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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, L.L.C.,	:	
Intervenor,	:	
v.	:	
GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS,	:	
Respondents.	:	

RESPONDENTS' BRIEF IN OPPOSITION TO INTERVENOR'S APPLICATION FOR SUMMARY RELIEF

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INTRODUCTION

Grant Township is a rural township of around 700 people, located in Indiana County, Pennsylvania. About eight years ago, the people of Grant Township learned that a fracking waste injection well slated for operation in close proximity to their sole source of drinking water threatened their health and well-being. Since that time, the people of Grant Township have worked to protect their constitutionally secured right to a clean and healthy environment, including by passing laws to ban the disposal of fracking waste. In response, Grant Township has been subjected to continuous and aggressive litigation tactics by PGE, DEP, and the oil and gas industry as a whole.

At the core of this case is the issue of whether a local community can secure and advance the right to a clean and healthy environment as set forth in Pennsylvania's Environmental Rights Amendment ("ERA," Pa. Const. Art. 1, § 27) by enacting local laws that prohibit an activity – here, the disposal of fracking waste – inconsistent with that right. This issue, as presented in this case, is a matter of first impression.

This case had been pending before this Court for four years before PGE sought to intervene. PGE's Application for Summary Relief concerns issues tangential to the core issues in this case as originally constituted between Grant Township and DEP and as repeatedly recognized by this Court over the past

several years. PGE seeks to make the case about its own federal constitutional rights.[1] It brought similar challenges in the federal district court proceedings involving a now-repealed ordinance, not the Home Rule Charter, in which Grant Township's arguments pursuant to the ERA were not even acknowledged by the district court.

As set forth below, Grant Township believes PGE's constitutional claims with regard to the Charter are without merit. Even if this Court were to find certain provisions of the Charter invalid as violating the United States Constitution, the core issues in this case would remain. The Court could sever those allegedly offending provisions and the key issue, regarding the validity of the provision banning the disposal of fracking waste, would still be before this Court.[2]

PGE's only argument addressing the validity of the Charter's ban on the disposal of fracking waste is its assertion, for the first time in its Application, that the Charter's prohibition is somehow preempted by the federal Safe Drinking Water Act.[3]

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[1] PGE has not properly brought its constitutional claims before this court. In seeking to intervene, PGE represented that it would not unduly delay or complicate this litigation. It adopted DEP's Petition for Review with only vague and generic reference to the assertion of its own constitutional claims.

[2] Indeed, PGE could have sought agreement that Grant Township would not enforce these allegedly offending provisions. In a comparable example, at the inception of this litigation, Grant Township and DEP agreed to temporarily enjoin the Charter provision pertaining to DEP's liability so that the Court could focus on the core constitutional issues raised in this case.

[3] PGE places heavy emphasis on *Seneca Resources Corp. v. Highland Twp*., No. 16-cv-289, 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017). That decision did not discuss the ERA, which was never raised by the parties in the case. (That fact is important because how the SDWA interacts

In sum, PGE's Application attempts to rehash arguments that have already been made and rejected by this Court[4] or are otherwise tangential to the state constitutional questions of import: whether the Charter's prohibition against the disposal of fracking waste is valid pursuant to the ERA, and whether DEP has violated its public trustee duties under the ERA.[5] Grant Township respectfully requests that the Court reject this diversion and remain focused on these issues of constitutional import, which are best situated for resolution by the Pennsylvania courts.

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with the ERA is part of Grant Township's defense to PGE's preemption claim.) Moreover, as set forth in depth below, the plain language of the SDWA itself makes clear that it does *not* preempt more protective state or local laws.

This is not the first time this Court has been presented with the *Seneca Resources* decision. DEP filed it as supplemental authority prior to the October 10, 2017 hearing on DEP's preliminary objections. At oral argument, Grant Township's counsel explained why that decision had no bearing on the issues before the Court. In issuing its May 2, 2018 order allowing Grant Township's counterclaims 3 and 4 to proceed, the Court did not reference the *Seneca* case.

[4] Another PGE rehashing of a previously rejected argument is its assertion that Grant Township can bring its ERA claim before the EHB. DEP already made this argument, and this Court already rejected it.

[5] In its Application, PGE raises the issue of Judge Baxter's sanctions order and attorneys' fees award, which have no bearing on the issues in this case. Judge Baxter sanctioned Grant Township's prior counsel based on two grounds, neither of which is applicable here. First, Judge Baxter found fault with the assertion of a right to local self-government, an argument considered and dismissed by this Court in 2018. It is worth noting that, at oral argument on October 10, 2017, the Court complimented both counsel, noting that the issues, which included a discussion of the right to local self-government as applied to the Charter, were "well argued on both sides." *See* Hearing Transcript, Oct. 10, 2017. The Court also permitted supplemental briefing on the issue. Second, Judge Baxter found fault with the fact that Grant Township brought constitutional counterclaims against PGE under 42 U.S.C. § 1983 on the grounds that PGE's conduct made it a state actor for purposes of that statute. Grant Township did not bring such counterclaims against PGE in this case. Grant Township and its counsel maintained that federal court erred in both the sanctions and attorneys' fees award, but reached a global settlement rather than pursue the appeals. *See* Stipulation to Dismiss Case, *PGE v. Grant Tp.,* No. 19-1969 (3d Cir., Nov. 12, 2019).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Should Grant Township's Counterclaims be allowed to proceed when Intervenor Pennsylvania General Energy Company, LLC ("PGE") has offered no defenses or counter-arguments to those claims?

SUGGESTED ANSWER: Yes.

2. Do genuine issues of material fact remain concerning whether Petitioner Pennsylvania Department of Environmental Protection ("DEP") has violated the Pennsylvania Constitution and whether Grant Township, in enacting the Charter, has fulfilled its duty under Article I, § 27?

SUGGESTED ANSWER: Yes.

3. Does the holding of a district court on distinct issues relating to a municipal ordinance comprise a *res judicata* bar to a subsequent Home Rule Charter enacted by popular vote?

SUGGESTED ANSWER: No.

4. Does PGE have a clear right to a declaratory judgment that the Charter violates the United States Constitution's Equal Protection Clause, when it did not request such relief in its Adoption of Petitioner's Petition for Review?

SUGGESTED ANSWER: No.

5. Does PGE have a clear right to a declaratory judgment that the Charter violates the United States Constitution's Petition Clause?

SUGGESTED ANSWER: No.

6. Does PGE have a clear right to a declaratory judgment that the Charter violates the United States Constitution's First and the Fourteenth Amendments?

SUGGESTED ANSWER: No.

7. Is the Home Rule Charter preempted by the federal Safe Drinking Water Act (SDWA)[6]?

SUGGESTED ANSWER: No.

COUNTER-STATEMENT OF THE CASE

Grant Township has passed two laws prohibiting the disposal of fracking waste: an ordinance, passed by the Township supervisors in June 2014, and the Home Rule Charter, passed by popular vote of the people of Grant Township in November 2015. A federal lawsuit by PGE involved the now-repealed ordinance. The present case involves the Charter, and, more specifically, is focused on Section 301, which bans the disposal of fracking waste. DEP initiated the present case to resolve the question of whether a Charter can ban an activity that DEP has otherwise permitted. In its response and Counterclaims, Grant Township contends

[6] 42 U.S.C §§ 300f to 300j.

that, in advancing the state constitutional right to a clean and healthy environment, a Charter can ban an activity that DEP has otherwise permitted. Grant Township also alleges that DEP has violated its own public trustee duties to secure this right.

Respondents submit that they are acting as reasonable and prudent public trustees in defending a ban on the disposal of fracking waste. Grant Township is preparing an Application for Partial Summary Relief that will cover how the significant evidence regarding the dangers of the disposal of fracking waste is such that there is no genuine issue of material fact as to whether Section 301 of the Charter, or its defense thereof, is reasonable and aligned with furthering the rights secured by the ERA. In the alternative, there are genuine issues of material fact for trial, some of which are set forth below, as to whether Section 301 of the Charter is valid under the ERA. Similarly, there are genuine issues of material fact as to DEP's breach of its public trustee duties. In the present application, PGE presents no evidence to the contrary. Under the prior orders of this Court, therefore, Grant Township's claims with regard to validity of Section 301 and with regard to DEP's breach of its public trustee duties must be allowed to proceed.

A. Commonwealth Court and Environmental Hearing Board Proceedings

In March 2017, DEP sued Grant in the instant action, seeking declaratory relief that the Charter is preempted by Pennsylvania's Oil and Gas Act[7] and Solid

[7] 58 P.S. § 2301 *et seq.*

Waste Management Act.[8] Grant Township's Answer included counterclaims as to how DEP's position violates fundamental, unalienable, indefeasible and constitutionally secured rights, including those laid out in the ERA. 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 provisions challenged by DEP 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 DEP 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.

DEP objected to all of Grant's counterclaims in its Preliminary Objections. 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*"), this Court sustained in part and overruled in part DEP's Preliminary Objections. The Court struck specific paragraphs of the New Matter and directed DEP to file and serve its answer to Counterclaims 3 and 4. *Grant Twp. I*, slip op. at 12-13, 16.

The Court reasoned:

> 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

[8] 35 P.S. § 6018.101 *et seq.*

> 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.

In December 2018, DEP filed an Application for Summary Relief to Dismiss Grant Township's Constitutional Claims Because Statutory Relief is Available. After a second oral argument, the Court denied DEP'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.

In March 2020, the Department rescinded PGE's permit for the Yanity well, citing the Charter as applicable law:

> 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.[9]

In April 2020, PGE appealed the rescission to the Pennsylvania Environmental Hearing Board ("EHB"). Grant Township applied for, and was granted, intervention in that proceeding. In December 2020, the EHB issued a stay in the permit rescission appeal proceedings pending the outcome of the PGE lawsuit against Grant Township.[10]

B. District Court Proceedings

In August 2014, 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 and raised the ERA as a defense to PGE's challenge to the ordinance.

In March 2015, PGE applied to DEP for a permit to convert the Yanity well into an underground injection well for the disposal of fracking waste. In October

[9] *See* Respondents' Application to Dismiss, Exhibit A, filed September 21, 2020.
[10] *See* Order of December 22, 2020, *Pennsylvania General Energy Company, LLC, v. Department of Environmental Protection*, EHB Docket No. 020-046-R.

2015, the district court ruled, in relevant part, that several of the ordinance provisions violated the Second Class Township Code and were unlawfully exclusionary. In November 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. In March 2017, DEP issued a permit to PGE authorizing the change-in-use of the Yanity well for frack waste disposal.

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. Prior to trial, the parties resolved the matter by entering into a stipulation in which PGE agreed to dismiss its remaining claims, withdraw its demand for compensatory damages, and accept nominal damages of $1 to fully resolve the outstanding claims.

PGE thereafter moved for attorney's fees pursuant to 42 U.S.C. 1988, seeking approximately $103,000 in attorney's fees and costs. Grant noted in its opposition that, given its extremely limited resources, this amount would bankrupt it. In March 2019, the district court awarded $100,000 in attorneys' fees and $2,979.18 in costs to PGE.

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 the attorneys. In November 2019, the parties settled for $75,000 paid by CELDF to PGE, with no admission of liability by any party.

In December 2020, PGE again sued Grant Township in the Western District, seeking to invalidate the Charter. The suit, which seeks injunctive and declaratory relief, is stayed pending the outcome of the instant proceedings.[11]

SUMMARY OF ARGUMENT

The Court should deny PGE's Application for Summary Relief for the following reasons: First, pursuant to the law of the case doctrine, Counts 3 and 4 of Grant's Counterclaims should be allowed to proceed. Second, genuine issues of material fact remain in the case regarding whether the Charter is a constitutional enactment of Grant Township's rights under the ERA because injecting frack waste into the Yanity Well poses an unacceptable risk to Grant Township's water, as well as to whether DEP has breached its duties under the ERA. Third, the requirements of the *res judicata* doctrine are not met. Fourth, the Charter does not

[11] *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).

violate the Equal Protection Clause of the United States Constitution. The Charter does not treat PGE any differently than any other similarly situated entity that would plausibly dispose of fracking waste in Grant Township. Even if PGE could maintain they were similarly situated, their claim still fails because Respondents had a rational basis for banning the disposal of fracking waste: protecting the environment and water of the residents of the Township. Fifth, the Charter does not violate the Petition Clause of the Constitution. From the face of PGE's Adoption of DEP's Petition for Review, it is apparent that PGE was able to access the courts. Sixth, the Charter does not violate PGE's substantive due process rights under the Fourteenth Amendment. PGE's substantive due process claims do not implicate a fundamental right, and Grant Township has a legitimate government interest in enacting the Charter. In the alternative, Respondents note that the Charter has a severability clause in the event the Court were to agree with PGE on the provisions at issue. Finally, the Charter is not preempted by the federal Safe Drinking Water Act. The plain text and legislative history of the SDWA establish Congress' intent to preserve, not preempt, state and local injection well regulations. Holding that the SDWA preempts the ERA and the Charter would also eviscerate the ERA and frustrate SDWA's cooperative federalism goals. Moreover, even if the SDWA did preempt the Home Rule Charter, SDWA's savings clause preserves Grant's state constitutional claims against DEP.

ARGUMENT

A. Pursuant to the Law of the Case Doctrine, Counts 3 and 4 of Grant's Counterclaims Should Be Allowed to Proceed.

PGE does not address Grant Township's Counterclaims in its Application; nor has it included them in its statement of questions, or briefed any counter-arguments or defenses against them. Despite this, it asks the Court to grant it summary relief on those claims. Pennsylvania Rule of Civil Procedure 123(a) states: "The application ... shall state with particularity the grounds on which it is based." An issue is waived if a party fails to raise or develop it in its brief. *Pa. School Boards Assoc., Inc. v. Public School Employees' Retirement System*, 751 A.2d 1237, 1241 (Pa.Cmwlth. 2000). Issues not set forth in, or fairly suggested by, a party's statement of questions involved will not be considered by the Court. Pa.R.A.P. 2116(a).

Here, PGE did none of those. Its treatment of Counts 3 and 4 of Grant's Counterclaims reads, in its entirety: "The Department's Petition for Review and Counts 3 and 4 of Respondents' Counterclaims should be dismissed as moot because they are wholly predicated on the Home Rule Charter."[12]

[12] Application at ¶ 7.

PGE appears to be asking for DEP's Petition for Review to be dismissed -- the Petition for Review that it adopted on March 10, 2021.[13] Respondents do not disagree that DEP's Petition should be dismissed. In fact, they filed an Application in the Nature of a Motion to Dismiss Petitioner's Claims for Mootness on September 21, 2020, and on October 15, 2020, DEP filed an application to stay or to dismiss the proceedings. However, the Court declined to dismiss either DEP's Petition or Grant's Counterclaims, holding: "We conclude that neither DEP's petition for review nor the Township's remaining counterclaims are moot, that a stay of the proceedings is not warranted, and that the parties must proceed to trial of the instant case."[14]

Nearly five years into this case, PGE appears to be trying for another bite at the apple by raising decisions already known to the Court -- namely, Magistrate Judge Susan Paradise Baxter's invalidation of the Township ordinance and *Seneca Resources Corp. v. Highland Tp*., No. 16-cv-289 (W.D.Pa. Sept. 29, 2017). The Court should reject Intervenor's attempts to revisit its previous rulings. *See, e.g., Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 817 (1988) ("[A]s a rule courts should be loath[] to [revisit prior decisions of its own or a coordinate court] in the absence of extraordinary circumstances such as where the initial

[13] *See* "Intervenor's Adoption of Petitioner's Petition for Review, and Answer to New Matter and Counterclaim of Respondents."
[14] Memorandum Opinion, January 26, 2021.

decision was clearly erroneous and would work a manifest injustice.") (internal quotation and citation omitted); *Commonwealth v. Starr*, 644 A.2d 1326, 1331 (Pa. 1995) (issues should not be reopened "in the later phases of a litigated matter"). The law of the case doctrine promotes finality and fairness by preventing the agitation of settled issues.

As noted above, the Court has held repeatedly, in 2018, 2020, and 2021, that if the Township at trial is able to prevail on its claim in Count 3 that provisions of the Oil and Gas Act and Solid Waste Management Act are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them. Similarly, if it can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP, an injunction could issue. 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 Complaint.[15] Grant seeks to prove that hydro fracking 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 Grant may or may not be able to prevail on its constitutional claims, this Court has already ruled that it may

[15] Memorandum Opinion of May 2, 2018 ("*Grant Township I*") at 16.

attempt to do so in defense of DEP's lawsuit.[16] Grant seeks a declaration that the Charter is a valid law under the ERA and has asserted that DEP has violated the ERA by failing to protect and advance the rights protected by the ERA and by attempting to prevent Grant from exercising, advancing, and protecting its rights thereunder.[17]

Now PGE, in its Application, once again asks the Court to dismiss Grant's Counterclaims 3 and 4, this time simply because they are based on the Home Rule Charter.

For nearly five years and as recently as this January, the Court has repeatedly held that this case presents significant issues. The Court should reject PGE's argument once again and allow Grant's counterclaims to proceed to trial.

B. Genuine Issues of Material Fact Remain.

Genuine issues of material fact remain concerning whether DEP has violated the Pennsylvania Constitution and whether Grant Township, in enacting the Home Rule Charter, has fulfilled its duty under the ERA. The evidence of dangers of fracking waste disposal in Grant Township, discussed below, should prompt the conclusion that § 301 of the Charter and its defense are reasonable and aligned with furthering the rights secured by the ERA.

[16] Memorandum Opinion and Order of March 2, 2020 ("*Grant Township II*") at 9.
[17] Memorandum Opinion and Order, January 26, 2021 at 9-10.

Alternatively, there are genuine issues of material fact for trial as to whether § 301 is valid under the ERA, and whether DEP has breached its public trustee duties. In the present Application, PGE presents no evidence to the contrary. Notably, the Application fails entirely to acknowledge the ERA or Grant Township's and the Commonwealth's public trustee duties thereunder. Under the prior orders of this Court, therefore, Grant Township's claims regarding the validity of the Charter and DEP's breach of its public trustee duties must be allowed to proceed.

1. **The Charter is a Constitutional Enactment of Grant's Rights under the ERA; Injecting Frack Waste Poses an Unacceptable Risk to Grant's Water.**

The parties differ on whether it is reasonable for a Home Rule municipality to pass, or for township supervisors to defend, a ban on the disposal of fracking waste based on its environmental and health impacts. The parties also likely differ on the exact standards that should be applied in considering the validity of a Home Rule Charter (or other local law) that adopts a more protective standard pursuant to the ERA.

Under the ERA, Grant Township has a public trustee duty to act in accordance with the right to a clean and healthy environment. The duty of a trustee is to act reasonably and prudently. Grant Township submits that the fracking waste disposal ban, and the defense of that ban, is reasonable and prudent; Respondents

have a reasonable belief that such waste is dangerous and otherwise a threat to a clean and healthy environment.[18] Hence, a ban on fracking waste disposal is consistent with Respondents' public trustee duties under the ERA.

More fundamentally, however, Grant Township submits that the Charter's ban is valid on its face, without the need to inquire into the reasonableness of its belief as to the potential harms of fracking waste. Whether that is true in every application of the ERA is beyond the scope of this case. But here, a specific reasonableness inquiry is unnecessary because the Charter's ban addresses an area already regulated, albeit inadequately, by DEP. A local law that imposes greater protections than the state (DEP) or the federal government (as is recognized by the principle of cooperative federalism embedded in most federal environmental regulatory schemes) should be held to be valid on its face.

PGE's Application neither addresses these core issues nor provides any evidence that would demonstrate as a matter of law and undisputed fact that the Charter's ban on the disposal of fracking waste is unreasonable, otherwise inconsistent with Grant Township's trustee duties, or not in furtherance of the right to a clean and healthy environment. To the extent PGE's motion could be

[18] Pursuant to the precautionary principle, Grant Township need not prove that fracking waste actually is dangerous or causes specific harms. It is sufficient that the waste may cause harm. Reliance on the precautionary principle is consistent with the actions of a reasonable and prudent trustee. That said, the evidence in this case shows more than just a possibility or likelihood of harm.

construed as seeking summary judgment on the Charter's validity on these grounds, it must be denied. Surely the ban's reasonableness, if not facially obvious, is a question for trial. Respondents' expert opinions, described further below, support its defense of the ban. Moreover, deposition testimony of DEP's own witnesses underscores the ban's reasonableness.

Michael Seth Pelepko, DEP program manager for subsurface activities, testified that injecting wastewater in the Yanity well may induce seismicity. Ex. A, Pelepko Deposition at 41-42. He further testified that it is not possible to test the outer casings of the Yanity well to know what kind of condition they are in. *Id.* at 48. Pelepko stated that he is aware of casings failing. *Id.* at 48-49. He has not overseen a hydrogeological analysis to find out which way the contamination would go in the event of a casing failure. *Id.* at 49. Nor has he analyzed where the waste would go in the event of a surface spill such as a truck rollover while carrying wastewater fluid. *Id.* at 49-50.

Jay Parrish, former Pennsylvania state geologist, wrote in his expert report:

> Given the type of use proposed, which does not allow for remediation or cleanup at a later date, and could result in induced seismicity, and the recent evidence of injection wells causing changes 5-6 miles away, it is my opinion, based on my knowledge and expertise in geology/geophysics and familiarity with the specific facts of the case, that it would be extremely important to avoid an area with even a hint of basement faulting or extensive fracturing within such a distance. Central Indiana County has several 3 features indicating such weaknesses. Accordingly, it is my opinion, to a reasonable degree of scientific certainty, that the Yanity injection well is located at an

> inappropriate site that poses an unacceptable risk to the surrounding community.

Parrish Report at 2-3.

Dr. Marsha Haley concluded in her expert report, *inter alia*:

> In my expert opinion, the scientific literature and my personal experience and observations support the following conclusions to a reasonable degree of scientific certainty:
> - Fracking waste contains chemicals which are hazardous to human health.
> - Fracking waste contains levels of radiation which are hazardous to human health.
> - In Grant Township, if fracking waste makes its way into the water table from which drinking water is drawn, either from routine operation hazards and/or operational failure, there is a high probability that people's health will be adversely affected as a result of exposure to toxic/radioactive materials.

Haley Report at 5-6 (internal citations omitted).

Professor John R. Stolz, Ph.D. pronounced that "the toxicity and radioactive nature of the fluids intended for disposal, the location of the injection well close to private water wells, and the lack of access to public water make the injection well a significant risk to the drinking water in Grant Township."[19] Regarding PGE's 2013 lab analysis of brine proposed for disposal via the Yanity well, which found levels of Gross Alpha (3,380 pCi/L) and Gross Beta (1,220 pCi/L), and 1,100 pCi/L of 226Ra and 510 pCi/L of 228Ra, Stolz noted the likelihood "that other brine loads could contain more radium based on the data in the PA DEP TENORM study" -- a

[19] Stolz Report at 7.

2016 investigation where produced Marcellus water had 226Ra concentrations from 1,700 pCi/L to as high as *26,600 pCi/L*.[20]

Stolz recounted two recent Ohio injection well fiascoes where drilling waste migrated up to five miles from Class II injection wells into conventional production wells and an abandoned well, the latter of which was spewing radioactive brine.[21] Given the prospect of injection well leakage in the Yanity geological formation, the considerable radioactivity of the drilling wastes PGE will be injecting into Yanity, and the presence of at least 15 private water systems within a mile of that well, Dr. Stolz called Yanity's operation a "significant risk."

Geologist Daniel S. Fisher, PG concluded in his report that "the proposal to inject pressurized wastewater into the Huntersville Chert (Dho) via the Yanity 1025 Well poses an unacceptable risk to public health and safety."[22] Fisher's opinion derives from these findings, among others:

- The Huntersville Chert (where the Yanity well is situated) is unfit as a target zone for wastewater injection because it is intensely faulted and fractured and, therefore, highly transmissive.[23]
- Fractures allow the transmission of high-pressure fluids with minimal pressure loss over large distances.[24]
- The Huntersville Chert/Oriskany formation has naturally poor containment characteristics and is not recommended as an injection target.[25]

[20] *Id.* at 3, 4.
[21] *Id.* at 5.
[22] Fisher Report at 6-7.
[23] *Id.* at pp. 8-9.
[24] *Id.* at 9.
[25] *Id.* at 10-11.

- The Redbird #4 Class II Disposal Well event in Ohio in 2019 underscores how fractures can allow the uncontrolled migration of injected brine.[26]
- After a spill at the Lockhart Well, which is close to the Yanity Well, made clear the potential danger of injecting into the already-pressurized Huntersville Chert, within less than a year, all the wells in the Huntersville Chert (Dho) within at least four miles of the Yanity Well were plugged.[27]
- Cross-strike Structural Discontinuities (CSDs) and the associated orthogonal faults are vertical planes of weakness that exhibit increased permeability compared to the same types of rocks outside the CSD zone.[28]
- The Yanity Well is near the intersection of the Home-Gallitzin CSD and an associated orthogonal fault. This location is expected to have enhanced permeability through vertical fractures from both fault systems.[29]
- Should the injected brine encounter transmissive fractures or faults, vertical fluid migration would move either upwards toward the underground source of drinking water and the surface or move downward toward the basement. If the former, the impact to drinking water aquifers would be substantial and nearly impossible to mitigate. If the latter, induced seismic events may occur, depending upon the degree to which the pore pressure is increased and the internal equilibrium is changed.[30]
- If the permit is allowed, fracking in the overlying Marcellus (or other Lower Devonian shales) must be prohibited near the Yanity Well.[31]

While discharging the Township's public trustee duty should not require a battle of experts, Grant Township's ample evidence that injecting fracking waste

[26]*Id.* at 12-13. Fisher also points out that "that the conditions at the Redbird #4 Class II Disposal well are very similar to those at the Yanity Well, except that the Redbird #4 well was not located near two mapped large-scale vertical fracture zones. . . ." *Id.*
[27]*Id.* at 15-16.
[28]*Id.* at 27-28.
[29]*Id*. at 28-30.
[30]*Id.* at 37.
[31]*Id*.

into the Yanity Well would pose an unacceptable risk to its water reinforces the reasonableness of the Township's ban.

2. A Genuine Dispute of Material Fact Exists As To Whether DEP Has Breached its Duties Under the ERA.

The grounds upon which PGE could possibly seek summary relief as to Count 4 of Grant Township's Counterclaims are unclear. What is clear is that there remains a genuine dispute of material fact as to whether DEP has failed and is failing, as a public trustee, to protect Grant Township and other communities across Pennsylvania from the harms of fracking and frack waste.[32]

For example, Scott Perry, head of Oil and Gas at DEP, testified at his deposition that if there is a notice of violation – that is, if the Department has found water contamination from oil and gas operations – DEP provides no affirmative notice to neighboring residents.[33] He also testified that the DEP does not test for

[32] Respondents' New Matter at ¶¶ 67, 119-20.

[33] Perry testified:

> Q So if someone doesn't have Internet access, they would not be able to access that information, correct?
> A Well, there are numerous ways that someone can use the Internet when you don't have it in your house.
> Q Okay. So they would need to find a place with Internet and go on the DEP website?
> A That would -- that would be correct or they could -- they could do Right-to-Know law requests of us to find out about notices of violation at wells near them.

Exhibit B, S. Perry Deposition at 93.

radium-226 or radium-228 when there have been water contamination complaints filed.[34]

Perry further testified that DEP is not implementing a recommendation made by the Pennsylvania Auditor General in 2014 to start a true manifest system to track all fracking waste disposal. The Auditor General's report recommends trucking manifests to

> . . . track waste from gas wells from the first use of the water to the final disposition of the wastes, including wastewater. An effective system requires that each load of waste is tracked from generator to hauler to disposal site. . . . the harm in not instituting a manifest system is that DEP does not have *one* unified and integrated system to track waste, and as we discuss below, DEP does not know if the self-reported data is accurate and reliable.

Ex. D, GT-5 (Auditor General Report) at 58-59 (emphasis in original). Questioned about the manifesting proposal, Perry responded: "We have not done that." *Id.*; Ex. B, S. Perry Deposition at 124-25.

Further, according to Perry, the DEP will not implement the Auditor General's recommendation that the total number of residents' water quality complaints and number investigated should be publicly posted on their website. The Auditor General report found that:

> DEP does not provide the public with information related to complaints about water supplies impacted from shale gas drilling. Without this information, it is impossible for the public to know where and when water supplies are contaminated. . . . DEP could at a minimum post

[34] *Id.* at 111.

> aggregate information about complaints, such as the number of complaints it receives, the number of complaints that result in an investigation, the number of water supplies—both public and private—impacted by shale gas drilling, etc. . . . [O]nce the complaint is investigated, DEP could provide the above-mentioned aggregate information. ...
>
> A government agency responsible for environmental regulation and protecting the environment should provide determination letters and aggregate complaint information to the public to be as fully transparent and accountable as possible.

Ex. D, GT-5, Auditor General Report, at 72-73.

Regarding this Recommendation 20, Perry testified that DEP has no plans to publicize information on the number of complaints and those that resulted in investigation. Ex. B, S. Perry Deposition at 132-33; Ex. D, GT-5, Auditor General Report, at 72-73.

Perry described a shocking arrangement between Petitioner DEP and Belle Vernon Municipal Authority in which so long as the landfill paid fines, the DEP would allow the municipality to continue to dump fracking waste-contaminated water into the Monongahela River. Perry testified:

> Q And does it -- is this email saying that the landfill will agree to pay fines for those violations and Belle Vernon may keep dumping the waste?
> ...
> A It does say that it would allow -- if Belle Vernon agreed, that the landfill would continue to discharge to their treatment system which ultimately discharges to the river.

Ex. B, S. Perry Deposition at 100-104; Ex. C, GT-12.

Also troublingly, DEP has systematically failed to send written findings to Pennsylvanians whose water has been contaminated by oil and gas operations. Respondents' fact witness Joshua Pribanic was deposed regarding the DEP Standards and Guidelines for Identifying Tracking and Resolving Oil and Gas Violations (DEP Exhibit 16), and said:

> We just know that it wasn't happening throughout the Department, and, in fact, still isn't happening in many of the offices at the DEP.... We were in the Pittsburgh office in 2015, and I believe 2016 as well. That was the last office that we reviewed records at. And, of course, we found complaints in that instance which were still not receiving findings in writing. And, in fact, it was the worst office in the state with regards to complaints not receiving findings in writing. It was almost every single instance.
>
> We have ... direct statements from the Pittsburgh office that they didn't believe that they were -- that they needed to send determinations at all to anybody. And that was in, like, 2016 and '15. So we've had communications with them in regards to this. ... [I]t was a major problem that we saw in that southwest office, because each of your offices are operating differently.
>
> You know, your northwest, north central office isn't operating the same as your southwest office. There's no ... consistency between each office and how they handle complaint investigations, which Harvard found as well and published in 2014. And also the auditor general and the attorney general. There's major issues there.

Ex. E, Pribanic Deposition at 197-200.

These, as well as myriad other facts that came to light throughout the discovery process,[35] go to the ultimate issue of DEP's breach of its duty under the ERA and provide good cause for the Court to deny PGE summary relief.

C. The Requirements of the *Res Judicata* Doctrine Are Not Met.

The holding of a district court on distinct issues relating to a separate law that was not democratically enacted by the people of a Home Rule municipality does not meet the requirements of the *res judicata* doctrine.

Technical *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are "related, yet distinct" components of the doctrine known as *res judicata*. *J.S. v. Bethlehem Area Sch. Dist.*, 794 A.2d 936, 939 (Pa. Cmwlth. 2002). *Res judicata*, or claim preclusion, applies only when there exists a "coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued." *Id.* When *res judicata* applies, "[a]ny final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action." *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 669 A.2d 309, 313 (1995).

[35] More factual support for Grant Township's Counterclaims will be included in Respondents' forthcoming Application for Partial Summary Relief.

Here, half of these factors are missing. First, the supposedly identical law in the district court lawsuit was a Grant Township ordinance, whereas here, it is the Township's popularly enacted Home Rule Charter. *See Bd. of Supervisors of Willistown Twp. v. Main Line Gardens, Inc.*, 184 A.3d 615, 626 (Pa. Cmwlth. 2018) (defense of *res judicata* was not valid because the requisite identities of previous lawsuits were not present). Second, the causes of action in PGE's federal lawsuit against Grant included various claims under the U.S. Constitution, whereas here, Grant's counterclaims are based on the ERA. Therefore, technical *res judicata* is not an applicable defense in this case.

Collateral estoppel or issue preclusion renders issues of fact or law incapable of relitigation in a subsequent suit if, in a prior suit, these (1) same issues were (2) "necessary to [a] final judgment on the merits ... [and (3)] the party against whom [issue preclusion] is asserted [was] ... a party, or [was] ... in privity with a party[ ] to the prior action and ... [(4)] had a full and fair opportunity to litigate the issue in question," *Balent*, 669 A.2d at 313. Collateral estoppel is designed to "protect[ ] litigants from assuming the burden of re-litigating the same issue with the same party ... and [to] promot[e] judicial economy through preventing needless litigation." *McNeil v. Owens-Corning Fiberglas Corporation*, 680 A.2d 1145, 1147-48 (Pa. 1996).

Here, again, collateral estoppel does not apply. PGE brought its district court suit against Grant on different issues arising under the federal Constitution. Far from promoting judicial economy, PGE then chose to intervene in this case and raise similar issues before this Court. However, those are not the issues present here. As described above, the Court has repeatedly defined the issues in the instant case to include whether the state preemption statutes are constitutional under the ERA; whether the Charter is a constitutional enactment of the Township's duty under the ERA; and whether DEP has failed in its duty under the ERA. Nowhere are federal constitutional questions implicated.[36]

D. The Home Rule Charter Does Not Violate the United States Constitution.

PGE is now arguing for the first time – at the summary relief stage – that it has a clear right to a declaratory judgment that the Charter violates the federal Constitution's Equal Protection Clause. Yet it did not request such relief in its Adoption of Petitioner's Petition for Review.[37]

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[36]PGE agrees. In PGE's own "Application to Exclude Grant Township's Expert Reports Based on Relevance," filed a week after this Application for Summary Relief, it states that "the Oil and Gas Act or the SWMA, or the Department's statewide enforcement of those statutes, ... are the only remaining issues in this case." *Id*. at 7. PGE further admits: "This Court has ruled that the Township's only issues that remain in this case are Counts 3 and 4 of its Counterclaims, which seek a declaration that the Pennsylvania Oil and Gas Act, the [SWMA], and the Department's enforcement of these statutes, violate [the ERA]." *Id.* at 2. PGE does not mention the federal constitutional questions raised in its Application.

[37] *See* "Intervenor's Adoption of Petitioner's Petition for Review, and Answer to New Matter and Counterclaim of Respondents" at 3. In its New Matter, PGE's only relevant averment is a sweeping reference to the entire federal Constitution: "PGE avers that the Charter is not a valid local law [because] ... its provisions violate the United States Constitution." *Id.* at 5. Its only

PGE cannot now, in an application for summary relief, claim that it has established a clear right to that relief when it never requested the relief in the first place. *See Christian v. Johnstown Police Pension Fund Ass'n*, 218 A.2d 746, 749 (Pa. 1966) (a declaratory judgment must conform to the case as made out by the pleadings, and must be consistent with the relief prayed for).

Nevertheless, Grant Township responds to the arguments raised by PGE below.

1. The Home Rule Charter Does Not Violate the Equal Protection Clause.

The Home Rule Charter does not violate the Equal Protection Clause because the Charter does not treat Plaintiff any differently than any other entity that plausibly would dispose of fracking waste within Grant Township. Even if PGE could maintain that it is similarly situated to others treated more favorably, its claim still fails because Respondents had a rational basis for banning the disposal of fracking waste: namely, protecting the environment and water supply for the residents of Grant Township.[38]

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mention of the specific constitutional clauses is in a denial, not an affirmative defense. *Id.* at 17 ("PGE denies that the rulings of Judge Baxter relating to de jure exclusion of legitimate uses and violations of the Equal Protection, Substantive Due Process, and Petition Clause clauses of the U.S. Constitution do not apply to the Charter.").

[38] Alternatively, PGE cannot fairly complain that it (or any corporation) has been singled out. While, for instance, the § 301 prohibition specifically mentions "any corporation or government," § 105 makes clear that Grant Township residents have an enforceable right to be free from the depositing of waste from oil and gas extraction by anyone. Thus, while § 301 is more specific to corporations and governments, for good reason, the Charter read as a whole and in light of § 105's express language cannot be said to treat individuals, corporations, or governments differently.

"[I]n an equal protection challenge the question is whether 'the Township has irrationally distinguished between similarly situated classes.'"[39] A plaintiff that is not a part of a protected class such as gender or race may still have an equal protection claim under the "class of one" theory.[40] Under that doctrine, a plaintiff may obtain relief for equal protection violations so long as a plaintiff alleges that it has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[41] In the Third Circuit, a plaintiff asserting a "class of one" claim "must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment."[42]

a. Similarly situated

The first step in an equal protection analysis is to ascertain whether PGE was treated differently than similarly situated entities.[43] Persons are similarly situated when "they are alike in all relevant aspects."[44] The Court thus must begin by

[39] *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 171 (3d Cir. 2006) (quoting *Rogin v. Bensalem Twp.*, 616 F.2d 680, 689 (3d Cir. 1980)).
[40] *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000).
[41] *Willowbrook*, 528 U.S. at 564.
[42] *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006).
[43] *Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985); *Melrose, Inc. v. City of Pittsburgh,* 613 F.3d 380, 394 (3d Cir. 2010).
[44] *Startzell v. City of Philadelphia,* 533 F.3d 183, 203 (3d Cir. 2009) (internal quotations omitted).

examining whether PGE is similarly situated to others who may be permitted to inject fracking waste in Grant Township.[45]

The Charter does not treat PGE any differently than any other similarly situated entity, that is, an entity that plausibly would dispose of fracking waste within Grant Township. Corporations are the only entities with the necessary resources and immunities to engage in such activities, and, unlike individual persons, they can avoid damages for spills and leaks by conducting business as one or more corporations with limited assets available to satisfy damages claims, or by declaring bankruptcy.[46]

b. Legitimate government purpose

Next, if "the entities are similarly situated," then Grant Township "must justify its different treatment of the two," by demonstrating that the ordinance is rationally related to a legitimate government purpose.[47] "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic" of government activity.[48]

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[45] *See Congregation Kol Ami v. Abington Twp*., 309 F.3d 120, 137 (3d Cir. 2002) (the "first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated to other uses that are either permitted as of right, or by special permit, in a certain zone.").
[46] *See SWEPI, LP v. Mora County*, 81 F. Supp. 3d 1075, 1080 (D.N.M. 2015).
[47] *Cty. Concrete Corp*., 442 F.3d at 171 (citation omitted).
[48] *See Holt Cargo Sys., Inc. v. Delaware River Port Auth*., 20 F.Supp.2d 803, 825 (E.D. Pa. 1998); *see also FCC v. Beach Commns, Inc.*, 508 U.S. 307, 313 (1993) (holding that government actions will be found rational "if there is any reasonably conceivable state of facts" that could support them).

In *SWEPI, LP v. Mora County*, the District of New Mexico considered an equal protection challenge to a local law banning oil and gas extraction and development activities, and found a rational basis for the disparate treatment of corporations.[49] The court held that "[i]t is rational that, if corporations and not individuals engage in fracking, Mora County would ban corporations but not individuals from engaging in hydrocarbon exploration and extraction."[50]

Similarly, here, even if PGE could maintain that it was similarly situated to others treated more favorably, its claim still fails because Respondents had a rational basis for banning it from disposing of fracking waste: namely, protecting the environment and water supply for the residents of Grant Township.[51]

Indeed, Respondents have a public trustee duty to do so under the ERA.[52] As articulated in the Charter's Bill of Rights, it was passed to protect the health and safety of the community and the environment.[53] The people of Grant Township identified the depositing of fracking waste as a serious threat to their community, including their drinking water.[54]

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[49] *SWEPI, LP v. Mora County*, 81 F. Supp. 3d 1075, 1080 (D.N.M. 2015).
[50] *Id.* at 1176.
[51] *See Pioneer Aggregates, Inc. v. Pa. DEP*, No. 3:11-00325 (M.D.Pa., September 21, 2012).
[52] Pa. Const., Art. I, Section 27; *see also Robinson Township, Washington County v. Commonwealth,* 83 A.3d 901 (Pa. 2013).
[53] Through the Charter, the residents of Grant Township identified many reasons for their adoption of the Charter, including their "right to clean air, water, and soil"; "right to the scenic, historic, and aesthetic values of the Township, including unspoiled vistas and a rural quality of life"; and "right to a sustainable energy future." DEP Petition for Review, Exhibit E at 1.
[54] *Id.*

The Charter affects only corporations, because corporations are the only entities that use fracking and other dangerous oil-and-gas extraction techniques, and not because of an invidious discrimination or bias. Communities have legitimate reasons to be concerned about corporate activities, coupled with inadequate federal and state oversight, causing environmental contamination and public health hazards.[55] Accordingly, Respondents' actions were rationally related to the legitimate state interest.

2. The Home Rule Charter Does Not Violate the Petition Clause.

For an "access to court" claim brought under the Petition Clause, PGE must establish actual harm or prejudice resulting from the alleged deprivation of rights.[56]

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[55] While recognizing that Judge Baxter came to a different conclusion in *Pennsylvania General Energy Co., L.L.C., v. Grant Tp.*, No. 14-cv-209-SPB (W.D.Pa.) [hereinafter "*PGE I*"] (March 31, 2017 Memorandum Opinion) at 20-25, Respondents respectfully submit that the question is not whether the parties are similarly situated with respect to the enjoyment of constitutional rights. If that were the test, no Equal Protection claim would ever fail because every litigant in an EP challenge has rights. The questions are (1) whether the Township has irrationally distinguished between similarly situated parties, and (2) whether the parties are similarly situated with respect to the object of the Charter. Here, Respondents did not single out PGE for disparate treatment. The Charter applies to any entity that seeks to dispose of fracking waste in the Township. Second, even if PGE was similarly situated to an individual, Grant Township rationally concluded that it was a near-certainty that only corporations and governmental entities would potentially engage in the depositing of fracking waste. For this reason, Judge Baxter's finding that "there is no evidence between the disparate treatment of corporations and the state goals of the Ordinance" was erroneous. Indeed, the Court can take judicial notice of the fact that DEP has not granted frack waste disposal permits to any individuals. *See* DEP, "Underground Injection Wells" (available at https://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/Pages/Underground-Injection-Wells.aspx), showing a list of all permitted injection wells in Pennsylvania. None are granted to an individual.

[56] *See Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997) ("an individual's constitutional right of access to court is protected by the First Amendment's clause granting the right to petition the government for grievances") (citations omitted) and *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir.

The Petition Clause affords PGE the right to seek redress of any grievances it may have over the Charter. Indeed, PGE exercised that right by intervening in this lawsuit and filing several other lawsuits against Respondents, as described above. However, PGE cannot maintain a Petition Clause claim in this lawsuit, as it has yet to be denied redress of such grievances.[57]

In *PGE I*, Judge Baxter held that Grant Township's Ordinance violated the Petition Clause because it "limit[ed] access to courts only through approved 'community meetings.'"[58] Here, *the Charter contains no similar provision*.[59] Notably, this also undercuts PGE's argument of *res judicata.*

In *Seneca*, Judge Baxter held that Highland Township's Home Rule Charter violated the Petition Clause by "*attempt*[ing] to eliminate the ability of corporations to access the courts, which it cannot constitutionally do."[60] Judge Baxter in *PGE I* also held that "While the Ordinance did not actually prevent PGE from filing the instant action, the Ordinance *attempted* to do so. It is that *attempt*

2006) (claim for denial of court access requires evidence of actual injury in the form of a consequential infringement of the protected right) (citation omitted), *cert. denied*, 549 U.S. 1286 (2007).

[57] *See Mitchell v. Flaherty*, No. 2:11-cv-610 (W.D.Pa. January 30, 2012); *see also Western Pa. Restaurant Ass'n v. City of Pittsburgh,* 77 A.2d 616, 620 (Pa. 1951) ("The fact that the ordinance does not provide for a right of appeal to the courts from the refusal of the licensor to grant a permit is immaterial in view of the fact that such right must be held to exist even in the absence of an express grant thereof").

[58] *PGE I* (note 40, *supra*) (March 31, 2017 Memorandum Opinion) at 27.

[59] *See generally* DEP Petition for Review, Exhibit E.

[60] *Seneca Resources Corp. v. Highland Tp*., No. 16-cv-289 (W.D.Pa. Sept. 29, 2017) (emphasis added).

that runs afoul of the Constitution."[61] Respondents respectfully submit that the Court should find differently in the instant case. From the face of Intervenor's Adoption of DEP's Petition for Review, it is apparent that PGE was able to access the courts. Although PGE has not identified the legal vehicle by which they are challenging constitutionality, Respondents note that an *attempted* constitutional violation is not cognizable under Section 1983, only a claim of *actual* deprivation.[62]

3. The Home Rule Charter Does Not Violate PGE's Substantive Due Process Rights.

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."[63] "To prevail on a substantive due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of a protected property interest."[64] A successful facial substantive due process challenge to the Charter must "allege facts that would support a finding of arbitrary or irrational legislative action by the Township."[65]

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[61] *PGE I* (note 40, *supra*) (March 31, 2017 Memorandum Opinion) at 26-27 (emphasis added).
[62] *See Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9th Cir.), *cert. denied*, 469 U.S. 1038 (1984); *Holt*, 20 F.Supp.2d at 834; *Ashford v. Skiles*, 837 F.Supp. 108, 115 (E.D.Pa.1993); *Defeo v. Sill*, 810 F.Supp. 648, 658 (E.D.Pa.1993).
[63] U.S. Const. Amend. 14 § 1.
[64] *Cty. Concrete Corp*., 442 F.3d at 165 (citation omitted).
[65] *Id.* at 169 (citation omitted).

The Third Circuit has held that the "fabric of substantive due process, as woven by our courts, encompasses at least two very different threads."[66] The first thread of substantive due process applies to legislative acts.[67] A legislative act that limits a fundamental right will survive a substantive due process challenge only if it is necessary to promote a compelling governmental interest.[68] When a fundamental right is not at stake, a law must be rationally related to a legitimate government interest in order to survive a substantive due process challenge.[69]

The second thread of substantive due process jurisprudence analyzes "non-legislative," or executive, government actions.[70] When a plaintiff challenges a non-legislative state action, the Court must look, as a threshold matter, to whether the property interest being deprived is "fundamental" under the Constitution. If it is, then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of procedures used. If the interest is not "fundamental," however, the governmental action is entirely outside the ambit of

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[66] *Nicholas v. Pennsylvania State Univ.,* 227 F.3d 133, 139 (3d Cir. 2000).
[67] *Koorn v. Lacey Twp.,* 78 F.Appx. 199, 202 (3d Cir. 2003). Legislative acts are, "generally[,] laws and broad executive regulations" which "apply to large segments of society" -- as distinguished from a non-legislative, or executive, act, which "typically applies to one person or to a limited number of persons." *Nicholas,* 227 F.3d at 139 n. 1.
[68] *Nicholas,* 227 F.3d at 139.
[69] *Koorn,* 28 F.Appx. at 202.
[70] *Id.*

substantive process and will be upheld so long as the state satisfies the requirements of procedural due process.[71]

Because the Charter is a legislative enactment, the arbitrariness of Respondents' enactment of the Charter should be judged under a rational basis or strict scrutiny standard, depending on the nature of the interests involved. A legislative act that limits a fundamental right will survive a substantive due process challenge only if it is necessary to promote a compelling governmental interest.[72] When a fundamental right is not at stake, a law must be rationally related to a legitimate government interest in order to survive a substantive due process challenge.[73]

a. PGE's Substantive Due Process claims do not implicate a fundamental right.

PGE does not even assert that the Charter implicates a fundamental right, and there is no protected property interest at issue. In any case, because its property rights are not fundamental rights, a rational basis analysis is the correct standard. Courts have routinely held that property interests and rights do not rise to the level of fundamental rights requiring a strict scrutiny analysis. Property rights, and economic interests in general, have not been treated as fundamental rights, at least

[71] *Nicholas,* 227 F.3d at 142.
[72] *Nicholas,* 227 F.3d at 139.
[73] *Koorn,* 28 F.Appx. at 202.

since the demise of *Lochner*.[74] Here, PGE does not claim that the Charter has impermissibly deprived it of any fundamental right protected as a matter of substantive due process, because no specific fundamental property interest has actually been deprived.[75]

b. Respondents have a legitimate government interest.

Grant Township has a legitimate government interest in enacting the Charter. It is rational that the Charter would ban corporations, but not individuals, from engaging in the disposal of fracking waste. Such a distinction is not arbitrary. Only corporations have the resources to engage in fracking, and have the immunities to avoid liability from spills and leaks by resorting to bankruptcy. It is rational that, if corporations and not individuals engage in fracking, Grant Township would ban corporations but not individuals from engaging in frack waste disposal.

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[74] *See*, *e.g., John E. Long, Inc. v. Borough of Ringwood,* 61 F.Supp.2d 273, 285 (D.N.J. 1998) (Chesler, M.J) (noting that "a person does not have a fundamental right to use . . . property or have it zoned in any way he or she wishes"); *Polselli v. Nationwide Mut. Fire Ins. Co., No. CIV A* 91-1364, 1993 WL 137476, at *8 (E.D. Pa. Apr. 30, 1993) (Yohn, J.) ("However, a property right is not considered one of the fundamental rights entitled to strict scrutiny analysis."); *Nicholas,* 227 F.3d 133; *see generally Albright v. Oliver,* 510 U.S. 266, 271-72 (1994). *See Piecknick v. Com*., 36 F.3d 1250, 1261-62 (3d Cir. 1994) (there is a Fourteenth Amendment liberty to pursue a calling or occupation, but not the right to engage in a specific business operation, i.e., an exclusive towing contract in a particular area); *Phantom of E. Pa. v. N.J. State Police*, Civ. A. No. 07-2748, 2008 U.S. Dist. LEXIS 38624 at *7 (E.D. Pa. May 13, 2008) (Plaintiff must allege more to show a constitutional injury than that it has lost unspecified business where it still has the ability to carry out its fundamental business operation).

[75] *See Pioneer Aggregates*, *Inc.,* No. 3:11-00325.

It is therefore not unreasonable for Grant Township to apply the Charter's prohibitions to corporations but not to individuals. As District Judge James O. Browning noted, "engaging in any expensive business venture, without limited liability protections, would subject a person's entire wealth to liability if something went wrong. Using an incorporated entity, however, allows a person to risk only a definite amount of money – that which he or she invested into the entity – without risking the rest of his or her wealth. *It is thus reasonable to assume that only incorporated entities, and not individuals, engage in hydrocarbon exploration and extraction*."[76]

4. In the Alternative, the Charter Contains a Severability Clause.

In the event the Court is inclined to agree with PGE, the appropriate remedy would be to sever the offending provisions. Section 602 of the Charter contains a severance clause, which says:

> Section 602. Severability. All provisions, sections, and subsections of this Charter are severable, and if any subsection, 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.

[76] *SWEPI, LP v. Mora County*, 81 F. Supp. 3d 1075, 1176 (D.N.M. 2015).

Severance is also in accordance with principles of statutory construction. *Mount Airy # 1, LLC v. Pa. Dep't of Revenue & Eileen McNulty*, 154 A.3d 268, 279–80 (Pa. 2016) ("These provisions may operate even in the absence of the local share assessment. Because we do not believe that the Gaming Act's valid provisions are so dependent upon Subsections 1403(c)(2) and (c)(3) that the General Assembly would not have enacted the former without the latter, we will sever only those two subsections from the Act. See 1 Pa.C.S. § 1925 ('[P]rovisions of every statute shall be severable ... unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one.').")

With regard to Section 301, the allegedly offending language specifying "for any corporation or government" could be severed in accordance with Section 602, thereby leaving Section 301's prohibition to read: "It shall be unlawful within Grant Township to engage in the depositing of waste from oil and gas extraction." This provision, as with all other Charter provisions not directly implicated by PGE's constitutional claims, would remain.

E. The Home Rule Charter is Not Preempted by the Federal Safe Drinking Water Act.

The federal Safe Drinking Water Act, as amended, 42 U.S.C. §§ 300f *et seq*., preempts neither Grant Township's Home Rule Charter nor the ERA. This is so for three reasons. First, the act's plain text and purpose establish Congress' intent to preserve, not preempt, state and local injection regulations. Second, holding that the SDWA preempts the ERA and the Charter would eviscerate the ERA and frustrate the SDWA's cooperative federalism goals. Finally, even if the Charter is preempted, SDWA's savings clause preserves Grant's ERA claims against DEP.

1. The Home Rule Charter's Brine Disposal Ban Does Not Conflict with the Safe Drinking Water Act.

"Pre-emption may be either express or implied, and implied preemption includes both field preemption and conflict preemption."[77] Conflict preemption occurs either where "compliance with both federal and state regulations is a physical impossibility or where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[78] Courts must utilize their judgment to determine what constitutes an obstacle to federal law, which is "informed by examining the federal statute as a

[77] *Lozano v. City of Hazleton*, 724 F.3d 297, 303 (3d Cir. 2013).
[78] *Id.*

whole and identifying its purpose and intended effects."[79] In preemption analysis, courts should assume that historic police powers of States are not superseded "unless that was the clear and manifest purpose of Congress."[80]

In discerning congressional intent, courts look first to the plain text of the statute.[81] If a statute's text is clear, "our inquiry ends: we give effect to Congress's intent."[82] Because these provisions are uncommonly litigated, however, it is useful to examine the Act's legislative history to provide historical context.[83]

When first introduced in the Senate, the SDWA contained no provisions regulating underground injection wells. That changed as Congressional testimony revealed the threat unregulated injection posed to national aquifers.[84] Congress

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[79] *Id.* at 303.
[80] *Arizona v. U.S.*, 567 U.S. 387, 400 (2012).
[81] *Cazun v. Att'y Gen.*, 856 F.3d 249, 255 (3d Cir. 2017).
[82] *Id.*
[83] Respondent presents this history only to provide context, not to resolve ambiguity in an otherwise clear text. *Pellegrino v. U.S. Trans. Sec. Admin*, 937 F.3d 164, 179 (3d Cir. 2017) ("Our Court has declined to employ legislative history if a statute is clear on its face.") Nevertheless, to the extent any provision of the SDWA's UIC provisions could be considered ambiguous, "we have allowed recourse to legislative history in the face of ambiguity." *Id*.
[84] Safe Drinking Water Supplemental Hearings, 92 Cong. 57 (June 7 and 8, 1972):

> CONGRESSMAN WILLIAM ROY (KS). Once that contamination occurs, how long is it before this given supply of ground water is no longer contaminated? Would you like to speak to that, Mr. Hockman?
>
> Mr. HOCKMAN. That could vary anywhere from a few years to hundreds of thousands of years, depending upon the physical characteristics of the aquifer itself. And the other thing that should be considered in this regard is the method by which you could clean up that aquifer. This is one of the major problems of after-the-fact consideration of pollution.
>
> Mr. ROY. In other words, is it not unfair to state that after-the-fact consideration of pollution of aquifers is a very difficult consideration indeed; is that correct?

received testimony describing instances where unsafe injection wells contaminated nearby aquifers, including instances where "injected brine [] erupted from the ground 'like geysers[.]'"[85] While some states banned injection activities altogether, Congress concluded that the Federal government had to act to counter the "clearly [] increasing problem" of groundwater contamination.[86]

To that end, the SDWA grants the EPA administrator authority to promulgate regulations that establish an underground injection control (UIC) plan which sets "minimum requirements" to prevent "underground injection which endangers drinking water sources."[87] SDWA requires the EPA administrator to ban the operation of wells without a permit, which may only be granted if the applicant proves their well will not contaminate nearby aquifers.[88] EPA must establish inspection, reporting, and recordkeeping requirements for active wells[89] and is charged with enforcing violations of its regulations.[90]

While SDWA mandates EPA set a regulatory floor, it also envisions a substantial role for states to fill. If a state desires to pursue polluters itself, it may

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Mr. HOCKMAN. It is almost an impossibility in many cases.

[85] Safe Drinking Water Act of 1973 Hearings, 93 Cong. 154-157 (May 31, 1973).
[86] H.R. Rep. 93-1185 at 6481.
[87] 42 U.S.C. § 300h (a)-(b).
[88] 42 U.S.C. § 300h(b)(1)(A-B). Wells may also be drilled "by rule" it will not endanger drinking water sources. *Id*.
[89] 42 U.S.C. § 300h(b)(1) (C).
[90] 42 U.S.C. § 300h-3.

displace EPA as the primary enforcer of groundwater regulations by submitting a proposed regulatory plan to EPA for approval ("primacy").[91] If a state's plan is as stringent as EPA's regulations as promulgated under 42 U.S.C. § 300h(b)(1)(A-D), the Administrator must approve it.[92] Additionally, through its savings clause, SDWA preserves states' and municipalities' pre-existing authority to adopt laws that regulate underground injection, so long as the state does not use that power to undermine the SDWA's other provisions.[93]

From the text, it is plain that Congress' intent was to regulate underground injection activities to protect groundwater. By requiring regulators and permittees to prove their injection activities would not harm groundwater, Congress ensured that every new injection well would undergo a minimum level of review before injection activities could occur. SDWA also evinces Congress' intent to promote cooperative federalism, recognizing the co-equal role of states in protecting underground drinking water, through its primacy provisions and savings clause.

Having firmly established Congress' purpose in enacting the SDWA's UIC provisions, Respondents proceed to apply the Act's text and purpose to the issue at hand. SDWA's text is clear: Congress did not intend to preempt local regulations like Grant's brine disposal ban. Furthermore, cases PGE cites suggesting the

[91] 42 U.S.C. § 300h-1.
[92] 42 U.S.C. § 300h-2.
[93] 42 U.S.C. § 300h-1.

contrary are either irrelevant or wrongly decided because they stray from the Act's text.

a. The SDWA's savings provision preserves Grant's authority to regulate underground injection activities.

By the SDWA's plain text and its accompanying legislative history, it is clear that Congress did not intend to displace states' and municipalities' traditional role as regulators of injection wells. SDWA preserves the inherent authority of states and their subdivisions to regulate underground injection wells through its savings provision at 42 U.S.C. § 300h-2(d):

> State authority to adopt or enforce laws or regulations respecting underground injection *unaffected*.
>
> *Nothing* in this subchapter shall diminish *any authority* of a State or political subdivision to adopt or enforce any law or regulation respecting underground injection but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter. (emphasis added).

"It is well established that when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms."[94] Here, the statute could not be clearer. The states' pre-existing authority to regulate underground injection wells through the police power is "unaffected." "Nothing" in the SDWA "shall affect" the authority of either a state or one of its subdivisions to adopt "any law" respecting underground injection wells.

SDWA's accompanying report confirms this interpretation:

[94] *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

> [T]he [savings clause] *preserves* the rights of State (and local) governments to adopt and enforce any requirement concerning underground injection. The section makes clear, however, that compliance with any such requirement will not relieve any person of any duty to comply with requirements imposed pursuant to this legislation.[95]

Here, the ERA empowers and demands the Commonwealth "act affirmatively to protect the environment."[96] The same powers and duties extend to municipalities like Grant Township. They predate the SDWA and are precisely the powers explicitly "preserved" and "unaffected" in its savings provision. Therefore, where, as here, a municipality bans underground injection activities through a lawful exercise of its Constitutional powers, there is no conflict with the SDWA. Accordingly, Grant's Home Rule Charter is not preempted by the SDWA.[97]

Nevertheless, without examining the SDWA's text, purpose, or history, PGE asserts that there is a "clear conflict" between the Charter and EPA's UIC program.[98] The Charter, PGE concludes, frustrates "SDWA's intended purpose of creating a program to authorize" injection wells. [99] PGE mistakes the means for the purpose. SDWA's purpose is to protect underground sources of drinking water.[100]

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[95] H.R. Rep. 93-1185 at 6486 (emphasis added).
[96] *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 657 (2013).
[97] To the extent PGE relies on conflict preemption's "impossibility" scenario, the court should reject its invitation to "engage in freewheeling speculation about congressional purpose" when the text of the Act is clear. *Arizona v. U.S.*, 567 U.S. at 440 (Scalia, J., concurring in part and dissenting in part).
[98] Intervenor's Brief at 41.
[99] *Id.*
[100] *See infra*, section E.1.

It accomplishes that purpose by ensuring injection wells are designed and managed to a minimum level of safety.

PGE also ignores the Act's savings clause and cooperative federalism concerns.[101] In doing so, PGE flips the SDWA's purpose on its head. Under PGE's interpretation, the UIC provisions not only ensure wells meet a minimum level of safety, but they also *require* the construction of wells in communities that do not want them. Such an interpretation has no basis in either the Act's text or legislative history and is plainly contrary to its purposes.

For similar reasons, the district court in *Seneca Resources v. Highland Township* erred when it held that the SDWA preempted a disposal ban in Highland Township.[102] The court determined that Highland's disposal ban created a direct obstacle to Congress' intent to promote federalism and protect drinking water.[103] Despite its correct acknowledgment of the act's twin goals, the court did not discuss SDWA's savings clause, nor did it acknowledge the conflict between groundwater protection and its preemption holding.[104]

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[101] *See Lewis v. Alexander*, 685 F.3d 325, 343 (3d Cir. 2012) (emphasizing that courts must give "full effect to all of Congress' statutory objectives[.]")
[102] No. 16-cv-289, 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017).
[103] *Id.* at 5.
[104] Intervenor also relies on *S.D. Mining Assoc. v. Lawrence Cty.*, 155 F.3d 1005 (8th Cir. 1998) to illustrate that "courts have preempted municipal ordinances that frustrate, and therefore, conflict with a federal statutory purpose." Intervenor's Brief at 39. There, the court invalidated a county ordinance that *de facto* banned surface mining because it conflicted with the Federal Mining Act. Looking at the "text and structure of the statute itself," the court concluded the act's purpose was to encourage mining and safely regulate it. 155 F.3d at 1010.

The *Seneca* court relied on a similar case that is worth distinguishing. In *EQT Production Company v. Wender*,[105] a West Virginia district court invalidated a local ban on brine disposal wells. There, the municipality claimed the SDWA's savings clause exempted it from West Virginia's UIC program. Because West Virginia had received primacy, however, the court disagreed, holding that the ordinance was preempted on state grounds.[106] That reasoning does not apply here because Pennsylvania has not assumed primacy.

The court also concluded the ordinance violated the SDWA because "whether run by the state or the EPA," the SDWA restricts the ability of regulators to prohibit brine disposal wells. The court erred. 42 U.S.C. 300h(b)(2)(A) provides, in part:

> (2) Regulations of the *Administrator* under this section for State underground injection control programs may not prescribe requirements which interfere with or impede–

Respondent does not dispute that it is possible for an ordinance to conflict with a federal statute. Respondent merely disputes that the Charter conflicts with *this* statute. The Eighth Circuit's analysis of an entirely different statute is inapplicable, and SDWA's purpose can hardly be construed to "encourage" its regulated activity. Insofar as Intervenor presents *S.D. Mining Assoc.* to show that a federal permit acts as a trump card over all local bans on federal activity, it will find no support in the SDWA's text.

For the same reasons, two other cases cited by Intervenor, *Colorado Dep't of Public Health and Env't v. U.S.*, 693 F.3d 1214 (10th Cir. 2012) and *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Rogers*, 27 F.3d 1499 (10th Cir. 1994), are unenlightening except to illustrate the general principle of conflict preemption.

[105] 191 F.Supp.3d 583 (S.D. West Virginia 2016).

[106] *Id.* at 597.

> (A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations (emphasis added).

Within the SDWA, "Administrator" is a defined term and means "the Administrator of the Environmental Protection Agency."[107] "When a statute defines a term, we must follow that definition and exclude unstated meanings of that term."[108] Under the act's plain terms, the brine disposal restriction applies only to the EPA administrator, not municipalities.[109]

Finally, PGE asserts without elaboration that allowing municipalities to prohibit injection wells "would create chaos for the comprehensive regulatory scheme the SDWA establishes."[110] PGE's bold assertion is without merit. Federal permittees have always had to comply with the Commonwealth's varied local regulations as a condition of their permit.

For these reasons, the Home Rule Charter and the ERA do not conflict with the SDWA. Accordingly, the SDWA preempts neither.

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[107] 42 U.S.C. § 300f(7).
[108] *Thorne v. Pep Boys Manny Moe & Jack, Inc.*, 980 F.3d 879, 888 (3d Cir. 2020).
[109] EPA itself has approved several state primacy plans that ban brine disposal wells. *See, e.g.*, CT ADC § 22a-430-8(b)(2), approved by EPA at 40 C.F.R. § 147.350(a).
[110] Intervenor's Brief at 42.

b. Finding that the SDWA preempted the ERA and the Charter would eviscerate the ERA in areas of federal regulation and frustrate SDWA's cooperative federalism goals.

SDWA's basic structure, where the EPA sets a regulatory floor that states may expand upon, is typical of federal environmental statutes enacted in the spirit of cooperative federalism. The Commonwealth has long been an active participant in such programs and has assumed primary or shared enforcement authority for certain provisions of the SDWA, Clean Water Act (CWA),[111] Clean Air Act (CAA),[112] and Resource Conservation and Recovery Act (RCRA).[113] Pennsylvania has enacted state versions of those laws pursuant to its trustee duties, as the Court in *Robinson Township* summarized:

> The second obligation peculiar to the trustee is, as the Commonwealth recognizes, to act affirmatively to protect the environment, via legislative action. . . . The General Assembly has not shied from this duty; it has enacted environmental statutes, most notably the Clean Streams Act;[114] the Air Pollution Control Act;[115] and the Solid Waste Management Act.[116]

Of course, Pennsylvania may also be sued for violating the ERA when those acts have the opposite effect. In this action, Respondents assert the Pennsylvania Solid Waste Management Act (SWMA), as applied, violates the ERA. Yet, even

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[111] 33 U.S.C §§ 1251 *et seq.*
[112] 42 U.S.C. 7401 *et seq*.
[113] 42 U.S.C. § 6901 *et seq.*
[114] 35 P.S. § 691.1 *et seq*. The Commonwealth's CWA.
[115] 35 P.S. § 4001 *et seq*. The Commonwealth's CAA.
[116] *Robinson Twp. v. Commonwealth* at 657. The SWMA, 35 P.S. § 6018.101 *et seq*., regulates hazardous waste also covered by RCRA.

though the SWMA implements portions of its federal counterpart, RCRA, no one asserts or would think to assert that Grant's ERA claims are preempted by RCRA because they challenge the Commonwealth's implementation of it.

Here, however, the Commonwealth *has* shied from its duties. The Commonwealth has never enacted legislation nor promulgated regulation as part of the process to achieve primacy under the SDWA.[117] Accordingly, EPA administers the SDWA's UIC program in Pennsylvania. In other words, it implements SDWA's minimum acceptable standards for well safety.

Respondents submit that the ERA mandates the ban of brine disposal wells whether that be a statewide or locally-enacted ban. Pennsylvania's governor has deferred to EPA and neither he nor the General Assembly have provided definition to that mandate. Consequently, the electors of Grant Township have filled the void by adopting the Charter and banning the practice. PGE attempts to curtail this inquiry by invoking the specter of federal preemption. As Respondents have explained, PGE incorrectly asserts federal preemption without accounting for the SDWA savings provision in the hopes that this case's central inquiry – whether injection disposal wells violate the Constitution – will become unreviewable. Grant Township maintains that in the absence of legislation by the General Assembly to

[117] Respondents are unable to locate any entry in the Federal Register where the EPA has acknowledged receiving a primacy plan from Pennsylvania.

implement a primacy program, it may – indeed, has a duty to – legislate in the place of the legislature.

Furthermore, dismissing Grant's counterclaims on SDWA grounds would make a mockery of cooperative federalism. The SDWA envisions the Commonwealth and EPA working together as co-equal partners,[118] not to provide a means for the Commonwealth to shirk its constitutional duties.

2. Even if the Charter Were Preempted by the SDWA, Grant's ERA Claims Should be Allowed to Proceed Under the Act's Savings Clause.

If the Court finds that the Charter is preempted by the SDWA, the Court should interpret the SDWA's Savings Clause to permit Grant to proceed to trial with its ERA counterclaims.

In *International Paper Co. v. Ouellette*, the Court held that the Clean Water Act, by virtue of its savings clause, did not preempt state nuisance claims against in-state polluters, even if they held a CWA-backed discharge permit.[119] "By its terms the CWA allows States . . . to impose higher standards on their own point sources. . . . [T]his authority may include the right to impose higher common-law as well as higher statutory provisions."[120] The CWA's savings clause is found in two sections, and provides:

[118] *See infra* Sec. E. 1.
[119] 479 U.S. 481, 498 (1987).
[120] *Id.*

> "Except as expressly provided ..., nothing in this chapter shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."[121]
>
> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief...."[122]

The SDWA's savings clause is similarly worded and should be interpreted in the same way to preserve state law claims, including constitutional claims. As this Court has recognized, Respondent seeks to prove that "hydrofracking and disposal of its waste is so dangerous to the environment" that it violates the ERA.[123] The savings clause preserves pre-existing state claims, including constitutional ones. Accordingly, the Township should be allowed to proceed to trial.

CONCLUSION

For the foregoing reasons, this Court should deny Pennsylvania General Energy Company's Application for Summary Relief.

Dated: December 23, 2021

Respectfully submitted,

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[121] 33 U.S.C. § 1370.
[122] 33 U.S.C. § 1365(e).
[123] *Grant Township II* at 9. Insofar as Grant seeks to prove hydrofracking violates the ERA, the SDWA cannot preempt the ERA because Congress exempted fracking operations from coverage in 2005.

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I certify that the foregoing Respondents' Brief in Opposition to Intervenor's Application for Summary Relief contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135(a). Excluding the parts of the Brief that are exempted by Pa.R.A.P. 2135(b), there are 13,913 words in the Brief, as counted through the use of Microsoft Word.

Dated: December 23, 2021

/s/ Karen L. Hoffmann
Karen L. Hoffmann, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: December 23, 2021

/s/ Karen L. Hoffmann
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