



# The PIOGA press

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## Federal court invalidates portions of a local ordinance that banned the use of underground injection wells

On October 14, the United States District Court for the Western District of Pennsylvania invalidated several sections of a Grant Township, Indiana County, local ordinance that was enacted in an attempt to prevent an oil and gas operator from operating an underground injection well that had been permitted by the United States Environmental Protection Agency (EPA). In *Pennsylvania General Energy Company, L.L.C. v. Grant Township*, Civil Action No. 14-209, 2015 U.S. Dist. LEXIS 139921 (W.D. Pa. Oct. 14, 2015), Pennsylvania General Energy Company, L.L.C. (PGE) filed a federal complaint against Grant Township to challenge the constitutionality, validity and enforceability of a self-described Community Bill of Rights Ordinance. Babst, Calland, Clements and Zomnir, P.C. in Pittsburgh represents PGE in this case.

PGE drills for and produces natural gas in Grant Township and other municipalities in Pennsylvania. PGE sought to reclassify an existing gas production well located in Grant Township as an underground injection well for disposal of produced fluid. EPA is responsible for implementing the Underground Injection Control (UIC) Program under the federal Safe Drinking Water Act, and for regulating the construction, operation, permitting and closure of injection wells that place fluids underground for disposal. Produced fluid can be treated and/or disposed of at commercial treatment facilities or injected into permitted UIC wells. When deciding whether to issue a UIC permit, EPA must determine whether the proposed injection operation will safely protect underground sources of drinking water from the subsurface injection of fluids. In this regard, UIC permits, like the one issued to PGE, condition subsurface operations on stringent well integrity and operational requirements.

On March 19, 2014, EPA issued to PGE a UIC permit to authorize the injection of brine and produced fluids into the former production well. The permit subsequently was unsuccessfully appealed to the United States Environmental Appeals Board. Shortly thereafter, on June 3, 2014, Grant Township adopted the ordinance, designed to prevent PGE's efforts to pursue its



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rights under the EPA-issued UIC permit. The ordinance states that it is "establishing a Community Bill of Rights for the people of Grant Township, Indiana County, Pennsylvania, which prohibits activities and projects that would violate the Bill of Rights, and which provides for enforcement of the Bill of Rights." The ordinance expressly prohibits any corporation or government from depositing within Grant Township waste from oil and gas extraction activities and invalidates any state or federal injection well permit. "Depositing of waste from oil and gas extraction" is defined broadly in the ordinance to include the following:

The depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, "produced water," "fract [sic] water," tailings, flowback or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

The ordinance likewise broadly defines "extraction" to mean "the digging or drilling of a well for the purposes of exploring for, developing or producing shale gas, oil, or other hydrocarbons." Corporations that violate or seek to violate the ordinance "shall not be deemed to be 'persons,' nor possess any other legal rights, privileges, powers, or protections," and are denied the right to challenge the ordinance on preemption or other grounds.

The operation of oil and gas wells unavoidably and necessarily requires engaging in the disposal of waste from oil and gas extraction. Any producing oil and gas well will also produce brine and other fluids, which must be properly disposed

of by the operator. One lawful means of disposing of these produced fluids is by using a permitted underground injection well, which is what PGE sought to do in Grant Township.

In response to the passage of the ordinance, PGE filed a complaint in the United States District Court in which it sought (i) a declaration that the ordinance is unconstitutional and invalid under state law, (ii) an injunction to prohibit Grant Township from enforcing the ordinance, and (iii) compensatory damages, attorneys' fees and costs. PGE filed a motion for judgment on the pleadings in which PGE asked the District Court to enter judgment in PGE's favor as a matter of law based on the factual and legal averments in its complaint.

The court granted in part PGE's Motion for judgment on the pleadings. The court held that the provisions of the ordinance that make it unlawful for a corporation to deposit oil and gas extraction waste and the provisions that nullify state or federal permits were invalid and unenforceable under the Second Class Township Code because Grant Township exceeded the scope of its authority under that law. The court also struck down these provisions as being exclusionary because they banned a legitimate use.

The district court also invalidated the provisions of the ordinance that attempted to strip corporations of their legal rights and prevent them from challenging the ordinance in court as being preempted by the Pennsylvania Limited Liability Company Law (which expressly provides that corporations shall have the legal capacity of natural persons to act) and the Second Class Township Code (which expressly provides that persons aggrieved by a local ordinance have the right to challenge the legality of the offending ordinance in court). The court declined to rule on the constitutionality of the ordinance at this time because it found that the challenged provisions were invalid under state law. The court enjoined Grant Township from enforcing the invalidated sections of the ordinance and will now take up the issues of the constitutionality of the ordinance and other liability issues, as well as PGE's damages, including attorneys' fees and costs.

Grant Township is represented on a pro bono basis by Community Environmental Legal Defense Fund (CELDF). CELDF has sought to convince communities across the country to enact self-styled community bill of rights ordinances that are designed to stop activities such as oil and gas extraction and management of wastes from those activities. As in the *PGE v. Grant Township* case, CELDF has urged courts to modify or eliminate well-established legal principles. The Western District of Pennsylvania rejected CELDF's effort on the basis of decades-long precedent. With respect to the remaining issues of damages, attorneys' fees and costs, CELDF will again face century-old legal precedent interpreting and applying constitutional rights under the Supremacy Clause and the First and Fourteenth Amendments to the United States Constitution. In this regard, the United States Supreme Court has long held that corporations are deemed to be "natural persons" under the United States Constitution with the same constitutional rights as individuals.

*If you have questions regarding this decision, please contact Kevin J. Garber (412-394-5404 or [kgarber@babstcalland.com](mailto:kgarber@babstcalland.com)), James V. Corbelli (412-394-5649, [jcorbelli@babstcalland.com](mailto:jcorbelli@babstcalland.com)) or Alana E. Fortna (412-773-8702, [afortna@babstcalland.com](mailto:afortna@babstcalland.com)).*