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Texas Supreme Court Rules That an Injection Permit Does Not Preclude a Subsurface Trespass Claim

By [Mike Nasi](#), [Ali Abazari](#) and [Ben Rhem](#)

Introduction

On August 26, 2011, the Texas Supreme Court reversed and remanded a decision by the 9th Court of Appeals that determined that holders of underground injection well permits issued by the Texas Commission on Environmental Quality (TCEQ) are immune from civil liability.¹ The Appellate Court had determined that the plaintiff in this case was barred from recovering in tort for subsurface trespass damages because the wells had been authorized by the TCEQ.

In reversing the Appellate Court's decision, the Supreme Court held that merely obtaining a permit to conduct regulated activities from the appropriate state regulatory agency does not shield the permit holder from civil liability. The Supreme Court relied on provisions in the Injection Well Act that specifically address the issue, stating, "[t]he fact that a person has a permit issued under this chapter does not relieve him from any civil liability,"² the general view of the legal effect of an administrative permit, and prior case law.

The decision by the Supreme Court did not seek to address the merits of the trespass claim. The Court made no determination as to whether the injected wastewater migrated onto the plaintiff's property and contaminated the drinking water supply. The court only addressed the threshold issue of whether obtaining a permit to drill an injection well discharges the holder from civil liability for conduct authorized by the permit.

Although there are uncertainties associated with the quantification of trespass damages in such cases, this holding will require prospective underground injection permittees to consider and analyze the risk of tort claims, and perhaps take measures to avoid the possibility of such actions arising.

Facts

FPL Farming, Ltd (FPL) owns two tracts of land, one of which borders the land on which Environmental Processing System, L.C. (EPS) operates a wastewater injection well. In 2006, FPL filed suit against EPS alleging trespass, negligence, and unjust enrichment, and seeking a permanent injunction. The trial court found for EPS and FPL appealed the case to the Beaumont Court of Appeals.

Before addressing the merits of the appeal, the Appellate Court considered whether FPL could pursue a trespass claim when the TCEQ had approved the permit and TCEQ knew the waste would migrate into the deep subsurface underlying FPL's property. The Appellate Court determined that FPL could not pursue a trespass

claim in this situation, stating, "[W]hen a state agency authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts."³

Conflicting Appellate Decisions

Prior to filing suit against EPS for trespass, FPL had filed suit against TCEQ for granting an amendment to EPS' permit in 2003. The Austin Court of Appeals upheld the decision by the TCEQ to grant the permit amendments. However, the Court also stated that, "should the waste plume migrate to the subsurface of FPL Farming's property and cause harm, FPL Farming may seek damages from EPS."⁴ The Amarillo Court of Appeals relied on that same logic, when it held in *Berkley v. Railroad Commission of Texas*, that "securing a permit does not immunize the recipient from the consequences of its actions if those actions affect the rights of third parties."⁵

Thus, the decision by the Beaumont Court of Appeals, determining that holders of wastewater injection well permits issued by the Texas Commission on Environmental Quality (TCEQ) are immune from civil liability, is in direct conflict with the decisions issued by the Austin and Amarillo Courts.

Holding

The Supreme Court reversed the decision by the Beaumont Court and reiterated the reasoning used by the Austin and Amarillo Courts, stating, "a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit." The Supreme Court relied on provisions in the Injection Well Act and TCEQ Rules that specifically address the issue. Section 27.104 of the Injection Well Act states, "the fact that a person has a permit issued under this chapter does not relieve him from any civil liability."⁶ Furthermore, TCEQ rules regarding injection wells state, "the issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations."⁷

In addition to the statutory and regulatory provisions discussed above, the court also relied on previous judicial decisions regarding the legal effect of an administratively granted permit. In *Magnolia Petroleum Co. v. Railroad Commission*, the Court stated that a permit is a "negative pronouncement" that "grants no affirmative rights to the permittee."⁸ Instead of granting rights to the permittee, the permit merely "removes the government imposed barrier to the particular activity requiring a permit."⁹ In other words, when an agency grants a permit, it means the agency is satisfied that the applicable regulations will be complied with and therefore, it will not prohibit the applicant from conducting the permitted actions. It does not, however, grant the permit holder immunity from tort liability.

The Court analogized the situation to that of a state issued driver's license. The issuance of a driver's license permits the driver to drive legally, but not on his neighbor's lawn.¹⁰ Similarly, when a health authority issues a permit to operate a restaurant, and a patron gets sick from eating at the restaurant, the fact that the restaurant was permitted does not preclude the patron from recovering against the restaurant.¹¹

Conclusion

The Court holds that a permit issued under the Injection Well Act does not shield permit holders from civil tort liability that may result from consequences of the permitted act. Permit holders should therefore evaluate the potential risk associated with third party claims as a result of the permitted action, and should take proactive steps to limit any liability.

If you have any questions regarding this e-Alert, please contact **Mike Nasi** at 512.236.2216 or mnasi@jw.com, **Ali Abazari** at

512.236.2239 or aabazari@jw.com, or **Ben Rhem** at 512.236.2012 or brhem@jw.com.

¹FPL Farming Ltd. v. Env'tl. Processing Sys., L.C., No. 09-1010, slip op. at 2 (Tex. August 26, 2011).

²TEX. WATER CODE § 27.104.

³FPL Farming Ltd. v. Env'tl. Processing Sys., L.C., 305 S.W.3d 739, 744-45 (Tex. App.—Beaumont 2009).

⁴FPL Farming, Ltd. v. Tex. Nat. Res. Conservation Comm'n, 2003 WL 247183 at *5.

⁵Berkley v. R.R. Comm'n of Texas, 282 S.W.3d 240, 243 (Tex. App.—Amarillo 2009).

⁶TEX. WATER CODE § 27.104

⁷30 TAC 305.122(c).

⁸Magnolia Petroleum Co. v. R.R. Comm'n, 170 S.W.2d 189, 192 (1943)

⁹FPL Farming Ltd. v. Environmental Processing Systems, L.C., No. 09-1010, slip op. at 7 (Tex. August 26, 2011)

¹⁰*Id.* at 6 (Tex. August 26, 2011) (citing *Berkley*, 282 S.W.3d at 243).

¹¹*Id.* at 7-8 (citing Austin City Code § 10-3-61).

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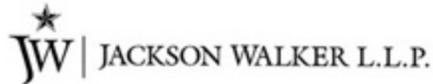
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