

## Gas Company May Challenge Local Ordinance Prohibiting Deposit of Flowback Water into Underground Injection Wells

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**SUMMARY**

**A Federal Magistrate Judge in Pennsylvania has ruled that an oil and gas exploration company may challenge a township ordinance that makes it unlawful to deposit flowback water into underground injection wells within the township.**

Highland Township, Elk County, Pennsylvania enacted its so-called Community Bill of Rights ordinance which prohibits the operation of underground injection control (UIC) wells to dispose of flowback water waste from oil and gas extraction operations. Nestled in the heart of the Marcellus Shale play, the township's ordinance seeks to limit UIC wells that in some cases have already been permitted by the EPA. On March 29, 2016, Magistrate Judge Susan Paradise Baxter of the U.S. District Court for the Western District of Pennsylvania held that Seneca Resources Corporation (Seneca) had standing to challenge an ordinance enacted by the Township which both prohibits the depositing of waste from oil and gas extraction, and provides that permits issued by any government agency for this purpose are invalid in Highland Township. *Seneca Resources Corp. v. Highland Twp.*, C.A. No. 15-60, 2016 WL 1213604 (W.D. Pa. Mar. 29, 2016).

- Seneca had received a federal permit from the United States EPA to convert certain of its natural gas wells in the township into UIC wells, and applied for a state permit from the Pennsylvania Department of Environmental Protection (DEP).
- Seneca brought the action to enjoin Highland Township and the Highland Township Board of Supervisors from enforcing the ordinance, claiming that it prevents Seneca from converting its natural gas wells into UIC wells in accordance with its federal permit.
- The Township claimed that Seneca did not have legal standing to challenge the ordinance because there was no injury for the court to redress, since Seneca had not yet obtained a permit from DEP. Thus, it could not operate a UIC well in Highland Township even if the ordinance was invalidated.
- After Seneca challenged the ordinance, DEP sent Seneca a letter stating that it was suspending its review of Seneca's permit application until the district court ruled on the validity of the ordinance.
- The district court agreed with the drilling company and held that Seneca had standing to challenge the ordinance because (1) Seneca had sustained an injury directly attributable to the ordinance – DEP's delay and ultimate suspension of its review of Seneca's permit application, and the ordinance's alleged effect of stripping Seneca of its constitutional rights, (2) Seneca's injuries were traceable to the ordinance, and (3) a favorable decision was likely to redress the harm because it would remove the ordinance as an impediment to DEP's review of the permit application and restore Seneca's constitutional rights.

- In holding that Seneca had standing to challenge the ordinance, the district court recognized that the circularity of the Township's argument would result in Seneca never being able to challenge the ordinance. The Township argued that Seneca could not challenge the ordinance unless it obtained the DEP permit, but Seneca could not obtain the DEP permit while the ordinance was in place. Thus, Seneca would never be able to challenge the ordinance. ("Such reasoning invokes images of the proverbial cat chasing its tail.")

A small number of municipalities have enacted so-called "Community Environmental Bill of Rights" ordinances. Such ordinances attempt to deny corporations and their owners their constitutional rights to do business in the municipality. The focus of these ordinances has been on the oil and gas drilling industry. The industry is just now challenging the validity of such ordinances and this case is important in helping to establish that drilling companies have standing to challenge these enactments.

Saul Ewing attorneys will continue to monitor the enactment of and challenges to so-called "Community Environmental Bill of Rights" ordinances. For more information on these ordinances and Saul Ewing's services for the oil and gas industry, please contact the authors or the attorney at the firm with whom you are regularly in contact and see [www.GasAndOilLawyers.com](http://www.GasAndOilLawyers.com)

## Relevant provisions of the Highland Township ordinance:

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

(a) It shall be unlawful within Highland Township for any corporation or government to engage in the depositing of waste from oil and gas extraction. (b) No permit, license, privilege, charter,

or other authority issued by any state or federal entity which would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Pennsylvania Constitution, the United States Constitution, or other laws, shall be deemed valid within Highland Township.

### Section 4 – Enforcement

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

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