

Intervenor Pennsylvania General Energy Company, L.L.C. (“PGE”) hereby replies to Respondents’ Response to PGE’s Motion to Confirm Issues for Trial.

I. Fracking is Not an Issue in the Case

The parties’ pleadings dictate the issues for trial under our rules of procedure. *City of Philadelphia v. Kane*, 438 A.2d 1051, 1052 (Pa. Commw. Ct. 1982) (“The Pennsylvania system of fact pleading requires that the pleading must define the issues, and every act or performance essential to that end must be set forth in the complaint”); *Rodes v. Anckaitis*, 279 A.2d 782, 783 (Pa. Commw. Ct. 1971) (quoting *Glick v. Peoples-Pittsburgh Trust Company*, 7 A.2d 364, 365 (Pa. Super. Ct. 1939) (“The very purpose of pleadings is to frame concisely definite and distinct issues for trial of the cause. Parties have the right to believe the issues as therein set forth are to be tried”) (emphasis added).

The validity of the Home Rule Charter’s prohibition of waste disposal¹ – not hydraulic fracturing (or “fracking” as used by Respondents and the Court) – is at issue in this case. *See* the Department of Environmental Protection’s (“DEP’s”) Petition for Review in the Nature of Complaint Seeking Declaratory Judgment, ¶¶ 24, 30-50. The Home Rule Charter does not prohibit other oil and gas activities, including hydraulic fracturing.

¹ **Section 301. *Depositing of Waste from Oil and Gas Extraction.*** It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

Respondents’ surviving Counterclaims 3 and 4 assert that the Home Rule Charter is a valid exercise of a purported right under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution (“ERA”), to prohibit the disposal of oil and gas waste in Grant Township, in stark contradiction to federal and state law. No pleading in this case alleges that hydraulic fracturing as an activity (as opposed to disposing wastewater generated by hydraulic fracturing into an injection well) is so dangerous as to violate the Environmental Rights Amendment. The Court’s mention of hydraulic fracturing in its March 2, 2020 opinion denying DEP’s application for summary relief does not expand Counterclaims 3 and 4 or the issues in this case. See *Krajsa v. Keypunch, Inc.*, 622 A.2d 355, 357 (Pa. Super. Ct. 1993) (“A purpose behind the rules of pleading is to enable parties to ascertain, by utilizing their own professional discretion, the claims and defenses that are asserted in the case. This purpose would be thwarted if courts, rather than the parties, were burdened with the responsibility of deciphering the cause of action from a pleading . . .”).

Putting hydraulic fracturing as an activity on trial would turn this case into an exceedingly complex litigation while obfuscating the issue before the Court – i.e., whether the Home Rule Charter’s prohibition of waste disposal is valid. Hydraulic fracturing is a highly engineered process. Key aspects include choosing a drilling location and creating a well pad; drilling vertical wells and extending horizontal

laterals; ensuring mechanical integrity of the casing strings and production tubing of a well; using drilling chemicals to condition wells and proppants to hold open reservoir pore spaces; understanding subsurface and reservoir geology and seismicity; maintaining correct well pressures; and dehydrating and compressing gas for pipeline distribution. Countless expert reports and witnesses would be needed on these and other issues if the Court were to address any claim that hydraulic fracturing is inherently unsafe. A trial on hydraulic fracturing generally would simply be unmanageable. Additionally, many diverse parties including natural gas operators, trade associations, other regulatory agencies, investors, municipalities who receive annual Act 13 impact fee payments, chambers of commerce, mineral owners who receive royalty income, public interest groups, academics, and various others who have an interest in natural gas exploration, drilling, production and pipelines in Pennsylvania and beyond likely will petition to intervene to protect their interests, given the significant implications of the issues for natural gas and energy production in Pennsylvania.

Respondents' Counterclaims 3 and 4 do not subsume their claim of "widely documented harmful, even lethal, consequences of the fracking industry on communities and ecosystems at every step of the process" (Response, p. 4) or even hint that hydraulic fracturing is so dangerous as to violate the ERA. Their pleadings do not support that notion.

II. A Motion in Limine Is Inadequate to Protect PGE's and DEP's Interests

Respondents contend PGE and DEP can file a motion in limine to exclude extraneous material and narrow issues for trial. However, unless hydraulic fracturing as an activity is excluded now, under the March 31, 2021 Stipulated Amended Case Management Order, neither PGE nor DEP will know until July 30, 2021 what evidence Respondents intend to proffer at trial.² No one can predict the nearly endless possible aspects of hydraulic fracturing on which Respondents might offer an expert report. A motion in limine does not adequately protect PGE's and DEP's interests or promote judicial economy, for two reasons.

First, it takes too long and needlessly burdens the Court. PGE's and DEP's expert reports are due on August 30. One month is not enough time for PGE and DEP to review Respondents' expert reports, prepare and file a motion in limine, permit Respondents to respond, and allow the Court to rule on the motion before countering expert reports are due. Also, a motion in limine would come too late in time to put others on notice of what is at issue in this case. If a motion in limine is denied late this summer and hydraulic fracturing is decided to be at issue, many of the interested parties listed above will seek to intervene, which will delay trial.

² Their Response says only that they cannot litigate their Counterclaims "without some evidence as to DEP's failures to address the harms of fracking" (Response, p. 6).

Second, it would be unfair and unreasonable to force PGE and DEP to bear the burden and cost of trying to anticipate what expert testimony Respondents might offer in their expert reports on July 30 regarding any number of issues related to fracking as an activity, in order to have rebuttal expert reports in hand on issues Respondents may not raise or evidence the Court would exclude through a motion in limine.

PGE requests the Court to confirm that the question of whether hydraulic fracturing is so dangerous to the environment as to be in violation of the Environmental Rights Amendment is not at issue and therefore Respondents may not introduce evidence at trial on this question.

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2021, a copy of the foregoing Intervenor's Reply in Support of its Motion to Confirm Issues for Trial was served electronically via the PACFile filing system, in accordance with P.A.R.A.P. 121 upon the following counsel of record:

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