

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' RESPONSE TO INTERVENOR'S
MOTION TO CONFIRM ISSUES FOR TRIAL**

Respondents Grant Township and the Grant Township Supervisors respectfully request that this Honorable Court deny Intervenor Pennsylvania General Energy Company, L.L.C.'s ("PGE") Motion to Confirm Issues for Trial, and instead allow the adversarial processes of civil litigation to narrow the issues to the key disputes in this action without imposing a premature and unorthodox limitation.

I. Intervenor's motion is procedurally defective.

PGE's "Motion to Confirm Issues for Trial" is actually a motion to preclude evidence from trial. PGE seeks to keep out "evidence related to whether hydraulic fracturing is so dangerous to the environment as to be in violation of the Environmental Rights Amendment." Mot. at Wherefore Clause.

This premature motion would be more appropriate as a motion *in limine* or as a pre-trial stipulation. Issues for trial are narrowed through the discovery process, which is ongoing. *Gregury v. Greguras*, 196 A.3d 619, 628 (Pa. Super. 2018) (*en banc*) ("One of the primary purposes of discovery is to prevent the surprise and unfairness of a trial by ambush, in favor of a trial on the merits. Parties may discover the evidence that will be offered at trial, and assess the credibility of witnesses. Consequently, discovery is calculated to facilitate early settlement or *narrow issues for trial*.") (emphasis added).

Currently, pursuant to the Stipulated Amended Case Management Order, written discovery responses must be served by May 31, 2021; depositions and all discovery must be completed by July 15, 2021; and motions *in limine* must be filed by September 30, 2021.

More than four years into this litigation, PGE has intervened at this late stage and is now trying to direct the case on behalf of DEP. The evidence that PGE seeks to exclude through its improper "motion to confirm issues for trial" is

directly relevant to Grant Township's Counterclaims against DEP. PGE is in the curious position of seeking to narrow the issues for trial on DEP's behalf.¹

II. Intervenor's motion is moot.

PGE's motion is "[b]ased on the apparent conflict between the Court's Orders and the issues pled by the parties." Mot. ¶ 9. Because there is presently no such conflict, PGE's motion is moot.

PGE's concerns relate to the Case Management Order of February 26, 2021, which required simultaneous filing and service of lists of witnesses, exhibits, and expert reports. However, the Stipulated Amended Case Management Order, entered by this Court on March 31, 2021, superseded the earlier Order and resolved the purported conflict. The stipulated Order, which was agreed to by all parties (including Intervenor), provides a staggered schedule for expert witnesses and reports. Respondents must provide such by July 30, 2021, and PGE and DEP must do so by August 30, 2021. In short, Intervenor will have ample time to supplement and submit its expert reports with full knowledge of the evidence that Respondents intend to introduce.

Hence, the primary stated basis for the Intervenor's Motion is no longer factually true. The scope of evidence will be narrowed in the normal course of

¹ While PGE would likely benefit from DEP's continued violations of the Environmental Rights Amendment with regard to fracking, it does not have standing to defend against Grant Township's Counterclaims, unless it concedes that it is a state actor also subject to the duties imposed by the Environmental Rights Amendment.

discovery and litigation. PGE appears to have filed this Motion out of a desire to avoid a public hearing of the widely documented harmful, even lethal, consequences of the fracking industry on communities and ecosystems at every step of the process, from production to disposal. Again, if Intervenor desires to have evidence of this excluded at trial, the proper recourse would be for it to file a motion *in limine after* such evidence has been produced in discovery. Respondents, of course, reserve the right to oppose any such challenge, for the reasons stated below.

III. Evidence regarding fracking is directly relevant to Respondents' Counterclaims.

Fracking waste disposal is the specific activity prohibited by the Charter, but Grant Township's Counterclaims implicate DEP's failures to protect Pennsylvanians under the Environmental Rights Amendment. An accounting of those failures must necessarily take into account evidence regarding fracking.

As this Honorable Court already correctly indicated, key issues in this case hinge on the dangers of fracking. In its May 2, 2018 Memorandum Opinion, this Court allowed Respondents' Counterclaims 3 and 4 to proceed over the DEP's objections, recognizing that those claims in part depended on whether "the Township at trial [could] prevail on its claim in Count 3 that provisions of the Oil and Gas Act and SWMA are unconstitutional" as violations of the Environmental Rights Amendment and "similarly, if it can prove its claim in Count 4 that these

statutes are being unconstitutionally applied by DEP.” May 2, 2018 Opinion at 16.

In its March 2, 2020 Memorandum Opinion, the Court stated: “[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 [Environmental Rights Amendment], and thus that the statutes upon which DEP bases its preemption claims are constitutionally invalid.” March 2, 2020 Opinion (emphasis added).

As the Court recognized, Grant Township’s Counterclaim as to DEP’s violation of the Environmental Rights Amendment is broadly pled, such that it includes DEP’s failure to fulfill its public trustee duties in how it has addressed the environmental and health impacts of fracking, including, but not limited to, the disposal of fracking waste.

Further, allowing evidence only of the harm caused by the disposal of fracking waste, without any evidence regarding the fracking process itself or where that waste originated, would unreasonably constrain the Court’s understanding of the issue. Intervenor’s motion fails to rebut the necessity of presenting evidence as to the process of *creating* hydraulic fracturing waste when evaluating a law banning the *disposal* of that waste. The issue of disposing of fracking waste cannot be considered in any meaningful way without describing how that waste is created and thus why a prohibition of its disposal is pursuant to, and in furtherance of, the Environmental Rights Amendment.

In sum, Grant Township cannot zealously litigate its Counterclaims without presenting at least some evidence as to DEP's failures to address the harms of fracking in a way that respects the rights secured by the Environmental Rights Amendment. As set forth above, discovery is ongoing, and the extent of such evidence can be properly narrowed through pretrial motions *in limine* and stipulations.

CONCLUSION

For the foregoing reasons, PGE's Motion to Confirm Issues for Trial should be denied.

Dated: April 15, 2021

Respectfully submitted,

/s/ Karen L. Hoffmann

Karen L. Hoffmann

PA I.D. No. 323622

SYRENA LAW

128 Chestnut Street

Suite 301A

Philadelphia, PA 19106

412-916-4509

karen@syrenalaw.com

Counsel for Respondents