

# TEXAS LAWYER

MARCH 10, 2014

An ALM Publication

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## OUT of ORDER

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### High Court Weighs Issue of Subsurface Trespass

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The Texas Supreme Court is weighing whether to recognize a cause of action for subsurface trespass by migrating waste from an injection well. The high court heard oral argument on Jan. 7 in *Environmental Processing Systems LC v. FPL Farming Ltd.*, and the decision potentially will affect the use of injection wells by the oil and gas industry, as well as other industries throughout Texas.

The case has a long history, with two decisions by Beaumont's Ninth Court of Appeals and one Texas Supreme Court ruling, plus a related administrative dispute going to Austin's Third Court of Appeals. The case began its march to its second consideration by the Texas Supreme Court in 2006 when FPL Farming sued Environmental Processing Systems for trespass, negligence and unjust enrichment, noted the Supreme Court's first ruling in *FPL*

*Farming Ltd. v. Environmental Processing Systems* (2011). FPL alleged that EPS injected wastewater under its property that migrated to FPL's adjoining subsurface property. FPL based this allegation on modeling conducted by EPS as part of the deep well injection permitting process that projected when the plume might migrate under FPL's property, according to *FPL Farming Ltd. v. Texas Natural Resources Conservation Commission*, a related case decided by Austin's Third Court of Appeals in 2003.

EPS injected the wastewater using a mile and a half deep Class I injection well, which was permitted by the TNRCC, a predecessor agency of the Texas Commission on Environmental Quality, according to the Supreme Court's 2011 decision in *FPL Farming Ltd. v. Environmental Processing Systems*.

Class I injection wells are used to dispose of waste by injecting it below the lowest underground forma-

tion containing drinking water. Class II injection wells are used for, among other things, enhanced recovery of oil or natural gas.

After a trial on the merits, the jury found against FPL on all of its claims, and the judge entered a take-nothing judgment in favor of EPS, wrote the Texas Supreme Court.

On appeal in *FPL Farming Ltd. v. Environmental Processing Systems*, Beaumont's Ninth Court of Appeals found in 2009 that, as a matter of law, no subsurface trespass occurred because the TNRCC authorized the subsurface injections.

The Texas Supreme Court in 2011 reversed and remanded to the Ninth Court, ruling that permit holders are not shielded from civil tort liability resulting from actions governed by the permit. "[T]he mere fact that an

administrative agency issues a permit to undertake

an activity does not shield the permittee from third party tort liability

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## The decision also might affect the legal status of the subsurface movement of fluids used in hydraulic fracturing.

stemming from consequences of the permitted activity,” the court wrote. However, the Supreme Court explicitly did not address whether subsurface wastewater migration can constitute a trespass.

On remand, the Ninth Court in 2012 held, among other things, that FPL has a cause of action for subsurface trespass at common law.

The Texas Supreme Court granted review and is poised to determine whether there is a cause of action for subsurface trespass.

### At Stake

EPS contends in its brief to the high court that the existence of such a cause of action is contrary to both public policy and legal precedent holding that property owners such as FPL may not exclude—and neighboring property owners such as EPS may not prevent—subsurface-fluid migration. According to EPS and its amici in their briefs at the high court, allowing such a cause of action would have a detrimental

effect on the oil and gas industry, as well as numerous other industries in Texas that utilize injection wells; the court should balance that detrimental effect against FPL’s lack of any reasonable expectation of use of the briny water into which the waste might migrate.

FPL responds in its brief to the high court that it should have a cause of action for subsurface trespass because, among other reasons: FPL has a property right to the subsurface; EPS should not be allowed to store wastewater under FPL’s land for free; FPL is being deprived of the full value of its property; the cost of obtaining subsurface leases would not be unduly prohibitive for EPS and others that utilize injection wells; other industries, such as hospitals, contribute more to the public welfare yet must pay for the land they use; and this case implicates only Class I injection wells and not Class II or other classes of wells.

During oral argument, many of the questions posed by the court concerned the application of traditional trespass rules to the subsurface context.

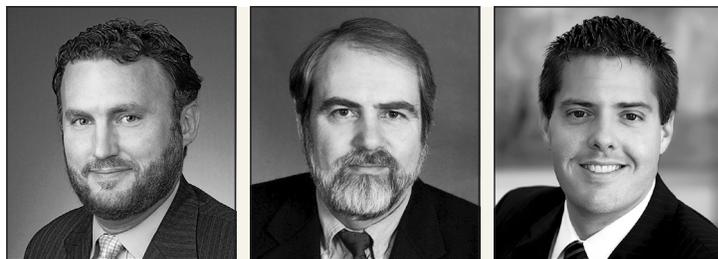
For example, Justice Debra Lehmann asked EPS: “So, if someone were to come into your garage, for example, and start storing their materials in your garage without your permission, and that’s a trespass, clearly you’d

have a cause of action, right? And isn’t this the same thing?”

And Justice Eva Guzman asked FPL: “Do traditional trespass rules work, though, given the uncertainties of the subsurface and different competing industries, particularly the oil and gas industry and their use of it? Can we, in this case, rely on traditional trespass rules to find harm?”

It is uncertain whether the court will decide this case based on traditional trespass rules or some other rationale (e.g., establishing a balancing test in which courts balance the public or economic interest in the subsurface activity against the actual harm to the plaintiff).

Moreover, it is unclear whether the court’s ultimate decision will apply only to Class I injection wells or more broadly to other classes of wells widely used in oil and gas operations. The decision also might affect the legal status of the subsurface movement of fluids used in hydraulic fracturing. All interested parties, including possible plaintiffs and defendants alike, should keep their eyes out for the decision.



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