

In A Town's Fight Against Gas Drilling, Preemption Is Key

By **Garrett Trego**

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Western District of Pennsylvania Magistrate Judge Susan P. Baxter reiterated in an opinion issued recently that certain municipal laws prohibiting natural gas drilling are preempted by the federal Safe Drinking Water Act and the Pennsylvania Oil and Gas Act. *Seneca Res. Corp. v. Highland Twp. et al.*, No. 16-cv-289 (W.D. Pa. Sept. 29, 2017) (“Seneca III”).

The decision is the result of a complex procedural and political history in the township, and it reinforced an earlier settlement and consent decree between the same parties. In its opinion, the federal court provided guidance regarding the interplay among federal, state and local authority over energy development in Pennsylvania.



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The dispute between Seneca and the township originated in 2014, when the U.S. Environmental Protection Agency granted Seneca a permit for an underground injection control well in Highland Township, a town of 492 residents as of the 2010 census, in Elk County, Pennsylvania. During Seneca’s federal application process, the township adopted a local “community bill of rights ordinance” that prohibited the deposition, storage, treatment or injection of materials that have been used in the extraction of natural gas into the land, air or water of the township.

Seneca sued the township to overturn the ordinance, and ultimately entered a settlement and consent decree with the township’s board of supervisors declaring this portion of the ordinance invalid. *Seneca Res. Corp. v. Highland Twp.*, No. 15-060 (W.D. Pa. Aug. 2016) (“Seneca I”).

Following the board’s settlement of the previous litigation, the township’s residents voted through a referendum for the adoption of a new Home Rule Charter that included similar provisions to the previously invalidated ordinance. In particular, the Home Rule Charter: (1) declared unlawful the deposition of any waste from oil and gas extraction within the township (Section 401); (2) declared any state or federal permit to be invalid if the permit would violate the rights asserted by the charter (Section 404); and (3) revoked the “personhood” of any corporation that sought to violate the provisions of the charter (Section 501). *Seneca III* at 3-4.

Seneca once again sued the township, seeking invalidation of the new Home Rule Charter. *Id.* at 4. In an odd twist of civics, the members of the board of supervisors did not oppose Seneca’s lawsuit and

conceded that portions of the referendum and Home Rule Charter were invalid and unenforceable.

Another local governmental entity, the Municipal Authority (which controlled the water supply for a portion of the township), opposed Seneca's lawsuit; however, Magistrate Judge Baxter denied the Authority's petition to intervene, determining that the Authority did not have a unique legal interest in defending the new Home Rule Charter. *Seneca Res. Corp. v. Highland Twp. et al.*, No. 16-289, 2017 U.S. Dist. LEXIS 152738, at *14 (W.D.Pa. Sept. 20, 2017) ("Seneca II").

Denial of the Authority's petition to intervene left the township's board of supervisors to defend a position contrary to their previous settlement of Seneca I. Though the Home Rule Charter was in a different form than the ordinance invalidated by Seneca I, the township supervisors were constrained to concede that based on Seneca I, Sections 401, 404 and 501 of the Home Rule Charter were invalid and unenforceable. *Seneca III* at 4-5.

With the board of supervisors' concessions in hand, Seneca moved for judgment on the pleadings against the township. The court issued an opinion in support of its conclusions, though there was some question as to whether an opinion would be required where a defendant did not oppose a plaintiff's dispositive motion. *Seneca III* at 6.

The court found that Section 401, which declared any deposition of oil and gas waste in the township to be unlawful, was preempted by state and federal law, and that it violated additional laws related to the authority of local governments. First, the court held that the federal Safe Drinking Water Act preempted Section 401 because Section 401 presented an obstacle to the law's stated goals. *Id.* at 10.

Next, it found that the same provision was expressly preempted by the terms of the Pennsylvania Oil and Gas Act, which stated that "except with respect to local ordinances adopted pursuant to the Municipalities Planning Code and ... the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations ... are hereby superseded." *Id.* at 11.

Additionally, the court found that Section 401 was invalid because the provision amounted to illegal exclusionary zoning, *id.* at 16, and because the township lacked the legislative authority to engage in zoning decisions, *id.* at 13.

The court also addressed Section 501, which attempted to strip any corporation in violation of the Home Rule Charter of its legal "personhood." While the court likely could have invalidated the provision on numerous additional grounds, the court determined that Section 501 violated Seneca's First Amendment right to petition the government for redress, *id.* at 17, and that it violated Seneca's substantive due process rights by arbitrarily curtailing the corporation's constitutional protections, *id.* at 20.

The court finally determined that Sections 401, 404 and 501, along with a slew of related provisions of the Home Rule Charter, must be severed from the charter. *Id.* at 23.

The legal saga between Seneca and the lightly-populated Highland Township is instructive for practitioners engaged in the ongoing debate among municipalities, environmental rights organizations and the natural gas industry. The township's approach in this case, which flipped the principles of federalism upside-down, was extreme and ultimately unsuccessful, but it did delay progress for at least three years — from the date that the permit was issued to the date of the federal district court's latest decision.

The citizens of the township were creative in their tactics, even when the primary municipal government had conceded its opposition, although no doubt that creativity came at a cost to the township's coffers. For the industry, this federal decision strengthens their hand, and may serve to expedite similar disputes in the future, sending the opposition back to its creative drawing board.

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