itself or the issuance of the permit "convey any property rights of any sort, or any exclusive privilege." 40 C.F.R. § 144.51(g); 40 C.F.R. § 144.35(b). PGE points to nothing in the permit itself or the law regulating such permits that automatically creates a legitimate claim of entitlement sufficient to demonstrate a property interest. The face of the permit itself spells out that it "does not convey property rights or mineral rights of any sort or any exclusive privilege." ECF No. 170-2. "Because PGE has not satisfied its burden to prove the required property interest, the motion for summary judgment will be denied.").

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EXHIBIT 15

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SENECA RESOURCES CORPORATION, Plaintiff/Counterclaim-Defendant v. HIGHLAND TOWNSHIP, ELK COUNTY PENNSYLVANIA and the HIGHLAND TOWNSHIP BOARD OF SUPERVISORS, ELK COUNTY, PENNSYLVANIA, Defendants/Counterclaim-Plaintiffs	C.A. No. 1:15-cv-60-SPB US Magistrate Judge, Susan Paradise Baxter

STIPULATION AND CONSENT DECREE

AND NOW, come the Plaintiff/Counterclaim-Defendant, Seneca Resources Corporation ("Seneca"), by and through its counsel, Buchanan Ingersoll & Rooney PC, and the Defendants/Counterclaim-Plaintiffs, Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania (collectively "Highland"), by and through their counsel, Quinn Buseck Leemhuis Toohey & Kroto, Inc.[1], and together submit the within Stipulation and Consent Decree:

1. This action was initiated by Seneca on February 18, 2015, alleging that the "Community Bill Of Rights" ordinance adopted by Highland on January 9, 2013, was preempted by federal law, or the laws of the Commonwealth of Pennsylvania; constituted an improper use of legislative powers; and was unconstitutional (under both

[1] With regard to the drafting and adoption of the Community Bill Of Rights ordinance, and during the initial phases of this litigation, Highland was represented by the Community Environmental Legal Defense Fund ("CELDF"). Current counsel appeared for Highland on June 6, 2016 [Doc. 69].

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the United States Constitution and the Constitution of the Commonwealth of Pennsylvania).

2. This Court has jurisdiction over the Amended Complaint pursuant 28 U.S.C. § 1331 and 42 U.S.C. § 1983 and this Court's supplemental jurisdiction under 28 U.S.C. § 1367.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the Township is located in this judicial district and the events and acts giving rise to Seneca's claims occurred in this judicial district.

4. The pleadings in the instant matter are closed and, pursuant to 28 U.S.C. §636(c)(1), the parties have voluntarily consented to have United States Magistrate Judge Susan Paradise Baxter conduct all proceedings in this case, including the entry of a final judgment.

5. On March 24, 2015, Highland amended the "Community Bill Of Rights" ordinance seeking to address several of the infirmities previously identified by Seneca.

6. Seneca amended its Complaint on April 6, 2015, and continues to contend that the "Community Bill Of Rights" ordinance, even as amended, is preempted by federal law, or the laws of the Commonwealth of Pennsylvania; constitutes an improper use of legislative powers; and is unconstitutional (under both the United States Constitution and the Constitution of the Commonwealth of Pennsylvania).

7. Shortly before the instant action was filed, a lawsuit was brought before this Honorable Court in the matter of Pennsylvania General Energy Company, LLC v. Grant Township at docket number 1:14-CV-00209 Erie ("Grant Township").

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8. The legal issues in Grant Township are substantially similar to those now before the Court in the instant action, in that the dispute in Grant Township revolves around a "Community Bill Of Rights" ordinance nearly identical to that adopted by Highland. The Grant Township ordinance was also drafted by CELDF, which represents the defendant in that matter.

9. The parties in the Grant Township matter voluntarily consented to have United States Magistrate Judge Susan Paradise Baxter conduct all proceedings in that case, including the entry of a final judgment.

10. On October 14, 2015, United States Magistrate Judge Susan Paradise Baxter issued rulings dismissing a Rule 12(b)(1) Motion to Dismiss filed on behalf of Grant Township [Doc. 111 in 1:14-CV-00209], and granting in part a Rule 12(c) Motion for Judgment on the Pleadings filed on behalf of Pennsylvania General Energy Company, LLC [Doc. 113 in 1:14-CV-00209].

11. On March 29, 2016, United States Magistrate Judge Susan Paradise Baxter denied Highland's Rule 12(b)(1) Motion to Dismiss in the instant action [Doc. 43].

12. Presently pending before this Honorable Court are competing Motions for Judgment on the Pleadings.

13. In light of the procedural posture of this matter, and the current state of the law concerning the questions now before this Honorable Court, and in order to resolve all outstanding issues between the parties, Seneca and Highland hereby stipulate and agree as follows:

a. Section 3 of the Highland Community Bill Of Rights Ordinance, as amended (Amendment and Revision of Ordinance No. 1-9 of 2013) constitutes an impermissible exercise of Highland's legislative authority and is therefore invalid and unenforceable;

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b. Section 3 of the Highland Community Bill Of Rights Ordinance, as amended (Amendment and Revision of Ordinance No. 1-9 of 2013) is also invalid and unenforceable in that it is *de jure* exclusionary in seeking to prohibit entirely the exercise of a legitimate and lawful business activity (to-wit, the development of oil and gas resources and the management of related waste materials);

c. Section 4(b) and (c) of the Highland Community Bill Of Rights Ordinance, as amended (Amendment and Revision of Ordinance No. 1-9 of 2013) constitute an impermissible exercise of Highland's legislative authority and are therefore invalid and unenforceable;

d. Sections 5(a) and (b) of the Highland Community Bill Of Rights Ordinance, as amended (Amendment and Revision of Ordinance No. 1-9 of 2013), are unenforceable as preempted by state law;

e. Section 5(a) of the Highland Community Bill Of Rights Ordinance is, on its face, unconstitutional (under both the United States Constitution and the Constitution of the Commonwealth of Pennsylvania);

f. Section 6 of the Highland Community Bill Of Rights Ordinance is, on its face, unconstitutional (under both the United States Constitution and the Constitution of the Commonwealth of Pennsylvania);

g. Section 7 of the Highland Community Bill Of Rights Ordinance is, on its face, unconstitutional (under both the United States Constitution and the Constitution of the Commonwealth of Pennsylvania);

h. Inasmuch as Sections 3, 4(b) and (c), 5, 6, and 7 of the Highland Community Bill Of Rights Ordinance, as amended (Amendment and Revision of Ordinance No. 1-9 of 2013) are the operative provisions of the ordinance, and inasmuch as Highland hereby stipulates that these provisions are invalid and unenforceable for the reasons set in 11(a)-(g), above, Highland rescinded the Highland Community Bill Of Rights Ordinance, in all forms and in its entirety, as of August 10, 2016;

i. Highland hereby withdraws any pending challenges to Seneca's pending DEP permit applications for activity in the Township, and Highland will not raise any further legal challenges, comments, or permit appeals to oppose those permit applications;

j. Highland agrees that there are no other local permit requirements necessary for Seneca to complete prior to commencing operations within the Township;

k. Highland hereby withdraws its counterclaims against Seneca (including but not limited to any claims for injunctive relief, monetary damages, costs,

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and counsel fees related to the instant matter), in their entirety, and with prejudice;

l. In light of Highland's rescission of the Highland Community Bill Of Rights Ordinance (Amendment and Revision of Ordinance No. 1-9 of 2013), and the withdrawal of its counterclaims against Seneca, Seneca hereby withdraws its claims against Highland (including but not limited to any claims for injunctive relief, monetary damages, costs, and counsel fees related to the instant matter), in their entirety, and with prejudice; and

m. The parties stipulate and agree that each shall bear its own costs and counsel fees relative to the above-caption matter.

14. Nothing in this Consent Decree, however, shall preclude Seneca from challenging any future ordinance or charter by Highland, whether adopted by a new Board of Supervisors again seeking to assert those powers claimed in the Highland Community Bill Of Rights Ordinance (Amendment and Revision of Ordinance No. 1-9 of 2013) or otherwise.

15. Seneca may enforce the terms of this Stipulation and Consent Decree by seeking an Order of Contempt from this Honorable Court. In the event Highland breaches the Stipulation and Consent Decree, Seneca may also seek all those damages that it claimed in its Amended Complaint in this matter, notwithstanding the dismissal with prejudice.

16. The parties request that this Honorable Court adopt ¶¶13(a)-(g) as its findings and opinion regarding the merits of Seneca's claims relative to the Highland Community Bill Of Rights Ordinance (Amendment and Revision of Ordinance No. 1-9 of 2013).

WHEREBY the parties, Seneca Resources Corporation and Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania, by and through their undersigned counsel, respectfully request

that this Honorable Court approve the foregoing Consent Decree and specifically adopt as its opinion and findings those matters stipulated to by the parties at ¶11(a)-(f), above.

Respectfully submitted,

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EXHIBIT 16

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SENECA RESOURCES CORPORATION, Plaintiff v. HIGHLAND TOWNSHIP, ELK COUNTY PENNSYLVANIA and the HIGHLAND TOWNSHIP BOARD OF SUPERVISORS, ELK COUNTY, PENNSYLVANIA, Defendants	C.A. No. 1:16-cv-289-SPB US Magistrate Judge, Susan Paradise Baxter

BRIEF IN RESPONSE TO
MOTION FOR JUDGMENT ON THE PLEADINGS

AND NOW, come the Defendants, Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania (collectively, "Highland"), by and through their attorneys, the Quinn Law Firm, and file the within Brief in Response to the Motion for Judgment on the Pleadings of Seneca Resources Coropration ("Seneca"), of which the following is a statement:

I. Background:

The Court, of course, is familiar with the historical backdrop against which this litigation is being played out. As Seneca notes, this is the second lawsuit filed by it against Highland Township and the Highland Township Board of Supervisors with regard to a piece of municipal legislation that purports to ban certain otherwise lawful activities; deprive corporations and other businesses of the constitutional rights and protections long afforded them by federal jurisprudence and the Constitution of the United States, as amended.

The first lawsuit (Seneca Resources Corporation v. Highland Township, et al., 1:15-cv-00060) arose as a result of actions actually undertaken by the then-empaneled Board of Supervisors of Highland Township. That Board of Supervisors had allowed itself to be guided by an organization known as the Community Environmental Legal Defense Fund ("CELDF"), which styles itself as a "public service law firm." Specifically, Highland Township, following CELDF's advice, adopted an ordinance in essence drafted by CELDF, and called the Highland Township Community Bill of Rights (the "CBR"), a copy of which is attached to Seneca's Complaint as Exhibit B. When Seneca filed its first lawsuit in 2015, Highland Township was represented by CELDF attorneys, as were the parties who sought to intervene in that action.

One of the members of the previous Board of Supervisors was voted out of office in November 2015. Another member of the previous Board of Supervisors passed away at the end of December 2015; subsequently, his replacement was appointed by the Elk County Court Of Common Pleas. This changed the composition of the Highland Township Board of Supervisors sufficiently that there was no longer support for the CBR. After being advised by their new solicitor that the CBR was untenable, and after hearing from their CELDF attorney that there was little chance of success in the ongoing litigation, Highland Township retained new counsel (the undersigned) and undertook a course of action intended to minimize the Township's exposure in that action.

Part of that involved repealing the CBR, which was a practical impediment to any meaningful resolution of the case. Once that process was underway, Seneca and Highland Township negotiated a proposed Consent Decree that protected Highland Township from any claims for damages, costs, or counsel fees, and which was intended

to provide Seneca with a modicum of protection against future efforts by CELDF and others to reintroduce those portions of the CBR that were plainly unconstitutional, preempted by state or federal law, or otherwise invalid. That proposed Consent Decree was subsequently filed with, and approved by, this Court, resolving the 2015 lawsuit in its entirety.

The respite enjoyed by the parties, however, was painfully brief. In the May 2016 primary election cycle, certain individuals petitioned to place on the ballot in Highland Township a question proposing the creation of a "government study commission" to consider converting Highland Township from a Second-Class Township to a Home Rule community, pursuant to 53 Pa.C.S.A. §2901, et seq. The ballot question passed, a government study commission comprised of CELDF supporters was empaneled and recommended the adoption of a Home Rule Charter. CELDF provided advice, legal and otherwise, to the government study commission. Likewise, it continued to represent parties (including the Proposed Intervenors in this matter) seeking to intervene in Seneca v. Highland Township, et al., then pending before this Court, to defend the CBR after it was specifically aware of the fact that Highland Township no longer supported the CBR and was moving to repeal it.

On November 8, 2016, the Home Rule Charter ("HRC") was adopted by the voters of Highland Township. The HRC, as proposed by the CELDF-advised government study commission, incorporates much of the CBR, including those portions of the CBR that Highland Township, through its Board of Supervisors, previously acknowledged to be unconstitutional or otherwise unenforceable.

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As a result of this referendum, Highland Township find itself in the difficult in unenviable position of responding to a lawsuit concerning a piece of municipal legislation containing provisions that Highland Township has already acknowledged to be unconstitutional, preempted by state or federal law, and otherwise invalid, despite the fact that Highland Township, itself, took no part in the creation or passage of the HRC.

II. ISSUES:

A. Is the Highland Township Board Of Supervisors a Proper Party Defendant in This Action?

Suggested answer in the negative.

B. Is Seneca Entitled to Declaratory Relief with Regard to Those Portions of the HRC That Are Unconstitutional, Preempted by State or Federal Law, or Otherwise Unenforceable?

Suggested answer in the affirmative.

III. DISCUSSION:

A. The Highland Township Board Of Supervisors Is Not a Proper Party Defendant.

It is, perhaps, a small point, but it is an important one in this and other cases. The Highland Township Board of Supervisors is not a legal, or legally recognized, entity. It has no formal existence or identity outside of the larger context of Highland Township, itself. Like a "department"of a municipal entity, the Board of Supervisors does not constitute a "person" for purposes of claims pursuant to 42 U.S.C. §1983. Monell v. DSS of the City of New York, 436 U.S. 658, (1978). Accordingly, the Board of Supervisors is not a proper Defendant in this action. Martin v. Red Lion Police Dep't., 146 Fed.Appx. 558, 562 (3rd Cir. 2005); Johnson v. City of Erie, 834 F.Supp. 873, 878-879 (W.D.Pa. 1993).

Although it is certainly possible for municipal officers to be named and sued in their individual capacity, Seneca has not undertaken the steps necessary to do so here. They have not alleged any act or omission by one or more specific supervisors as having led to the harm of which they complain in the instant matter, nor could they properly do so inasmuch as the current members of the Highland Township Board of Supervisors have undertaken no action in furtherance of the HRC, nor have they sought to enforce any aspect of the HRC. Certainly, there is no basis upon which the court might properly grant Judgment on the Pleadings as against the Highland Township Board of Supervisors in the instant matter.

B. Nevertheless, Seneca is entitled to declaratory relief with regard to those portions of the HRC that are unconstitutional, preempted by state or federal law, or otherwise unenforceable.

Highland Township does not – cannot – take ownership of the HRC. The HRC was drafted by the government study commission and CELDF, which provided the government study commission with legal advice during the drafting and approval process. The HRC, as the product of these drafting efforts, suffers from all of the same legal infirmities as plagued the CBR and is, quite frankly, indefensible.

The HRC clearly exceeds the scope of authority statutorily granted to those who would seek to implement an alternative (in this case, “home rule”) form of government. Specifically, Pennsylvania’s Home Rule Charter and Optional Plans Law prohibits home rule charter municipalities from exercising powers contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable in every other part of the Commonwealth. 53 Pa.C.S.A. §2962. Any effort to do so would be invalid and/or subject to arguments of preemption, on any number of grounds.

Additionally, just like any act of the General Assembly, home rule charters must conform to constitutional standards, and is subject to legal challenge if it does not. In the instant matter, it is clear that several provisions of the HRC are facially unconstitutional and cannot be defended in good faith and within the framework of the Federal Rules of Civil Procedure and the Pennsylvania Rules of Professional Conduct.

Whether it is the effort to strip away long-recognize constitutional and due process protections for corporations and other forms of business; the effort to supersede applicable state and federal law with regard to the production of oil and natural gas, the management of clean water, and land use; or the effort to circumvent the state and Federal Rules of Civil Procedure, the HRC fails to comport with applicable law. Unfortunately, Highland Township is precluded by statute from taking action to repeal or amend the HRC at this time. 53 Pa. C.S.A. §§2929, 2941-2943. Accordingly, both it and Seneca must rely on this Court to adjudicate the matter.

Highland Township is constrained by the Consent Decree approved and adopted by this Court in Seneca Resources Corporation v. Highland Township, et al., 1:15-cv-00060, as well as the December 13, 2016 letter of the Township Solicitor, Timothy R. Bevevino [Doc. 12-2], and its Answer and New Matter in the instant matter to acknowledge the unconstitutionality, invalidity, unenforceability, and possible preemption of §§106-106, 109-110, 401, 404-411, and 501 of the HRC.

IV. CONCLUSION:

WHEREFORE, the Defendants, Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania, for the reasons set forth above, are constrained to acknowledge that §§109-110, 401, and 404-

411 of the HRC are invalid and unenforceable as an impermissible exercise of the Township's legislative authority and/or police powers; that §501 of the HRC is unconstitutional; and that §§103-106 of the HRC are unconstitutional, invalid, and unenforceable because they are inextricably intertwined with §§109-110, 401, 404-411, and 501 of the HRC. The Defendants further agree that Seneca Resources Corporation is entitled to relief that is declaratory in nature and with specific regard to those portions of the Home Rule Charter (identified above) that are properly subject to invalidation on the basis of (where appropriate) preemption by state or federal law; an improper exercise of municipal police or legislative authority; or unconstitutionality. Highland Township does not concede that Seneca is entitled to damages, costs, or counsel fees as against Highland Township, Elk County, Pennsylvania and the Highland Township Board of Supervisors, Elk County, Pennsylvania, however, inasmuch as Highland Township has undertaken no action to draft, propose, adopt, enforce, or defend the HRC.

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS,
TOOHEY & KROTO, INC.

By /s/Arthur D. Martinucci

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Counsel for Defendants,
Highland Township, Elk County,
Pennsylvania and the Highland
Township Board of Supervisors, Elk
County, Pennsylvania

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EXHIBIT 17

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EXHIBIT A to Notice of Appeal

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

March 19, 2018

Pennsylvania General Energy Co., LLC
Attn: Douglas Kuntz, President
120 Market Street
Warren, PA 16365-2510

Dear Mr. Kuntz:

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.

This rescission is not prejudicial to permittee, Pennsylvania General Energy, L.L.C., or another party, re-applying for an injection well permit designation for the Yanity well should the conflicting provisions of Grant Township's Home Rule Charter be changed to allow injection wells or adjudicated as no longer lawfully prohibiting that injection use.

Any person aggrieved by this action may appeal the action to the Environmental Hearing Board (Board) pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A. The Board's address is:

Environmental Hearing Board
Rachel Carson State Office Building, Second Floor
400 Market Street
P.O. Box 8457
Harrisburg, PA 17105-8457

TDD users may contact the Board through the Pennsylvania Relay Service, 800-654-5984.

Appeals must be filed with the Board within 30 days of receipt of notice of this action unless the appropriate statute provides a different time. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

A Notice of Appeal form and the Board's rules of practice and procedure may be obtained online at http://ehb.courtapps.com or by contacting the Secretary to the Board at 717-787-3483. The Notice of Appeal form and the Board's rules are also available in braille and on audiotape from the Secretary to the Board.

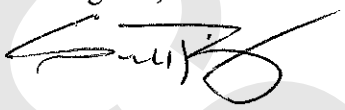
IMPORTANT LEGAL RIGHTS ARE AT STAKE. YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. IF YOU CANNOT AFFORD A LAWYER,

Certified Copy

YOU MAY QUALIFY FOR FREE PRO BONO REPRESENTATION. CALL THE SECRETARY TO THE BOARD AT 717-787-3483 FOR MORE INFORMATION. YOU DO NOT NEED A LAWYER TO FILE A NOTICE OF APPEAL WITH THE BOARD.

IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST BE FILED WITH AND RECEIVED BY THE BOARD WITHIN 30 DAYS OF RECEIPT OF NOTICE OF THIS ACTION.

Regards,



Scott Perry
Deputy Secretary
Office of Oil and Gas Management

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COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC,	
Appellant,	**EHB Docket No. 2020-046-R**
v.	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	
Appellee.	

PETITION TO INTERVENE

AND NOW Petitioner Grant Township, by and through its undersigned counsel, files this Petition to Intervene pursuant to 25 Pa. Code § 1021.81 and respectfully requests that the Board issue an Order granting Grant Township permission to intervene in the above-captioned appeal and in support thereof, states as follows:

1. Grant Township is a small rural township of approximately 700 people, located in Indiana County, Pennsylvania. In June 2014, Grant Township passed an ordinance to protect public health and the environment from the threat of fracking waste disposal in close proximity to residents' homes and to the Little Mahoning watershed, Township residents' sole source of drinking water.

District Court Proceedings

2. In August 2014, Appellant Pennsylvania General Energy Company, LLC ("PGE") sued Grant in the U.S. District Court for the Western District of Pennsylvania primarily to invalidate the ordinance under state law, and also seeking compensatory damages for the alleged violation of its constitutional rights pursuant to 42 U.S.C. 1983. Grant brought an affirmative counterclaim

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and raised the Article I, Section 27 of the Pennsylvania Constitution (the "Environmental Rights Amendment," or "ERA") as a defense to PGE's challenge to the ordinance.

3. In March 2015, PGE applied to Appellee, the Pennsylvania Department of Environmental Protection ("DEP" or "Department"), for a permit to convert an existing natural gas well located in Grant Township (the "Yanity well") into an underground injection well for the disposal of fracking waste.

4. In August 2015, the Department suspended its review of PGE's permit application pending the outcome of the federal litigation.

5. In October 2015, the district court ruled, in relevant part, that several of the ordinance provisions violated the Second Class Township Code and were unlawfully exclusionary.

6. On November 3, 2015, the residents of Grant Township voted to adopt a Home Rule Charter that changed the form of government in the Township from a Second Class Township to a Home Rule Municipality. The Charter prohibits any corporation or government from depositing waste from oil and gas extraction.

7. On March 27, 2017, the Department issued a permit to PGE authorizing the change-in-use of the Yanity well for frack waste disposal.

8. The district court subsequently granted partial summary judgment to PGE on half of its constitutional claims, granted judgment to PGE on the Township's counterclaim, and ordered sanctions of $52,000 against two attorneys for the Township. The court scheduled trial for May 2018.

9. Prior to trial, the parties resolved the matter by entering into a Joint Stipulation in which PGE agreed to dismiss its remaining claims, withdraw its demand for compensatory damages, and accepted nominal damages of $1 to fully resolve the outstanding claims.

Celebration

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10. PGE thereafter moved for attorney's fees pursuant to 42 U.S.C. 1988. In its motion, PGE stated that it sought approximately $103,000 in attorney's fees and costs. Grant noted in its opposition that, given its extremely limited resources, this amount would bankrupt the Township.

11. On March 31, 2019, the district court awarded $100,000 in attorneys' fees and $2,979.18 in costs to PGE.

12. Grant Township appealed the attorneys' fees order to the U.S. Court of Appeals for the Third Circuit, and its attorneys appealed the sanctions order. PGE filed a cross-appeal seeking more than $600,000 in additional sanctions against the Community Environmental Legal Defense Fund ("CELDF") and its attorneys.

13. On November 5, 2019, the parties settled for $75,000 paid by CELDF to PGE, with no admission of liability by either party.

14. On December 9, 2020, PGE again sued Grant Township in the Western District, seeking to invalidate the Charter. The suit seeks injunctive and declaratory relief.[1]

Commonwealth Court and Environmental Hearing Board Proceedings

15. On March 27, 2017, the same day that the Department issued a permit to PGE for the Yanity well, the Department sued Grant in Commonwealth Court seeking declaratory relief that the Charter is preempted by the Oil and Gas Act and the Solid Waste Management Act.

16. Grant Township filed an Answer on May 8, 2017, which included counterclaims as to how DEP's position violates fundamental, unalienable, indefeasible and constitutionally secured rights, including those laid out in the ERA.

17. Counterclaims 3 (Declaratory Judgment—The Charter is a Valid Law Pursuant to the Environmental Rights Amendment) and 4 (Violation of the ERA) allege that the Charter

[1] *Pennsylvania General Energy Company, LLC v. Grant Township of Indiana County and The Grant Township Board of Supervisors,* No. 1:20-cv-00351-SPB (W.D.Pa. 2020).

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provisions challenged by the Department were enacted pursuant to the ERA and thus are valid enforcements of constitutional rights that cannot be preempted by state statute. The Township also alleges that the Department has violated its public trustee duties to Pennsylvanians under the ERA and violated the ERA by attempting to prevent the people of Grant Township from protecting their rights thereunder.

18. DEP objected to all of Grant's counterclaims in its June 19, 2017 Preliminary Objections.

19. In *Department of Environmental Protection v. Grant Township of Indiana County and The Grant Township Board of Supervisors* (Pa. Cmwlth., No. 126 M.D. 2017, filed May 2, 2018) ("*Grant Township I*"), the Commonwealth Court sustained in part and overruled in part the Department's Preliminary Objections. The court struck specific paragraphs of the New Matter and directed the Department to file and serve its answer to Counterclaims 3 and 4. *Grant Twp. I*, slip op. at 12-13, 16.

20. The court reasoned as follows:

> If the Township at trial is able to prevail on its claim in Count 3 that the provisions of the Oil and Gas Act and SWMA are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them. Similarly, if it can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP, an injunction could issue. We cannot say at this time that the Counterclaims asserted in Counts 3 and 4 are so clearly without merit that they must be preliminarily dismissed. Scientific and historical evidence concerning environmental issues, and evidence of DEP's actions may be necessary to fully adjudicate these Counterclaims as well as DEP's [Petition for Review]. Accordingly, this demurrer must be overruled and the issue must await further proceedings.

Grant Twp. I, slip op. at 15-16.

21. In December 2018, the Department filed an Application for Summary Relief to Dismiss Grant Township's Constitutional Claims Because Statutory Relief is Available. A second oral argument took place in that case on October 2, 2019. The Commonwealth Court considered,

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among other issues, whether the Charter's provisions prohibiting the disposal of fracking waste are in accordance with the ERA and Grant's public trustee duties.

22. On March 2, 2020, the Commonwealth Court denied the Department's Application, holding:

> DEP's position is without merit. ... [T]he Township seeks to prove that hydrofracking and disposal of its waste is so dangerous to the environment as to be in violation of the ERA, and thus that the statutes upon which DEP bases its preemption claims are constitutionally invalid. While the Township may or may not be able to prevail on its constitutional claims, this Court has already ruled that it may attempt to do so in defense of DEP's lawsuit, and this application for summary relief is nothing more than a collateral attack on that decision.

Department of Environmental Protection v. Grant Township of Indiana County and The Grant Township Board of Supervisors (Pa. Cmwlth., No. 126 M.D. 2017, filed March 2, 2020) ("*Grant Township II*") at 7, 9.

23. Less than three weeks later, on March 19, 2020, the Department rescinded PGE's permit for the Yanity well, citing the Charter as applicable law. The Department stated in its letter to PGE:

> 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. 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.

See Exhibit A to Appellant's Notice of Appeal (Rescission Letter).[2]

24. On April 16, 2020, PGE appealed the rescission to this Board in the instant proceeding.

[2] The letter is mis-dated March 19, 2018.

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ARGUMENT

25. Section 7514(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(e) provides: "[a]ny interested party may intervene in any matter pending before the board [EHB]." *Tri-County Landfill, Inc. v. DEP,* 2014 EHB 128; *Borough of Glendon v. Dep't of Envtl. Res.,* 603 A.2d 226 (Pa. Cmwlth.1992), *petition for allowance of appeal denied,* 608 A.2d 32 (Pa. 1992); *Conners v. DEP*, 1999 EHB 669; *Tortorice v. DEP*, 1998 EHB 1169; *Wurth v. DEP*, 1998 EHB 1319. An entity has standing to intervene if the entity will be adversely affected in a substantial, direct, and immediate way such that it will "either gain or lose by direct operation of the Board's ultimate determination." *PA Waste, LLC v. DEP*, 2015 Pa.Envirn. LEXIS 28, at *2 (granting petition to intervene on behalf of county where permitted landfill was to be located); *P.H. Glatfelter Co. v. DEP*, 2000 Pa. Envirn. LEXIS 94, at *4 14.

26. Grant Township has such an interest in the instant appeal before the Board. An "immediate" interest may be shown "'where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.'" *Longenecker v. DEP*, 2016 EHB 552, 536 (quoting *Funk v. Wolf*, 144 A.3d 228, *aff'd,* 158 A.3d 642 (Pa. 2017) (quoting *Unified Sportsmen of Pa. v. Pa Game Comm'n*, 903 A.2d 117, 123 (Pa. Cmwlth. 2006)). In *Franklin Township v. Department of Environmental Resources*, 452 A.2d 718 (Pa. 1982), the Pennsylvania Supreme Court applied the substantial, direct, and immediate interest test set forth in *William Penn* as well as the "zone of interests to be protected" standard enunciated by the United States Supreme Court for standing in environmental cases in analyzing whether a municipality has standing to challenge the DER's issuance of a permit pursuant to the SWMA. The Court stated:

> [A] township and a county are more than abstract entities; each is also a place populated by people. They can be identified by fixed and definable political and

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> geographic boundaries. These boundaries encompass a certain natural existence--land, water, air, etc. collectively referred to as environment. *Whatever affects the natural environment within the borders of a township or county affects the very township or county itself. Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land which in turn irrevocably alter the physical nature of the municipality and county of which the land is a part. It is clear that when land is changed, a serious risk of change to all other components of the environment arises. Such changes and threat of changes ostensibly conflict with the obligations townships and counties have to nature and the quality of life. We believe that the interest of local government in protecting the environment, which is part of its physical existence is 'substantial' within the meaning of 'substantial interest' as set forth in* Wm. Penn Parking Garage, supra*. Aesthetic and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life's quality for all of its inhabitants. Recent events are replete with ecological horrors that have damaged the environment and threatened plant, animal and human life. We need only be reminded of the 'Love Canal' tragedy and many like situations faced by communities and local governments across the county to recognize the substantial local concerns. …*
>
> The direct and substantial interest of local government in the environment, and in the quality of life of its citizenry cannot be characterized as remote. We need not wait until an ecological emergency arises in order to find that the interest of the municipality and county faced with such a disaster is immediate.
>
> When a toxic waste disposal site is established, undoubtedly there is an instantaneous change in the land on which it is located, and an immediate risk to the surrounding environment and quality of life. These critical matters must be addressed by local government without delay. The environment which forms a part of the physical existence of the municipality or county has been altered and immediate attention must be given to the changed character if the local government is to properly discharge its duties and responsibilities. Furthermore, in the event of an environmental emergency, the local municipality and county would be the first line of containment and defense.

Franklin Township, 452 A.2d at 720-722 (emphasis added).

27. In *Glendon*, the Court applied *Franklin Township* and concluded that Glendon Borough had such substantial, direct, and immediate interests to warrant standing before the EHB even though it was not the owner of the property in question: "Although the Borough is not the owner of Glendon Woods, it has jurisdiction over that property. The park, because of its proximity to the proposed incinerator, is at a heightened risk of contamination both to Borough residents who

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use the park, especially children and to the grounds of the park itself. The Borough is also responsible for providing protection as well as emergency services to those people who use the park." *Borough of Glendon,* 603 A.2d at 251.

28. Here, Grant Township and its citizens have sufficient interests affected by the location of PGE's proposed fracking waste disposal within its borders so as to confer standing. Codified in the Home Rule Charter enacted by the people of Grant Township is a prohibition on the depositing of waste from oil and gas activities, an activity which the people of Grant determined violates the people's inherent, indefeasible, and constitutionally secured environmental rights. Hence, the Grant Township Supervisors have a duty to uphold the Charter and protect the community.

29. The Township's drinking water is at high risk of contamination from frack waste injected into the Yanity well. As the Court held in *Franklin Township*:

> Changing the inherent character and quality of the environment by the introduction of toxic wastes into the land, amply provides local government units with an interest which is direct in every meaningful sense. The same considerations which led us to the conclusion that the interest of local government in its physical attributes is substantial, apply in the determination that the interest is also direct. As we have noted, among the responsibilities of local government is the protection and enhancement of the quality of life of its citizens.

Franklin Township, 452 A.2d at 721-22.

30. Grant Township does not have a public water system. Every Township resident maintains their own well or spring as a source for their drinking water.

31. In this case, if the Board were to find in favor of the Appellant and reinstate the permit allowing injection of fracking waste into the Yanity well, this would violate the Charter as well as Article I, Section 27, by putting the drinking water of the residents of Grant Township at risk.

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Grant Township has a responsibility to protect its residents' right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

32. Finally, trucking fracking waste around Grant Township and then injecting it into a well located in very close proximity to residents, near the Township's watershed and sole source of drinking water, will not only have negative consequences for residents' quality of life and property values – it is a serious threat.

33. Once the environmental degradation has occurred, once the waste has been injected, there is no going back. It takes years for the environment to heal and it may never heal. As a benchmark, drinking water standards for Radium-226 are less than 5 pCi/L. A 2016 study published by DEP itself found fracking wastewater to contain up to 26,600 pCi/L of Radium-226, which has a half-life of *1,600 years*.[3] These are unacceptable impacts and risks to Grant Township residents.

34. Intervention at this stage of the proceedings will not create any delay or prejudice because, pursuant to the Board's September 16, 2020 Order, discovery is ongoing and is not set to end until January 14, 2021, and dispositive motions, if any, shall be filed on or before February 12, 2021. *See* 25 Pa. Code § 1021.81(a) ("A person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence.").

35. The Department does not oppose intervention by Grant Township.

36. PGE opposes intervention by Grant Township.

[3] *See* DEP, "Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) Study Report" (May 2016) at 3-8, 3-27, 9-3, https://assets.documentcloud.org/documents/5783199/PENNSYLVANIA-DEPARTMENT-of-ENVIRONMENTAL.pdf; Kristen Locy and Justin Nobel, "'If Only I Would've Known': Oil & Gas Whistleblowers Speak Out About Exposure to Radioactivity on Fracking Jobs" (Public Herald, Dec. 14, 2020), https://publicherald.org/if-only-i-wouldve-known-oil-gas-whistleblowers-speak-out-about-exposure-to-radioactivity-on-fracking-jobs/.

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WHEREFORE, Grant Township respectfully requests that the Board grants the foregoing Petition to Intervene and enters an Order allowing it to intervene in the above-captioned matter pursuant to 25 Pa. Code §1021.81. A proposed Order granting the requested relief is attached.

Dated: December 17, 2020

Respectfully submitted,

/s/ Karen Hoffmann
Karen Hoffmann, Esq.
PA Bar No. 323622
SYRENA LAW
128 Chestnut Street
Suite 301A
Philadelphia, PA 19106
(412) 916-4509
karen@syrenalaw.com

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VERIFICATION

I, Stacy Long, hereby state that I am the Vice-Chair of the Grant Township Board of Supervisors, and that the facts set forth in the foregoing Petition to Intervene are true and correct to the best of my knowledge, information, and belief. I understand that any false statements made herein are subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

Dated: December 17, 2020 Stacy Long

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COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC,	
Appellant,	**EHB Docket No. 2020-046-R**
v.	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	
Appellee.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition to Intervene upon all parties of record in this proceeding a true and correct copy of the documents to be served upon the following via the Board's electronic filing system:

Michael J. Heilman, Esq.
Forrest M. Smith, Esq.
Richard T. Watling, Esq.
Commonwealth of Pennsylvania
Department of Environmental Protection
Office of Chief Counsel
400 Waterfront Drive
Pittsburgh, PA 15222-4745

Kevin J. Garber, Esq.
Jean M. Mosites, Esq.
Babst Calland Clements & Zomnir
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222

Date: December 17, 2020

/s/Karen Hoffmann
Karen Hoffmann, Esq.

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EXHIBIT 19

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UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C. Plaintiff, vs. GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP BOARD OF SUPERVISORS, Defendant.	Case No. 1:20-cv-351 ***ELECTRONICALLY FILED***

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COMPLAINT

Plaintiff Pennsylvania General Energy Company, L.L.C. ("PGE"), by and through its undersigned counsel, files the following Complaint against Defendant Grant Township, Indiana County, Pennsylvania ("Grant Township"), and the Grant Township Supervisors to invalidate and enjoin enforcement of the Grant Township Home Rule Charter regarding the depositing of waste from oil and gas extraction, and in support thereof states as follows:

INTRODUCTION

1. Grant Township is a home rule municipality organized under the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2901 *et seq.* The residents of the municipality elected on November 3, 2015, to jettison its status as a Second Class Township under the Pennsylvania Second Class Township Code, 53 P.S. § 65101 *et seq.*, to pursue an agenda of entitlement to a

claimed sovereign right of local community self-government.[1] What is believed to be a true and correct copy of the Home Rule Charter ("HRC") is attached as Exhibit A and is incorporated herein.

2. In June 2014, the Second Class Township adopted a Community Bill of Rights Ordinance ("CBORO") that, among other things, prohibited corporations from depositing waste from oil and gas extraction in the township to prevent PGE from operating an injection well there. What is believed to be a true and correct copy of the CBORO is attached as Exhibit B and is incorporated herein.

3. After PGE challenged the CBORO in this Court, U.S. District Judge Susan Paradise Baxter[2] ruled on October 14, 2015, that numerous provisions of the CBORO were invalid, pre-empted, and unlawfully exclusionary under state law.

4. The month after Judge Baxter's decision was entered, the residents of the township elected to become a Home Rule municipality with a governing HRC that contained the same provisions that were invalidated by Judge Baxter.

5. On March 31, 2017, Judge Baxter ruled that multiple provisions of the CBORO violated the United States Constitution.

6. Despite the rulings of Judge Baxter, Grant Township has continued to claim that its HRC is valid and enforceable.

7. The HRC is unconstitutional and unlawful. Courts have routinely invalidated similar governmental overreaches across the country.

[1] The prior municipality is hereinafter referred to as the "Second Class Township" to distinguish the legal status of the municipality before the adoption of its Home Rule Charter.
[2] At the time of the ruling, Judge Baxter was a United States Magistrate Judge conducting the proceedings pursuant to the provisions of 28 U.S.C. Section 636(c)(1) with the consent of the parties.

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8. The HRC prevents PGE from operating or selling its injection well and exposes PGE to criminal penalties, civil actions, loss of property rights, and liability.

9. The HRC causes real and concrete harm to PGE by depriving PGE of its rights as guaranteed by the United States Constitution.

10. PGE is entitled to declaratory relief that the HRC is void and unenforceable, a preliminary and permanent injunction prohibiting enforcement of the HRC, and costs and expenses, including attorneys' fees.

PARTIES

10. PGE is a limited liability company organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at 120 Market Street, Warren, Pennsylvania 16365. PGE is, and at all times relevant herein was, authorized to do business in the Commonwealth of Pennsylvania. At all relevant times herein, PGE was in the business of exploration and development of natural gas.

11. Grant Township is a home rule municipality located in Indiana County, Pennsylvania, with a business address of 100 East Run Road, Marion Center, Pennsylvania 15759.

12. The Grant Township Board of Supervisors ("Supervisors," collectively with the Township, "Defendants") is the governing body of the Township. This action does not name any Grant Township supervisors in their individual capacity.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

14. PGE also seeks equitable relief and a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

15. Venue is proper in this Court because the events and omissions giving rise to PGE's claims occurred and are occurring in the Western District of Pennsylvania.

16. Venue is also proper in this Court because Grant Township is located within the Western District of Pennsylvania.

BACKGROUND

17. PGE's exploration and development activities include drilling and operating natural gas wells and managing, *inter alia,* brine and produced fluids generated from operating wells.

18. In 1997, Pennsylvania General Energy Corp., PGE's predecessor in interest, put into production a deep gas well in Grant Township on property known as the Yanity Farm pursuant to Well Permit No. 37-063-31807-00-00 issued by the Pennsylvania Department of Environmental Protection (the "Yanity Well").

19. On September 21, 2012, PGE entered into an injection lease with Michael H. Yanity, Marian E. Yanity, John G. Yanity, and Karen D. Yanity ("Lessors"), covering 150 acres of land, more or less, and being known as Tax Map Nos. 19-11-102, 19-11-102.2, and 19-11-102.3 for the purpose of, *inter alia,* injecting and disposing of tophole water, production brine, and stimulation flowback fluids associated with oil and natural gas exploration and production into the Huntersville and Oriskany formations ("Injection Lease").

20. The Injection Lease requires PGE to pay the Lessors $5,000 initial consideration, $10,000 additional first-year consideration, annual rental of $10,000, annual surface use rental of $4,000, and royalty of $.10 per barrel (42 US gallons) on injection fluids injected into the premises. The Injection Lease requires the payments to be adjusted annually based on the U.S. Bureau of Labor and Statistics unadjusted percent changes in the Consumer Price Index.

21. From September 2012 until October 2020, PGE paid $145,869.20 to the Lessors for the items set forth in Paragraph 20 hereinabove.

22. The Injection Lease is in force for so long as PGE makes the payments prescribed therein.

23. The United States Environmental Protection Agency ("EPA") issues Underground Injection Control ("UIC") program Class II-D permits under the federal Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.,* to authorize the injection of brine and produced fluids for disposal. Pennsylvania currently does not have primacy to administer the UIC program and issue UIC permits.

24. On May 2, 2013, PGE submitted an application to EPA for a UIC permit to convert the Yanity Well into a Class II-D brine injection well and to inject produced fluids generated at other PGE oil and gas wells into the Yanity Well.

25. EPA issued the UIC permit to PGE on March 19, 2014. On August 21, 2014, the United States Environmental Appeals Board issued an order denying review of petitions for appeal of the permit, and on September 11, 2014, EPA issued a final UIC permit to PGE.

26. Pennsylvania also regulates injection wells and ancillary facilities under the authority of the Pennsylvania Oil and Gas Act, 58 Pa.C.S. § 2301 *et seq*., and other Pennsylvania environmental statutes.

27. On April 16, 2014, PGE applied to the Pennsylvania Department of Environmental Protection ("DEP") to reclassify the Yanity Well from a production well to an injection well.

28. On June 3, 2014, the Second Class Township adopted the CBORO, a local law entitled as an ordinance "[e]stablishing a Community Bill of Rights for the people of Grant Township, Indiana County, Pennsylvania, which prohibits activities and projects that would violate the Bill of Rights, and which provides for enforcement of the Bill of Rights."

29. In Section 2, which was entitled "Statements of Law – A Community Bill of Rights," the CBORO outlined a manifesto declaring the Second Class Township's sovereign right to self-government, right to prohibit activities relating to fossil fuel extraction and production, and the existence of ecosystem rights. *See* Exhibit B at § 2.

30. The CBORO expressly prohibited within the Township any corporation or government from "engag[ing] in the depositing of waste from oil and gas extraction" and invalidated any "permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate [this prohibition] or any rights secured by [the CBORO], the Pennsylvania Constitution, the United States Constitution, or other laws". *See* Exhibit B at § 3(a), (b).

31. The CBORO defined "[c]orporations" as "any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, business entity, or limited liability company organized under the laws of any state of the United States or under the laws of any country." *See* Exhibit B at § 1(a).

32. PGE is a "corporation" as the term was defined in the CBORO. *See* Exhibit B at § 1(a)

33. "Depositing of waste from oil and gas extraction", as defined by the CBORO, included, without limitation, the following:

> [T]he depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "fract [sic] water," tailings, flowback or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

See Exhibit B at § 1(b).

34. The CBORO provided that corporations that violated or sought to violate the CBORO "shall not be deemed to be 'persons,' nor possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Ordinance. 'Rights, privileges, powers, or protections' shall include the power to assert state or federal

preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the municipality lack the authority to adopt this Ordinance." *See* Exhibit B at § 5(a).

35. The CBORO granted all residents of the Township the right to "enforce the rights and prohibitions secured by [the CBORO]" and the right "to intervene in any legal action involving rights and prohibitions of [the CBORO]." *See* Exhibit B at § 2(f).

36. The CBORO stated that "[a]ny corporation or government that violates any provision of [the CBORO] shall be guilty of an offense and, upon conviction thereof, *shall* be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of [the CBORO], shall count as a separate violation." *See* Exhibit B at § 4(a). (Emphasis added).

37. The CBORO provided that "Grant Township, or any resident of the Township, may enforce the rights and prohibitions of [the CBORO] through an action brought in any court possessing jurisdiction over activities occurring within the Township, in such an action, the Township or the resident shall be entitled to recover all costs of litigation, expert and attorney's fees." *See* Exhibit B at § 4(b).

38. The CBORO further provided that "[a]ny action brought by either a resident of Grant Township or by the Township to enforce or defend the natural rights of ecosystems or natural communities secured by [the CBORO] shall bring that action in the name of the ecosystem or natural communities secured by [the CBORO] in a court possessing jurisdiction over activities occurring within the Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Township to be used exclusively for the full and complete restoration of the ecosystem or natural community." *See* Exhibit B at § 4(c).

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39. On August 8, 2014, PGE filed a complaint in the U.S. District Court for the Western District of Pennsylvania challenging the constitutionality, validity, and enforceability of the CBORO and seeking injunctive relief, declaratory judgment, and compensatory damages.

40. On October 22, 2014, DEP issued a permit that authorized a change in the status of the Yanity Well that allowed PGE to use the Yanity Well as an injection well ("DEP Permit").

41. Starting on October 22, 2014, PGE had all permits required to begin using the Yanity Well to inject produced fluids from PGE's other oil and gas development operations.

42. On March 12, 2015, the DEP revoked the modification permit so that the DEP could perform what it called "additional required review of the application under applicable law."

43. On March 30, 2015, PGE filed a second application with the DEP to reclassify the Yanity Well from a production well to an injection well.

44. In August 2015, aware of the federal court action, the DEP suspended review of PGE's permit application pending the outcome of the challenge to the CBORO.

45. On October 14, 2015, U.S. District Judge Susan Paradise Baxter granted PGE's motion for judgment on the pleadings, declaring that the Pennsylvania Limited Liability Companies Act and the Second Class Township Code preempted the provisions of the CBORO identified in ¶¶ 30, 34, 37, and 38 above and declaring that the CBORO was unlawfully exclusionary under state law. The Court enjoined the Township from enforcing those sections. See *Pennsylvania General Energy v. Grant Township*, 139 F. Supp. 3d 706 (W.D. Pa. 2015).

46. Eighteen days after Judge Baxter issued her original opinion and order on October 14, 2015, invalidating critical provisions of the CBORO, the Supervisors repealed the CBORO and moved those unlawful and enjoined provisions to the HRC in an obvious, and admitted, attempt to evade that order and get the matter on the ballot before the upcoming November election day.

47. Grant Township adopted the HRC on November 3, 2015, as certified by the Indiana County Commissioners on November 16, 2015. See Exhibit B.

48. The HRC incorporated substantially the same Bill of Rights contained in Section 2 of the CBORO, including the following provisions:

a. **Section 103**. The people of Grant Township possess the right to use their local government to make law, and the making and enforcement of law by the people through a municipal corporation, or any other institution, shall not eliminate, limit, or reduce their sovereign right of local community self-government.

b. **Section 104**. All residents of Grant Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.

c. **Section 105.** All residents of Grant Township possess the right to the scenic, historic, and aesthetic values of the Township, including unspoiled vistas and a rural quality of life. That right shall include the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values, including from the depositing of waste from oil and gas extraction.

d. **Section 106**. Natural communities and ecosystems within Grant Township, including, but not limited to, rivers, streams, and aquifers, possess the right to exist, flourish, and naturally evolve.

e. **Section 107**. All residents of Grant Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of

energy from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure this right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human communities, natural communities, or ecosystems. The right to a sustainable energy future shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.

49. Sections 301 and 302 of the HRC are virtually identical to the invalidated CBORO §§ 3(a) and (b), expressly prohibiting within Grant Township any corporation or government from "engag[ing] in the depositing of waste from oil and gas extraction" and invalidating any "permit, license, privilege, charter, or other authorization issued to a corporation, by any State or federal entity, that would violate the prohibitions of this Charter or any rights secured by this Charter…" *See* Exhibit A at §§ 301, 302.

50. The HRC defines "[c]orporations" as "any corporation, or business entity, organized under the laws of any State or country." *See* Exhibit A at Art. VIII.

51. PGE is a "corporation" as the term is defined in the HRC.

52. The HRC definition of "Depositing of waste from oil and gas extraction" is identical to the CBORO definition in Section 1(b), with the exception of a correction in spelling. *See* Exhibit A at Article VIII.

53. Section 401 of the HRC is substantively identical to the invalidated CBORO § 5(a), providing that corporations that violate or seek to violate the HRC "shall not be deemed to be 'persons' to the extent that such treatment would interfere with the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by

this Charter or those laws, including standing to challenge the Charter or laws, the power to assert State or federal preemptive laws in an attempt to overturn the Charter or laws, or the power to assert that the people of Grant Township lack the authority to adopt this Charter or other Township laws." *See* Exhibit A at § 401.

54. Section 109 of the HRC, providing residents of Grant Township with the right to enforce the HRC, is substantially identical to CBORO § 2(f). *See* Exhibit A at § 109.

55. Section 303 of the HRC, establishing a criminal offense and penalties, is identical to CBORO § 4(a), with the exception of the substitution of the word "Charter" for "Ordinance." *See* Exhibit A at § 303.

56. Section 304 of the HRC, establishing a right of action in Grant Township and its residents and for recovery of attorneys' fees, is identical to the invalidated CBORO § 4(b), with the exception of the substitution of the word "Charter" for "Ordinance." *See* Exhibit A at § 304.

57. Section 305 of the HRC, providing for standing for ecosystems and "natural communities" and for damages, is substantially identical to the invalidated CBORO § 4(c). *See* Exhibit A at § 305.

58. On March 17, 2017, the DEP issued a second permit that authorized a change in the status of the Yanity Well that allowed PGE to use the Yanity Well as an injection well.

59. After PGE appealed certain conditions in the permit, the DEP issued an amended permit on April 3, 2018. ("DEP Permit II")

60. On March 31, 2017, Judge Baxter entered summary judgment in favor of PGE on its challenges to the CBORO based on the Equal Protection Clause, the First Amendment Petition Clause, and the Substantive Due Process Clause of the Fourteenth Amendment. Accordingly,

Judge Baxter invalidated the provisions identified in ¶¶ 30, 34, and 37 above as well as others and enjoined the Township from enforcing those provisions

61. On March 19, 2020, the Department, citing to the HRC, rescinded DEP Permit II.

62. PGE has attempted to sell the Yanity Well for disposal of produced fluids from gas development operations but has been unable to do so based on the existence of the HRC.

63. As a direct and proximate cause of Grant Township's adoption of the HRC, PGE has been precluded from operating the Yanity Well for legally permissible injection purposes. Most recently, in November 2020, Grant Township relied on the HRC in part to order PGE to stop hauling oil and gas well drilling equipment on Township roadways despite the existence of a valid highway permit to do so.

64. As a direct and proximate cause of Grant Township's adoption of the HRC, PGE has been and will continue to be precluded from selling the Yanity Well for legally permissible injection purposes.

65. PGE has suffered and will continue to suffer injury and damages if the HRC is deemed valid and enforceable.

COUNT I

42 U.S.C. § 1983 - Equal Protection Clause Violation

66. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

67. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. PGE is a "person" within the meaning of the Fourteenth Amendment and is entitled to the protections afforded thereunder, including that of equal protection of the laws.

68. The purpose of the Equal Protection Clause is to protect every person within a state's jurisdiction against arbitrary discrimination occasioned by the express terms of a statute or by its improper execution through duly constituted agents.

69. The Equal Protection Clause requires that the laws of the state treat persons in the same manner as others similarly situated.

70. Grant Township is required to act in conformance with the Fourteenth Amendment to the United States Constitution.

71. The HRC, without rational relationship to any legitimate governmental interest, treats corporations and governments seeking to dispose of waste from oil and gas extractions in Grant Township differently than similarly situated natural persons, in that the HRC only applies to corporations, such as PGE, and governments, and not natural persons. *See, e.g.*, Exhibit A at § 301.

72. Consequently, the HRC violates the Equal Protection Clause of the United States Constitution by treating corporations and governments differently than similarly situated natural persons.

73. The United States Supreme Court has found that an equal protection claim can be successfully brought by a "class of one" where the claimant asserts being singled out for disparate treatment by a municipality.

74. The HRC was initiated and enacted by Grant Township in direct response to the EPA's issuance of a UIC permit and the DEP's issuance of a change in use permit to PGE for the operation of a UIC well in Grant Township and in direct response to and in defiance of Judge Baxter's invalidation of multiple provisions of the CBORO.

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75. Accordingly, the HRC violates the Equal Protection Clause of the United States Constitution and must be enjoined from application and enforcement.

COUNT II

42 U.S.C. § 1983 – First and Fourteenth Amendments Violation

76. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

77. The First Amendment of the United States Constitution provides that no law shall abridge "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

78. The Fourteenth Amendment of the United States Constitution provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

79. The HRC purports to divest corporations, such as PGE, of their constitutional right to petition the Government for a redress of grievances in that it strips corporations of: (1) their status as "persons" under the law; (2) their right to assert state or federal preemptive laws in an attempt to overturn the HRC; (3) and their power to assert that Grant Township lacks the authority to adopt the HRC. Exhibit A at § 401.

80. The HRC provides no process or procedure through which PGE and similarly situated persons could challenge the provision that purports to render invalid applicable local, state, and federal permits or the deprivation of its liberty interests.

81. Thus, the HRC is aimed at suppressing PGE's right to make a complaint to, or seek the assistance of, the government for the redress of grievances related to the HRC.

82. Accordingly, the HRC violates the First and Fourteenth Amendments of the United States Constitution and must be enjoined from application and enforcement.

COUNT III

42 U.S.C. § 1983 - Substantive Due Process Violation

83. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

84. The doctrine of Substantive Due Process under the Fifth and Fourteenth Amendments of the United States Constitution prohibits, among other things, the government from abrogating a person's constitutional rights. U.S. Const. amend. V and amend. XIV, § 1.

85. In enacting the HRC, Grant Township intended by virtue of all of its provisions to deny corporations, such as PGE, their legal and long-standing Constitutional rights, including, but not limited to, their rights under the Equal Protection Clause, the Contract Clause, the First Amendment, the Fifth Amendment, and the Fourteenth Amendment of the United States Constitution.

86. Grant Township's conduct in abrogating PGE's interest in environmental and UIC permits at the Yanity Well is deliberate, arbitrary, and irrational, exceeds the limits of governmental authority, amounts to an abuse of official power, and shocks the conscience.

87. Accordingly, in enacting the HRC, Grant Township has denied PGE substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution and must be enjoined from application and enforcement.

COUNT IV

42 U.S.C. § 1983 - Procedural Due Process Violation

88. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

89. The Due Process Clause of the United States Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, amend. XIV, § 1.

90. The prohibition of underground injection of produced fluid within Grant Township as a direct result of the enactment of the HRC significantly and materially devalues PGE's legal rights and interests related to and/or held within Grant Township, including PGE's Injection Lease and UIC permit.

91. The prohibition of underground injection of produced fluid within Grant Township as a direct result of the enactment of the HRC significantly and materially devalues PGE's legal rights and interests in that it caused the loss of DEP Permit II allowing PGE to operate the Yanity Well.

92. The HRC provides for no process or procedure that could be utilized by PGE to challenge the provision of the HRC that purports to render invalid any permit that allows underground injection of produced fluid to be conducted within Grant Township and devalues any legal interests related thereto.

93. The fact that the HRC purports to prohibit corporations, such as PGE, from petitioning the government for the redress of grievances makes clear that the HRC provides for no process or procedure which PGE could avail itself to address the deprivation of its legal rights and interests caused by the HRC.

94. Therefore, the HRC deprives PGE of legal rights and interests protected by the Fifth and Fourteenth Amendments of the United States Constitution without providing due process of law and must be enjoined from application and enforcement.

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COUNT V

42 U.S.C. § 1983 - Procedural Due Process Violation

95. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

96. The Fifth Amendment prohibits the enforcement of criminal laws so vague that they fail to give ordinary people fair notice of the conduct they seek to punish, or so lacking in standards that they invite arbitrary enforcement.

97. Section 303 of the HRC creates a strict liability criminal offense: "[a]ny corporation or government that violates any provision of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate violation."

98. Section 110 of the HRC provides that, "All rights secured by this Charter are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors." This section further creates a right in Grant Township, the residents of Grant Township, and ecosystems and natural communities to enforce the HRC's provisions.

99. Section 102 of the HRC is unconstitutionally vague in that it does not specify what conduct would interfere with the purported right of the residents of Grant Township to "possess both the collective and individual right of self-government in their local community, the right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights."

100. Section 104 of the HRC is unconstitutionally vague in that it does not specify what conduct would violate the right of Grant Township residents and "natural communities and

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ecosystems within the Township" "to be free from activities which may pose potential risks to clean air, water, and soil within the Township…"

101. Section 105 of the HRC is unconstitutionally vague in that it does not specify what conduct would violate the right of Grant Township residents to "the scenic, historic, and aesthetic values of the Township, including unspoiled vistas and a rural quality of life...[including] the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values."

102. Section 106 of the HRC is unconstitutionally vague in that it does not specify what conduct would interfere with the purported right of natural communities and ecosystems within Grant Township to "exist, flourish, and naturally evolve."

103. The HRC is unconstitutionally vague in that it directs criminal sanctions not only at corporations that violate the law, but also to those that "seek to violate" the HRC, and does not specify what conduct would constitute such an offense. *See* Exhibit A at § 401.

104. The HRC is unconstitutionally vague in that it does not provide ordinary people fair notice of the quantum of criminal sanction they may face for violating the law.

105. Because there are no standards differentiating between criminal and non-criminal behavior, the HRC invites unconstitutional arbitrary enforcement.

106. Accordingly, the HRC is an unconstitutionally vague criminal law that must be enjoined from application and enforcement.

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COUNT VI

42 U.S.C. § 1983 - Contract Clause Violation

107. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

108. The Contract Clause of the United States Constitution provides that no state shall "pass any . . . Law impairing the Obligation of Contract . . ." U.S. Const. Art. I, § 10, Cl. 1.

109. The HRC bans PGE and any other corporation from engaging in the injection of waste from oil and gas extractions within Grant Township. *See* Exhibit A at § 301.

110. As set forth hereinabove, the Department rescinded DEP Permit II because of the existence of the HRC, which prevents the use of the Yanity Well under the Yanity Lease.

111. PGE has paid $145,869.20 to the Lessors for payments required by the Injection Lease and continues to incur costs as set forth hereinabove but has been unable to reap the benefits of its contract because of the existence of the HRC.

112. As set forth hereinabove, PGE has been unable to use or to sell the Yanity Well for disposal of produced fluids from gas development operations because of the existence of the HRC.

113. The continued existence of the HRC prevents PGE from realizing the benefits of the Injection Lease at great cost to PGE.

114. Accordingly, the HRC violates the Contracts Clause of the United States Constitution and must be enjoined from application and enforcement.

COUNT VII

Impermissible Exercise of Power under Home Rule Charter and Optional Plans Law

115. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

116. A home rule municipality's powers and limitations are derived from the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2901 *et seq.* and Article IX of the Pennsylvania Constitution.

117. Section 2961 of the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2961, provides that "[a] municipality which has adopted a home rule charter may exercise any powers and perform any function *not denied by the Constitution of Pennsylvania, by statute or by its home rule charter*." 53 Pa. C.S. § 2961 (emphasis added).

118. Moreover, Section 2962, which addresses the limitation on municipal powers, provides that [a] municipality *shall not* . . . [e]xercise powers *contrary to* or in limitation or enlargement of powers granted by statutes which are applicable in every part of this Commonwealth. 53 Pa. C.S. § 2962 (emphasis added).

119. Section 306 of the HRC provides that all laws adopted by the State legislature shall be the law of Grant Township *only to the extent that they do not violate the rights or prohibitions of the Charter*. *See* Exhibit A at § 306 (emphasis added).

120. Section 306 of the HRC violates the Pennsylvania Constitution. Article IX, Section 2 of the Pennsylvania Constitution grants municipalities the right to adopt a home rule charter and limits the powers that can be exercised by a home rule charter. In this regard, "[a] municipality which has a home rule charter may exercise any power or perform any function *not denied by this Constitution*, by its home rule charter *or by the General Assembly at any time*." Pa. Const. art. IX, § 2 (emphasis added). Therefore, a home rule municipality must exercise its powers in a manner that is consistent with the Pennsylvania Constitution and state law, not in a manner that directly contravenes that law. Section 306 of the HRC purports to make the HRC itself and local law superior to the Pennsylvania Constitution and state law.

121. Article I, Section 11 of the Pennsylvania Constitution provides that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law. . . ." Pa. Const. art. I, § 11.

122. Article I, Section 26 of the Pennsylvania Constitution provides that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, § 26.

123. In direct contravention of the constitutional guarantees set forth in Sections 11 and 26, the HRC strips corporations of their status as "persons" under the law and prohibits corporations from challenging the HRC or Grant Township's laws in a court of law. *See* Exhibit A at § 401.

124. Further, as set forth below, the HRC also contravenes Pennsylvania statutes regulating how oil and natural gas is developed and the status of corporations as "natural persons" in the eyes of the law.

125. The Home Rule Charter and Optional Plans Law expressly limits home rule municipalities from exercising powers contrary to or in limitation of constitutional and statutory rights and powers.

126. Accordingly, the HRC is an impermissible exercise of Grant Township's powers as a home rule municipality under the Home Rule Charter and Optional Plans Law and under Article IX of the Pennsylvania Constitution and is, therefore, invalid and unenforceable and must be enjoined from application and enforcement.

COUNT VIII

Preemption by the Pennsylvania Oil and Gas Act

127. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

128. By prohibiting within Grant Township the injection and storage of Oil and Gas Materials, Grant Township is impermissibly regulating the development of oil and natural gas, which is exclusively and comprehensively regulated within the Commonwealth by DEP pursuant to the Pennsylvania Oil and Gas Act, 58 Pa.C.S. § 2301 *et seq*. (the "Oil and Gas Act").

129. Section 3302 of the Oil and Gas Act, 58 Pa.C.S. § 3302, provides, in pertinent part, as follows:

> Except with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32.

130. By its terms, Section 3302 preempts local ordinances that attempt to regulate oil and gas development except for ordinances adopted pursuant to the Pennsylvania Municipalities Planning Code (the "MPC") or the Flood Plain Management Act (the "FPMA").

131. Even ordinances adopted pursuant to the MPC or the FPMA have significant limitations. An ordinance adopted pursuant to the MPC or the FPMA is preempted if: (1) the ordinance "contain[s] provisions . . . that accomplish the same purposes as set forth in" the Oil and Gas Act; or (2) the ordinance "contain[s] provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by the [Oil and Gas Act]." 58 Pa.C.S. § 3302.

132. By its terms, the HRC was not adopted pursuant to the MPC or the FPMA.

133. Moreover, one purpose of the HRC is virtually the same as the purpose set forth in the Oil and Gas Act and the HRC imposes conditions, requirements, and limitations on the same features of oil and gas operations regulated by the Oil and Gas Act.

134. One purpose of the HRC is to regulate underground injection and storage of Oil and Gas Materials to address the health, safety, and welfare of Grant Township residents. The Oil and Gas Act's purpose is to permit the optimal development of oil and natural gas while protecting the health, safety, and welfare of Pennsylvanians and the environment. *See* 58 Pa.C.S. § 3202(1).

135. The HRC imposes conditions, requirements, and limitations on the injection and storage of Oil and Gas Materials within Grant Township. The Oil and Gas Act directly regulates wells drilled or altered to provide for such injection.

136. Consequently, the HRC is preempted by the Oil and Gas Act and, therefore, is invalid and unenforceable and must be enjoined from application and enforcement.

COUNT IX

The HRC is Exclusionary

137. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

138. Section 2962 of the Home Rule Charter and Optional Plans Law provides: "With respect to the following subjects, the home rule charter shall not give any power or authority to the municipality contrary to or in limitation or enlargement of powers granted by statutes which are applicable to a class or classes of municipalities: . . . Municipal planning under the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code." 53 Pa. C.S. § 2962

139. It is a well settled principle of Pennsylvania land use law that a municipality must authorize all legitimate uses somewhere within its boundaries.

140. Section 603(i) of the MPC, 53 P.S. § 10603(i), provides that "zoning ordinances shall provide for the reasonable development of minerals in each municipality."

141. The HRC's outright ban on the injection and storage of Oil and Gas Materials within Grant Township excludes legally permitted uses within Grant Township.

142. Therefore, the HRC is invalid and unenforceable as exclusionary and must be enjoined from application and enforcement.

COUNT X

Preemption by the Pennsylvania Limited Liability Company Law

143. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

144. The Pennsylvania Limited Liability Company Law, 15 Pa.C.S. § 8901 *et seq*., (the "LLCL") provides that limited liability companies "have the legal capacity of natural persons to act." 15 Pa.C.S. § 8921.

145. In enacting the LLCL, the Commonwealth of Pennsylvania intended to, and in fact did, preempt municipal regulation of a limited liability company's status as a natural person.

146. The HRC purports to strip corporations including limited liability companies, such as PGE, of their status as natural persons and declares that corporations do not possess any other legal rights, privileges, power, or protections. *See* Exhibit A at § 401.

147. The HRC has been preempted by the LLCL, and is therefore invalid and unenforceable and must be enjoined from application and enforcement.

COUNT XI

28 U.S.C. §§ 2201 and 2202 - Declaratory Judgment

Unconstitutional and Unenforceable Ordinance

148. PGE hereby incorporates the factual allegations in Paragraphs 1 through 65, 67 through 75 (Count I), 77 through 82 (Count II), 84 through 87 (Count III), 89-94 (Count IV), 96 through 106 (Count V) and 108 through 114 (Count VI) of this Complaint as if fully set forth herein.

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149. As set forth above, the HRC: (1) violates PGE's constitutional rights under the Equal Protection Clause, the First, Fifth, and Fourteenth Amendments, and the Contract Clause of the United States Constitution; (2) deprives PGE of substantive and procedural due process as preserved by the United States Constitution; (3) is an impermissible exercise of power under the Pennsylvania Home Rule Charter and Optional Plans Law; (4) is preempted by the Pennsylvania Oil and Gas Act and the Pennsylvania Limited Liability Company Law; and (5) is impermissibly exclusionary.

150. An actual controversy exists between PGE and Grant Township and the Grant Township Supervisors with respect to whether the HRC is constitutional and enforceable.

151. Grant Township and the Grant Township Supervisors assert that the HRC is constitutional, while PGE maintains that the HRC infringes on its constitutional rights as set forth above.

152. The HRC has created uncertainty regarding PGE's rights with respect to underground injection in Grant Township in which it has a legal interest.

153. As set forth above, Grant Township is causing PGE irreparable harm by violating PGE's constitutional rights.

154. Declaratory relief from this Court will terminate the dispute and controversy between PGE and Grant Township and the Grant Township Supervisors with respect to the constitutionality and validity of the HRC.

155. Declaratory judgment is necessary here because PGE has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to its rights.

156. A judicial declaration is necessary as to whether the HRC: (1) violates the Equal Protection Clause, the First, Fifth, and Fourteenth Amendments, and the Contracts Clause of the

United States Constitution; and (2) deprives PGE of substantive and procedural due process as preserved by the United States Constitution.

157. PGE is entitled to a declaratory judgment stating that the HRC is void an unenforceable in its entirety and to specific declarations that:

a. The HRC is void and unenforceable because it violates the Equal Protection Clause, the First Amendment, the Fifth Amendment, the Fourteenth Amendment, and the Contracts Clause of the United States Constitution;

b. The HRC is void and unenforceable because it violates procedural and substantive due process rights afforded under the Fifth and Fourteenth Amendments of the United States Constitution;

c. The HRC is void and unenforceable because it is an unconstitutionally vague criminal law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

d. The HRC is void and unenforceable because it is an impermissible exercise of power under the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2901 *et seq.* and Article IX of the Pennsylvania Constitution.

e. The HRC is void and unenforceable because it is preempted by the Pennsylvania Oil and Gas Act, 58 Pa.C.S. § 2301 *et seq*.

f. The HRC is void and unenforceable because it is exclusionary.

g. The HRC is void and unenforceable because it is preempted by the Pennsylvania Limited Liability Company Law, 15 Pa.C.S. § 8901 *et seq*.

158. Any of the violations alleged in this Count must result in a declaration that the HRC is void and unenforceable in its entirety. The presence of a severability clause does not change this

outcome. Grant Township would not have enacted the HRC without each of the invalid provisions and the valid and invalid provisions of the HRC are so intertwined that it would be rendered meaningless if the offending provisions were severed.

PRAYER FOR RELIEF

WHEREFORE, PGE respectfully requests the following relief:

159. A preliminary and permanent injunction prohibiting any action to enforce the HRC.

160. Entry of judgment declaring that the HRC is void and unenforceable in its entirety and specific declarations that:

a. The HRC is void because it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

b. The HRC is void because it violates the First and Fourteenth Amendments to the United States Constitution.

c. The HRC is void because it violates procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

d. The HRC is void because it violates substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution.

e. The HRC is void because it is an unconstitutionally vague criminal law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

f. The HRC is void and unenforceable because it is an impermissible exercise of power under the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2901 *et seq.* and Article IX of the Pennsylvania Constitution.

g. The HRC is void and unenforceable because it is preempted by the Pennsylvania Oil and Gas Act, 58 Pa.C.S. § 2301 *et seq*.

h. The HRC is void and unenforceable because it is exclusionary.

i. The HRC is void and unenforceable because it is preempted by the Pennsylvania Limited Liability Company Law, 15 Pa.C.S. § 8901 *et seq*.

161. Awarding PGE all fees and costs incurred in this action, including all reasonable attorneys' and expert fees pursuant to 42 U.S.C. § 1988; and

162. Granting such other relief as this Court shall deem just and equitable under the circumstances.

Respectfully submitted,

By: /s/ Lisa C. McManus

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Kevin J. Garber, Esquire
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Alana E. Fortna, Esquire
Pa. I.D. #309691

Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222
412-394-5400

Counsel for Plaintiff, Pennsylvania General Energy Company, L.L.C.

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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Pennsylvania General Energy Company, L.L.C.

(b) County of Residence of First Listed Plaintiff Warren
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Lisa C. McManus, Pennsylvania General Energy Co., LLC
120 Market Street, Warren, PA 16365 814.723.3230

DEFENDANTS
Grant Township of Indiana County and the Grant Township Board of Supervisors

County of Residence of First Listed Defendant Indiana
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
United States Constitution and 28 U.S.C. §§ 2201 and 2202

Brief description of cause:
Home Rule Charter violates constitutional rights and is invalid under Pennsylvania statutory and decisional law.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE
12/07/2020

SIGNATURE OF ATTORNEY OF RECORD
Lisa McManus

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

JS 44AREVISED June, 2009
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (◉ Erie ◉ Johnstown ○ Pittsburgh) calendar.

1. **ERIE CALENDAR** - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean. Venang or Warren, OR any plaintiff or defendant resides in one of said counties.

2. **JOHNSTOWN CALENDAR** - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset OR any plaintiff or defendant resides in one of said counties.

3. Complete if on **ERIE CALENDAR:** I certify that the cause of action arose in Indiana County and that the Plaintiff resides in Warren County.

4. Complete if on **JOHNSTOWN CALENDAR:** I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

1. ◉ This case is related to Number 1:14-cv-209 . Short Caption Pennsylvania General Energy v. Grant Township
2. ○ This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:
CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit or involves the same issues of fact or it grows out of the same transactions as another suit or involves the validity or infringement of a patent involved in another suit EMINENT DOMAIN: Cases in contiguous closely located groups and in common ownership groups which will lend themselves to consolidation for trial shall be deemed related.
HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PARTC

I. CIVIL CATEGORY (Select the applicable category).

1. ○ Antitrust and Securities Act Cases
2. ○ Labor-Management Relations
3. ○ Habeas corpus
4. ◉ Civil Rights
5. ○ Patent, Copyright, and Trademark
6. ○ Eminent Domain
7. ○ All other federal question cases
8. ○ All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest
9. ○ Insurance indemnity, contract and other diversity cases.
10. ○ Government Collection Cases (shall include HEW Student Loans (Education), V A Overpayment, Overpayment of Social Security, Enlistment Overpayment (Army, Navy, etc.), HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, SBA Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.)

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct

Date: 12/7/2020

ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH FORMS MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

EXHIBIT 20

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., *Plaintiff*, v. GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP BOARD OF SUPERVISORS, *Defendants*.	Civil Action No. 20-351 ERIE District Judge Susan Paradise Baxter **DEFENDANTS' MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the *Younger* abstention doctrine, the Defendants, Grant Township and the Grant Township Board of Supervisors, hereby respectfully move this Court to dismiss the Complaint filed by the Plaintiff, Pennsylvania General Energy Company, L.L.C. ("PGE") on December 9, 2020.[1]

The Defendants rely on the Memorandum of Law filed concurrently with this motion.

The Defendants certify that, pursuant to Chambers Practices and Procedures, counsel made a good-faith effort to confer with the Plaintiff by telephone to

[1] In the instant proceeding, the parties filed a Joint Motion for Stay and Extension of Time on February 16, 2021. (ECF No. 6.) As noted in that filing, Plaintiff intends to intervene in the Pennsylvania Commonwealth Court case *Department of Environmental Protection v. Grant Township of Indiana County and the Grant Township Board of Supervisors,* No. 126 M.D. 2017 (Pa. Cmwlth. Ct.).

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determine whether the pleading deficiencies identified below properly may be cured by amendment on February 12, 2021. Plaintiff's counsel opposes the relief requested herein.

Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) because the Complaint fails to plead sufficient facts to establish that the Defendants deprived Plaintiff of its federal constitutional rights. Plaintiff is not entitled to injunctive relief because it cannot show irreparable harm, having waited more than five years to bring its claims.

Defendants respectfully submit that even if the Court finds that Plaintiff has valid claims, it should dismiss the claims pursuant to the *Younger* abstention doctrine because resolution of the claims in federal court would interfere with an ongoing state proceeding.

The grounds for Defendants' motion are set forth in the accompanying Brief in Support of Defendants' Motion to Dismiss, dated February 16, 2021. For the reasons appearing therein, Plaintiff's claims should be dismissed, with prejudice.

Dated: February 16, 2021

Respectfully submitted,

/s/Karen L. Hoffmann
Karen L. Hoffmann (PA 323622)
SYRENA LAW
128 Chestnut Street
Suite 301A
Philadelphia, PA 19106
412-916-4509

karen@syrenalaw.com

Attorney for Defendants

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendants' Motion to Dismiss has been served on all counsel of record via the Court's CM/ECF system.

Dated: February 16, 2021

/s/ Karen L. Hoffmann
Karen L. Hoffmann, Esq. (PA 323622)
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC, *Plaintiff*, v. GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP BOARD OF SUPERVISORS, *Defendants*.	)	Civil Action No. 20-cv-351 ERIE District Judge Susan Paradise Baxter

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS _____ day of _____, 2021, the Court **GRANTS** Defendants' Motion to Dismiss and enters an **ORDER** dismissing Plaintiff's Claims with prejudice.

_____
The Honorable Susan Paradise Baxter
United States District Judge

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EXHIBIT 21

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
Petitioner	:	
vs.	:	
PENNSYLVANIA GENERAL ENERGY COMPANY, LLC	:	
Intervenor	:	
vs.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS	:	
Respondents	:	No. 126 M.D. 2017

- - -

WEDNESDAY, AUGUST 11, 2021

- - -

Oral deposition of CAROLYN KNAPP, taken remotely via Zoom, commencing at 1:00 p.m., by Kimberly A. Wornczyk, a Registered Professional Reporter, New Jersey Certified Court Reporter (Certificate No. 30X100223500), and Notary Public in and for the Commonwealth of Pennsylvania.

- - -

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street - Suite 1800
Philadelphia, Pennsylvania 19103

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I would.

Q. And if you look down at the next definition down, a definition of person, so that basically describes a person as an individual who doesn't qualify as a corporation, correct?

A. Yes.

Q. So my question for you is: You personally have concerns, do you not, about corporations operating or permitting underground injection wells in the Commonwealth of Pennsylvania?

A. Can you say that again, please?

Q. Sure. You, personally, have concerns about corporations permitting and operating underground injection wells for the disposal of waste from hydraulic fracturing in the Commonwealth of Pennsylvania?

A. I personally have concern about injection wells in general no matter who it was.

Q. Okay. So that was actually my next question. So you would have the same concerns whether it was an individual who was

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permitting and operating an underground injection well? Whether it was a corporation, a partnership, an individual, you would have the same concerns?

A. Yes.

Q. Or a group of individuals, if a bunch of people got together and said, "We want to do this. We are not going to be a partnership" or "We are not going to be a corporation. We are going to be a group of individuals," you would have the same concerns?

A. I believe so.

Q. So I think this will be quick. You really don't have any personal knowledge of the Yanity Well; is that correct?

A. No, I don't.

Q. So you've never reviewed the permit application, materials that were submitted to either EPA or DEP to obtain that permit, correct, those permits?

A. To the best of my knowledge, I have not seen any documents. I've done -- to the best of my knowledge, I have not.

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EXHIBIT 22

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, and PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., Intervenor, v. GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, Respondents.	:	NUMBER 126 M.D. 2017

- - -

Thursday, August 12, 2021

- - -

Oral deposition of CAROL BETH FRENCH, taken remotely via Zoom, at Syrena Law, 128 Chestnut Street, Philadelphia, Pennsylvania 19106, beginning at 11:03 a.m., reported stenographically by Cheryl L. Goldfarb, a Registered Professional Reporter, Notary Public, and an approved reporter of the United States District Court.

- - -

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1801 Market Street - Suite 1800
Philadelphia, Pennsylvania 19103

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A. Yes.

Q. So do you personally have a concern about corporations disposing of waste from hydraulic fracturing in underground injection wells in Pennsylvania?

A. Do I have -- do I personally?

Q. Yes.

A. Yeah, I do.

Q. And would you have the same concerns if, rather than a corporation doing that, an individual or a group of individuals did that?

A. If they were operating at the same magnitude as a corporation?

Q. Yes.

A. If they were operating as the same -- at the same magnitude as a corporation, sure, with the same -- with the same waste, yeah.

Q. So if they were essentially doing what a corporation would do, you would have the same concerns whether it was a corporation or a government or an individual or a group of individuals?

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A. Yes.
Q. Okay. Let's talk a little bit about that Yanity well that was in Grant Township.
Have you ever been at that site?
A. No.
Q. Did you ever review any of the permit application materials for that site?
A. No.
Q. Have you ever reviewed the permit for that site?
A. No.
Q. Do you know any details about the construction of that well?
A. Nope.
Q. Do you know any details of the construction of any underground injection well that's been permitted in Pennsylvania?
Not a production well. I'm talking about underground injection wells.
A. I'm going to say no.
MR. FOX: Okay. So I want to pull up PGE 3, please, for a second.
MR. DeJESUS: (Complies.)

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EXHIBIT 23

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner,	:	
and	:	NUMBER
PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., Intervenor,	:	126 M.D. 2017
v.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, Respondents.	:	

- - -

Monday, August 16, 2021

- - -

Oral deposition of BRYAN BORIS LATKANICH, taken remotely via Zoom, at 95 Hill Road, Fredericktown, Pennsylvania 15333, beginning at 9:03 a.m., reported stenographically by Cheryl L. Goldfarb, a Registered Professional Reporter, Notary Public, and an approved reporter of the United States District Court.

- - -

VERITEXT LEGAL SOLUTIONS
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legal conclusions. I'm asking him to read a statement. And that's a speaking objection, which is improper, Mr. Lodge.

THE WITNESS: It says, "corporation or government," is what it says.

BY MS. SILVA:

Q. Okay. Would you have the same concerns about --

MS. SILVA: You can take this down, Ron.

MR. DeJESUS: (Complies.)

BY MS. SILVA:

Q. Would you have the same concerns about oil and gas waste, as you call it, if the work being done was done by an individual person rather than a company or a government?

A. It would concern me anyway.

Q. So it would concern you whether it was a company doing the oil and gas extraction --

A. Right.

Q. -- or a person or a township or a government entity, right?

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A. Right. Those are all run by people.

Q. Or if it was one person by themselves doing this?

A. Correct, you could say that.

Q. No. I'm asking you that. If it was a --

A. Well, I don't think one person is going to do all this work, but yes.

Q. You have the same concern?

A. That would really bother me if one person, being that humans are flawed, yes.

Q. Have you ever been to Grant Township, Mr. Latkanich?

A. I believe I've been through there in my college days.

Q. Have you ever been to the Yanity well site?

A. No, ma'am.

Q. Have you ever looked at the permit application for the Yanity well?

A. No, ma'am.

Q. Do you know any detail about the construction of that well?

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EXHIBIT 24

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner,	:	
and	:	NUMBER
PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., Intervenor,	:	126 M.D. 2017
v.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, Respondents.	:	

- - -

Wednesday, August 18, 2021

- - -

Oral deposition of EDWIN W. ATWOOD, taken remotely via Zoom, at 694 Mohawk Avenue, Warren, Pennsylvania 16365, beginning at 1:01 p.m., reported stenographically by Cheryl L. Goldfarb, a Registered Professional Reporter, Notary Public, and an approved reporter of the United States District Court.

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within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction."

Did I read that correctly?

A. Yeah.

Q. So this says it's "any corporation or government"; is that right?

A. Yeah.

Q. When you said you had concerns about underground injection wells or what people are trying to stop, would it matter to you whether or not the company doing the injection was a company, like a corporate company, a government, or if it was a private person?

A. It doesn't make any difference who it is. Usually it's a corporate company because there's no -- no private person can afford to do anything like that.

MS. SILVA: Ron, you can take this down.

MR. DeJESUS: (Complies.)

BY MS. SILVA:

Q. Have you ever been to Grant

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EXHIBIT 25

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner,	:	
and	:	NUMBER
PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C., Intervenor,	:	126 M.D. 2017
v.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS, Respondents.	:	

- - -

Friday, September 10, 2021

- - -

Oral deposition of JUDY WANCHISN, taken remotely via Zoom, at Frederick Law Group, PLLC, 836 Philadelphia Street, Indiana, Pennsylvania 15701, beginning at 1:00 p.m., reported stenographically by Cheryl L. Goldfarb, a Registered Professional Reporter, Notary Public, and an approved reporter of the United States District Court.

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Q. And then if we pull up the definition of "person," "'Person' means a natural person, or an association of natural persons, that does not qualify as a corporation under this Charter."

So this definition basically says that a person is something other than a corporation, correct?

A. Correct.

Q. So that could be an individual or a group of individuals, for example, correct?

A. Correct.

Q. So you have expressed publicly many times that you have concerns about corporations permitting, operating and constructing underground injection wells in Grant Township, correct?

A. Correct.

Q. Would you have the same concerns if it was an individual, a person who was permitting, constructing or operating an underground injection well in Grant Township?

A. If the person meant to do harm

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and poison the material that was going into the well, injecting, yes, I would.

Q. Well, even if they didn't mean to do that, if it was just an individual who said, I want to get a permit in Grant Township to construct and operate an underground injection well, you would have the same concerns that if a corporation was getting that permit, correct?

A. I suppose so, yes. I'd have to -- there would have to be more to it than what you just said.

Q. Well, this ordinance bans all corporations, regardless of what they intend to do, correct?

A. Yes.

Q. So what I'm asking you is, if an individual came along and wanted to do exactly what the corporation was intending to do, you would have the same concerns about that?

A. Yes.

Q. I'm sure I know the answer to this, but I'll ask it anyway.

You've actually reviewed the EPA

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EXHIBIT 26

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
Petitioner	:	
and	:	No. 126 M.D. 2017
PENNSYLVANIA GENERAL ENERGY COMPANY, LLC	:	
Intervenor	:	
vs.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS	:	
Respondents	:	

- - -

Friday, September 24, 2021

- - -

Oral deposition of JOSHUA PRIBANIC, taken remotely in, Bozeman, Montana, commencing at 1:00 p.m., and recorded stenographically by Theresa F. Franco, a Court Reporter and Notary Public.

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business entity -- I'm sorry about that -- organized under the laws of any state or country."

Do you see that?

A. I do.

Q. Okay. So that would mean a business entity that was registered with the Commonwealth of Pennsylvania. Could be a corporation. It could be a partnership, a limited liability partnership. Something that was registered with the Commonwealth, correct?

A. Yes.

Q. Now let's take a look at the definition of person. "Person means a natural person or an association of natural persons that does not qualify as a corporation."

Do you see that?

A. Yes.

Q. Okay. So there's a distinction between these definitions, between a corporation, which is some business entity, and individuals, correct?

A. Yes.

Q. Okay. So you have concerns,

personally, about corporations operating an underground injection well, correct?

MS. HOFFMAN: Objection.

BY MR. FOX:

Q. You can answer.

A. I'm sorry, what was the question?

Q. Yes. You have concerns, personally, about whether a corporation should be allowed to operate an underground injection well for disposing of hydraulic fracturing fluids?

A. Oh, yeah. I'm skeptical.

Q. Okay. All right. Would you have the same concerns if a wealthy individual said, I want to do that?

A. To do what?

Q. To operate and permit an underground injection well for hydraulic fracturing fluids?

A. I mean, if it was legal for a wealthy person to inject fluid underground, yeah. I would be concerned about it.

Q. Okay. So, whether it's a corporation or an individual or a group of

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individuals, wealthy or not, you'd have the same concerns?

A. Absolutely.

Q. And the same would be true if a government entity were to do that?

A. Yes.

Q. So, did you participate with Melissa Troutman in putting together a compendium of all the complaints that were made to DEP and DEP's response to those complaints regarding hydraulic fracturing activities in the Commonwealth of Pennsylvania?

A. I'm not sure what a compendium is. What's that?

Q. A compendium means like a complete document.

A. You can just call it what it is if you want.

Q. Did you put together a list of all complaints made to DEP and DEP's responses relating to hydraulic fracturing activities in Pennsylvania?

A. No. I didn't manufacture a list. Did you have another way of putting that?

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