

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA**

SENECA RESOURCES CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 15-60
	:	
HIGHLAND TOWNSHIP, ELK COUNTY,	:	
PENNSYLVANIA AND THE HIGHLAND	:	
TOWNSHIP BOARD OF SUPERVISORS,	:	
ELK COUNTY, PENNSYLVANIA	:	
	:	
	:	
Defendants	:	

VERIFIED COMPLAINT

Seneca Resources Corporation (“Seneca”), by and through its undersigned counsel, for its complaint states as follows:

Introduction

1. Seneca brings this action to temporarily and permanently enjoin Highland Township and its Board of Supervisors from enforcing Ordinance No. 1-9 of 2013 (“Ordinance”) which, *inter alia*, illegally purports to ban otherwise properly permitted and regulated underground injection control (“UIC”) wells used for the disposal of natural gas brines within the Township.¹ The Ordinance directly prevents Seneca from converting certain of its natural gas wells located in the Township into UIC wells *despite the fact that Seneca has received a permit to do exactly that from the United States Environmental Protection Agency*. The Ordinance attempts to ride roughshod over the comprehensive regulations set out in the Pennsylvania Oil

¹ A copy of the Ordinance is attached hereto as Exhibit A.

and Gas Act. It strips corporations of their rights in violation of the Supremacy Clause of the United States Constitution. It vitiates the protections afforded Seneca by the First, Fifth and Fourteenth Amendments to the Constitution. And it restricts the establishment of UIC wells which are necessary to the environmentally sound disposal of natural gas brines and produced waters resulting from natural gas operations in Pennsylvania.

2. In Pennsylvania, the United States Environmental Protection Agency (“EPA”) Region III issues permits for UIC wells following a rigorous technical review by EPA of an application’s environmental and safety merits and an opportunity for public comment. The Ordinance renders this extensive and comprehensive review a nullity by seeking to override the judgment of the EPA with the judgment of the Board of Supervisors.

3. Unless the relief requested by the complaint is granted, Seneca will continue to suffer irreparable harm for which it cannot be compensated by money damages alone. As more fully set forth below, because, *inter alia*, Defendants’ attempt to regulate UIC wells is preempted by both federal and Pennsylvania law, the Ordinance is void and unenforceable and any enforcement of the Ordinance by Defendants is a violation of Seneca’s rights.

Jurisdiction and Venue

4. This Court has jurisdiction over Counts I and IV, under 28 U.S.C. § 1331; Counts VII, VIII, and IX under 42 U.S.C. § 1983; and over the remaining Counts, which arise under Pennsylvania law, pursuant to this Court’s supplemental jurisdiction under 28 U.S.C. § 1367.

5. Seneca seeks equitable relief and a declaratory judgment pursuant to 28 U.S.C. §§ 2201 & 2202.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the Township is located in this judicial district and the events and acts giving rise to Seneca’s claims occurred in this judicial district.

7. This action belongs on the Erie docket of the Court pursuant to LCvR 3.

Parties

8. Plaintiff Seneca is a Pennsylvania corporation with a business address at 5800 Corporate Drive, Suite 300, Pittsburgh, PA 15237. Seneca is engaged in oil and natural gas exploration and production.

9. Defendant Highland Township (the “Township”) is a Second Class Township located in Elk County, Pennsylvania with a business address at PO Box 505, 363 Pennsylvania Avenue, James City, PA 16743.

10. Defendant Highland Township Board of Supervisors (“Supervisors”) is the governing body of the Township, which adopted the Ordinance.

Factual Background

A. Applicable Federal and State Regulation

11. Congress enacted the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300f *et seq.*, to protect the nation’s drinking water by creating minimum standards for public drinking water supply systems. The SDWA was passed to prevent “underground injection which endangers drinking water sources.” 42 U.S.C. § 300h(b)(1).

12. Part C of the SDWA, 42 U.S.C. §§ 300h-300h-8, established the UIC program. Under the SDWA, a permit is required for any “underground injection,” which is defined as “the subsurface emplacement of fluids by well injection.” *Id.* § 300h(b)(1) and (d).

13. EPA administers the UIC program, except where a state has obtained EPA approval of its program, known as primacy.

14. Pennsylvania has not obtained primacy under the UIC program. Therefore, EPA Region III issues UIC well permits in Pennsylvania. *See* 40 C.F.R. §§ 147.1951-147.1955.

15. 40 C.F.R. Parts 144 and 146 contain the federal rules governing the UIC program. UIC wells are categorized into classes, based upon various factors, including similarity in the fluids injected, activities, construction, injection depth, design, and operating techniques.

16. Additionally, Pennsylvania regulates wells utilized for disposal of oil and gas drilling and production fluids via rules adopted pursuant to the Pennsylvania Oil & Gas Act of 2012, 58 Pa. Con. Stat. §§ 2101 *et seq.* (“Oil & Gas Act”),² and the Clean Streams Law, 35 Pa. Stat. Ann. §§ 691.1 *et seq.* As set forth in 25 Pa. Code § 78.18, Pennsylvania requires two permits for disposal injection wells: a well permit from the Pennsylvania Department of Environmental Protection (“DEP”) and a UIC permit from EPA.

B. Seneca’s UIC Disposal Permit Application & EPA Review

17. On June 25, 2012, Seneca applied to EPA Region III for a permit to construct and operate a UIC Class IID commercial injection well, identified as Well No. 38268, located in the Township.

18. With its application (“Application”), Seneca proposed to convert existing natural gas Well No. 38268 (API No. 37-047-23835) into a UIC Class IID well. Well No. 38268 was drilled to the Elk 3 Sandstone formation, which is a depleted reservoir.

19. UIC Class IID wells inject brines and other fluids associated with the production of oil and natural gas or natural gas storage operations (“Brine”). When oil and gas are produced, Brine is also brought to the surface, which is separated from the oil and gas. Class IID disposal wells can only be used to dispose of fluids associated with oil and gas production.

20. As there are limited disposal options for the fluids produced by oil and gas operations, UIC wells are an environmentally-sound and necessary option.

² The Oil & Gas Act is also frequently referred to as Act 13.

21. On November 7, 2012, EPA Region III issued a public notice requesting comment on Seneca's Application. EPA Region III held a public hearing on the Application on December 11, 2012.

22. The public comment period closed, initially, on December 31, 2012. However, following numerous comments expressing concerns regarding seismicity, EPA Region III later re-opened the period for an additional 60 days, which ended on September 11, 2013.

23. During the time the Application was pending, EPA Region III undertook a critical evaluation of the environmental, health and safety implications of Seneca's proposed UIC well.

24. EPA Region III authored an extensive response to the comments and concerns it received from the public. *See* Exhibit B.

25. On January 28, 2014, EPA Region III issued UIC Permit No. PAS2D025BELK to Seneca ("Permit").

C. Challenges to Seneca's UIC Disposal Permit Application

26. After the issuance of the Permit, Judith Hudson, Susan Swanson and the Highland Township Municipal Authority (collectively, "Petitioners") filed petitions for review ("Petitions") with the Environmental Appeals Board of the United States Environmental Protection Agency ("EAB").

27. While the EAB rejected the Petitions on procedural grounds, the EAB also considered and rejected Petitioners contentions that EPA Region III had improperly issued the Permit without appropriate consideration of environmental concerns. *See* EAB Order Denying Review of UIC Appeal Nos. 14-01, 14-02 & 14.03, a copy of which is attached hereto as Exhibit C.

28. Specifically, the EAB noted that Region III had found that the water supplies of concern to Petitioners were located "outside the zone of endangering influence and in formations

that will be protected through construction and operational requirements of the well.” *See* Exhibit C at p. 6 (internal quotations and citations omitted).

29. According to the EAB:

[t]he Region also addressed concerns regarding seismic activity, stating that ‘the geologic setting and reservoir characteristics of the proposed injection well are entirely different than the circumstances encountered in Ohio, Oklahoma and Arkansas.’ Further, the Region explained that “EPA is not aware of any case where a seismic event caused an injection well to contaminate a[n] underground source of drinking water”].

Id.

30. The EAB issued its decision rejecting the Petitions on May 29, 2014.

31. On June 17, 2014, EPA Region III issued its final permit decision following its rejection of the Petitions and issued the final Permit effective the same day. *See* Exhibit D.

D. The Township’s Ordinance

32. On January 9, 2013, the Township adopted the Ordinance. *See* Exhibit A.

33. The Ordinance provides, in part:

It shall be unlawful for any individual or corporation ... to deposit, store, treat, inject or process waste water, “produced” water, “frack” water, brine or other materials, chemicals or by-products that have been used in the extraction of shale gas onto or into the land, air, or waters within Highland Township. This prohibition shall specifically apply to disposal injection wells.

Ordinance, §4(a).

34. The Ordinance also provides that corporations “shall not have the rights of ‘persons’ afforded by the United States and Pennsylvania Constitutions,” Ordinance §4(b), and “shall not possess the authority or power to enforce State or federal preemptive law against the people of Highland Township, or to challenge or overturn municipal ordinances adopted by the Board of Supervisors of Highland Township....” Ordinance §4(c).

35. The Ordinance imposes fines and potential imprisonment for violations of its provisions.

36. According to the Ordinance, it became effective on January 14, 2013.

COUNT I

Preemption by the Safe Drinking Water Act

37. Paragraphs 1-36 are incorporated herein as if fully set forth.

38. The Ordinance, *inter alia*, purports to ban the disposal of Brine within the Township. Ordinance §4(a).

39. The SDWA expressly provides for the disposal of Brine in permitted UIC wells, such as Seneca's. *See* 42 U.S.C. § 300h(b)(2)(A); (d)

40. The Township is attempting to impose its own rules upon the oil and gas industry regarding matters already regulated by the federal UIC program and in conflict with the SDWA and the regulations promulgated thereunder.

41. An ordinance is preempted under federal law when it acts as a clear obstacle to the accomplishment of the Congressional purpose and objectives embodied in a statute.

42. The Ordinance undermines the federally administered UIC program and stands as a clear obstacle to the goals and objectives of the SDWA. *Id.*

43. Consequently, the Ordinance is preempted by the SDWA and is, therefore, invalid and unenforceable.

44. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT II

Preemption by the Oil & Gas Act

45. Paragraphs 1-44 are incorporated herein as if fully set forth.

46. The Oil & Gas Act requires an operator to obtain permits from DEP for the drilling or alteration of any “well,” including a well for Brine disposal. 58 Pa. Con. Stat. §§ 3203, 3211. As such, the Oil & Gas Act directly regulates not only those wells drilled to extract oil and gas, but also wells drilled or altered to provide for Brine disposal.

47. The regulations adopted pursuant to the Oil & Gas Act specifically regulate the drilling and alteration of wells utilized for Brine disposal. *See* 25 Pa. Code § 78.18.³

48. The Ordinance expressly prohibits the disposal of Brine in the Township.

49. Such a prohibition is an impermissible attempt to regulate the development of oil and natural gas, which is exclusively and comprehensively regulated within the Commonwealth by DEP pursuant to the Oil & Gas Act and its implementing regulations.

50. Section 3302 of the Oil & Gas Act provides, in pertinent part, as follows:

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

58 Pa. Con. Stat. § 3302.

51. Section 3302 by its terms preempts any local ordinance (except those adopted pursuant to the MPC or Flood Plain Management Act) which attempts to regulate oil and gas development which is already regulated by Chapter 32 of the Oil & Gas Act.

³ On November 11, 2014, Seneca applied to DEP for a permit to convert Well No. 38268 to a UIC well. In response to the application, the Supervisors informed DEP of the Ordinance and argued it precludes DEP from issuing the requested permit. *See* Exhibit E, a copy of the Supervisors’ letter. The Supervisors’ letter further evidences the Township’s attempts to regulate the very same aspects of Seneca’s operations which are properly regulated by Act 13 and 25 Pa. Code Ch. 78.

52. The Ordinance cites no statutory authority for its adoption by the Township.

53. However, as discussed in Count VI herein, the Ordinance is not a properly-adopted MPC ordinance. The Ordinance was also not properly adopted under the Flood Plain Management Act.

54. The Ordinance's prohibition on disposal and storage of Brine is an attempt to regulate oil and gas development which is expressly regulated by Chapter 32 of the Oil & Gas Act. *See* 58 Pa. Con. Stat. §§ 3203, 3211; 25 Pa. Code § 78.18.

55. Therefore, the Ordinance clearly violates Section 3302 of the Oil and Gas Act and is invalid and unenforceable.

56. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT III

Impermissible Exercise of Police Power

57. Paragraphs 1-56 are incorporated herein as if fully set forth.

58. The Township and the Supervisors do not possess broad police powers. Rather, they possess only such powers as have been granted to them by the Pennsylvania General Assembly.

59. The Ordinance is not within the scope of powers granted to the Township and the Supervisors.

60. The Ordinance is unduly oppressive, arbitrarily interferes with private business, and imposes unnecessary restrictions upon lawful business activities based on the mere allegation and speculation that all disposal and storage of Brine adversely affects the health, safety, and welfare of the residents of the Township.

61. The Township lacks any evidence to support these oppressive restrictions.

62. The blanket prohibition established by the Ordinance does not bear any legitimate or rational relationship to the health, safety and welfare of the residents of the Township.

63. The Ordinance is an impermissible exercise of the Township's police powers and is, therefore, invalid and unenforceable.

64. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT IV

Supremacy Clause Violations

65. Paragraphs 1-64 are incorporated herein as if fully set forth.

66. The Ordinance purports to strip corporations of legal rights vested in them by virtue of state and Federal law.

67. In particular, the Ordinance provides that corporations "shall not have the rights of 'persons' afforded by the United States and Pennsylvania Constitutions." Ordinance §4(b).

68. Under Federal law, corporations are "persons" with the rights to assert various constitutional claims.

69. The Supremacy Clause of the United States Constitution, Article 6, Clause 2, provides that it is "the supreme Law of the Land."

70. Consequently, the Ordinance is in violation of the Supremacy Clause and is, therefore, invalid and unenforceable.

71. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT V

Exclusionary Zoning

72. Paragraphs 1-71 are incorporated herein as if fully set forth.

73. The Ordinance prohibits storage and disposal of Brines anywhere in the Township.

74. Under Pennsylvania law, an ordinance may not completely exclude a legitimate use.

75. Seneca's planned UIC well is a legitimate use.

76. Therefore, the Ordinance constitutes illegal exclusionary zoning under Pennsylvania law and is invalid and unenforceable.

77. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT VI

Impermissible Exercise of Legislative Authority

78. Paragraphs 1-77 are incorporated herein as if fully set forth.

79. The Township possesses only those rights which have been expressly, or by necessary implication, granted to it by the Pennsylvania Legislature.

80. As evidenced by the Ordinance's failure to identify any valid authority under which it was adopted, there is no statutory authority for its adoption.

81. The Ordinance is not authorized by the Second Class Township Code, 53 Pa. Stat. § 65101 *et seq.*

82. The Ordinance purports to regulate the location of uses within the Township and is, therefore, a zoning ordinance.

83. In Pennsylvania, the Municipalities Planning Code, 53 Pa. Stat. § 10101, *et seq.*, provides a comprehensive framework for municipal zoning and land use regulation and is, as the Pennsylvania Supreme Court has stated, the "Legislature's **mandate for the unified regulation**

of land use and development.” *Gary D. Reihart, Inc. v. Twp. of Carroll*, 409 A.2d 1167, 1170 (Pa. 1970) (emphasis added).

84. All zoning ordinances and subdivision and land development ordinances must be adopted pursuant to the MPC in accordance with its substantive provisions. *Id.*

85. The Ordinance was not adopted in compliance with the MPC.

86. The references in the Ordinance to the Declaration of Independence and to the Pennsylvania Constitution do not invoke a valid, lawful basis for the provisions of the Ordinance. *See, e.g.*, Exhibit A (Ordinance “Whereas” clause). The Township is not a “citizen,” subject to such protections; moreover, a constitutional amendment is the appropriate, legal process by which citizens may exercise their right to alter their government.

87. Consequently, the Ordinance is an illegal exercise of legislative authority by the Township and is, therefore, invalid and unenforceable.

88. Further, as a result of Defendants’ actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT VII

First Amendment Violation

89. Paragraphs 1-88 are incorporated herein as if fully set forth.

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

91. The Ordinance purports to divest corporations, such as Seneca, of their constitutional right to petition the government for redress of grievances in that it strips corporations of: (1) their status as “persons” under the law; (2) their right to assert state or

federal preemptive laws in an attempt to overturn the Ordinance; and (3) their power to assert that the Township lacks the authority to adopt the Ordinance. *See* Exhibit A §§ 4-5.

92. Accordingly, the Ordinance violates the First Amendment of the United States Constitution.

93. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNTY VIII

Substantive Due Process Violation

94. Paragraphs 1-93 are incorporated herein as if fully set forth.

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

96. In enacting the Ordinance, the Township intended to deny corporations, such as Seneca, their legal and long-standing Constitutional rights, including, but not limited to, their rights under the First, the Fifth, and the Fourteenth Amendment of the United States Constitution.

97. The Township's conduct in abrogating Seneca's interest in environmental and UIC permits at Well No. 38268 is deliberate, arbitrary, irrational, exceeds the limits of governmental authority, amounts to an abuse of official power, and shocks the conscience.

98. Accordingly, in enacting the Ordinance, the Township has denied Seneca substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution.

99. Further, as a result of Defendants' actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

COUNT IX

Procedural Due Process Violation

100. Paragraphs 1-99 are incorporated herein as if fully set forth.

101. The Due Process Clause of the United States Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law”.

102. The prohibition of underground injection of produced fluid within the Township as a direct result of the enactment of the Ordinance significantly and materially devalues Seneca’s legal rights and interest related to and/or held within the Township, including Seneca’s UIC permit. U.S. Const. Amend. 5 and Amend. 14, § 1.

103. The Ordinance provides for no process or procedure which could be utilized by Seneca to challenge the provision of the Ordinance which purports to render invalid any permit that allows underground injection of produced fluid to be conducted within the Township and devalues any legal interests related thereto.

104. The fact that the Ordinance purports to prohibit corporations, such as Seneca, from petitioning the government for the redress of grievances makes clear that the Ordinance provides for no process or procedure to which Seneca could avail itself to address the deprivation of its legal rights and interests caused by the Ordinance.

105. Therefore, the Ordinance deprives Seneca of legal rights and interests protected by the Fifth and Fourteenth Amendments of the United States Constitution without providing due process of law.

106. Further, as a result of Defendants’ actions, Seneca has suffered and will continue to suffer hardship, irreparable injury, and damages. Seneca has no adequate remedy at law.

WHEREFORE, Plaintiff requests that this Court:

- a. Declare that the Ordinance is preempted by federal and state law;
- b. Declare that the Ordinance is an impermissible exercise of police power by the Township;
- c. Declare that the Ordinance is a violation of the Supremacy Clause of the U.S. Constitution;
- d. Declare that the Ordinance constitutes illegal exclusionary zoning;
- e. Declare that the Ordinance constitutes an impermissible exercise of legislative authority;
- f. Declare that the Ordinance is a violation of Seneca's First Amendment Rights;
- g. Declare that the Ordinance is a violation of the Fifth and Fourteenth Amendments to the U.S. Constitution;
- h. Award compensation and consequential damages pursuant to 42 U.S.C. § 1983;
- i. Award Plaintiff all fees and costs incurred in this action;
- j. Issue preliminary and permanent injunctions prohibiting the Township from enforcing the Ordinance and/or otherwise interfering with Seneca's operations within the Township; and
- k. Grant such other relief as this Court shall deem just and equitable under the circumstances.

Respectfully submitted,

February 18, 2015

/s/ Megan S. Haines

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