

Drill Texas Drill!: Surface Rights And Subsurface Effluent

Law360, New York (December 20, 2013, 6:24 PM ET) -- The Texas Supreme Court is considering whether deep injection well effluent that migrates to an adjoining landowners' property constitutes an actionable trespass. *Environmental Processing Systems LC v. FPL Farming Ltd.*, No. 12-0905 (Tex. S. Ct.)(oral argument scheduled Jan. 7, 2014). The case involves a state-permitted wastewater disposal well, but could have implications for oil and gas drilling and other underground energy disposal measures like carbon capture and sequestration.

If the court were to rule in favor of the landowner, oil and gas exploration and production companies ("E&P companies") could face significantly increased costs for disposal of wastewater generated by their operations. In that event, E&P companies could be forced to relocate wells, purchase rights allowing them to continue operating, and/or develop and construct alternative disposal and recycling methods.

If the court were to rule that such activities are not an actionable trespass, adjoining landowners could still have recourse, but only if they were to suffer actual damage. While the equities seem to tilt in favor of the E&P companies, established principles of common law trespass make this a close case, certainly one well worth watching.

Factual and Procedural Background

Environmental Processing Systems ("EPS") owns and operates disposal operations in Liberty County, Texas. EPS obtained permits from the Texas Commission on Environmental Quality ("TCEQ") to inject nonhazardous wastewater into the Frio formation, a groundwater aquifer more than 7,000 feet below surface level. The Frio formation is extremely saline, approximately 146,000 mg/l and, as constituted, is unusable.

The adjoining landowner, FPL Farming ("FPL"), owns and operates a rice farming operation and concedes that EPS' injection of nonhazardous wastewater had not resulted in migration to the surface, affected FPL's drinking water, or interfered with FPL's use of the surface of its property. FPL alleged that the potential contamination of its groundwater from EPS' operations could prevent it from fully realizing the value of its property in the future.

The dispute between EPS and FPL dates back to 1996, when EPS pursued permitting at the TCEQ and FPL challenged the permit. Eventually, EPS paid FPL \$185,000 for FPL to withdraw its challenge. In 1999, EPS sought to amend its permit, FPL challenged the amendment, and lost in administrative and judicial proceedings. See *FPL Framing Ltd. v. Texas Natural Resource Conservation Comm'n* in 2003. In 2006, FPL filed an action in the 75th District Court in Liberty County, which resulted in a jury verdict and take-nothing judgment in favor of EPS. FPL appealed to the Court of Appeals for the Ninth Circuit of Texas at

Beaumont, which affirmed the take-nothing judgment, holding that FPL could not recover for trespass because TCEQ had authorized EPS' activities. *FPL Farming Ltd. v. Env'tl Processing Sys LC.*, 305 S.W.3d 739 (Tex App. — Beaumont 2009).

The Texas Supreme Court agreed to review the Beaumont court's decision and reversed, holding that the mere possession of a TCEQ permit does not provide immunity from civil liability. *FPL Farming Ltd. v. Env'tl. Processing Sys LC.*, 351 S.W. 3d 306 (Tex. 2011). The court also noted that "we do not decide today whether subsurface wastewater migration can constitute a trespass, or whether it did in this case." *Id.* at 314-15. On remand, the Court of Appeals held that deep subsurface wastewater migration can constitute an actionable trespass because FPL had an economic interest in protecting its deep subsurface aquifer from EPS' disposal wastewater. *FPL Farming Ltd. v. Env'tl Processing Sys LC.*, 383 S.W. 3d 274 (Tex App. — Beaumont 2012). The Court of Appeals further held that the trial court erred in placing the burden on FPL to prove that EPS entered onto FPL's property without consent. *Id.* at 284.

The Parties' Contentions

The positions advanced by EPS and FPL collide on many different levels, with each seeking to portray its argument as the one in line with "traditional" practice. But, this case truly seems to be one of first impression.

EPS contends that Texas precedent provides that the right to exclude others from the subsurface is limited to the reasonable expectations of the owner's use. Relying on a series of Texas Supreme Court decisions dealing with the "rule of capture," in the context of the extraction of minerals by the oil and gas industry, EPS asserts that the court must balance public policy and private interests in determining whether migration of fluids into deep subsurface aquifers is an actionable trespass. EPS concludes that the public interests in the extraction of minerals far exceeds the interests of a landowner in an aquifer deep below the surface to which it has no use.

FPL argues that both Texas statutes and the established law of trespass support its right to preclude migration of EPS' effluent into its property. First, FPL points to the Texas water code, which provides that "a landowner owns the groundwater below the surface of the landowner's land as real property." Tex. Water Code Ann. § 36.002(a). Second, FPL relies upon numerous judicial decisions ruling that a landowner may recover for trespasses to the subsurface below its property.

The Practicalities of the Issues Before the Court

The issue before the court is akin to disputes over "air rights." While a landowner may prohibit some trespasses immediately above its property, the landowner cannot prohibit commercial airline flights several thousand feet above. Left to be decided here is whether the migration of wastewater into an unusable brackish aquifer 7,000 feet below the surface is more like an obstruction near the surface or commercial airliners at 20,000 feet.

The Texas Supreme Court has a number of options if it is inclined to rule in EPS' favor, ranging from a broad ruling that the migration of contaminants into unusable groundwater on the property of another is not a trespass to more narrow rulings confined to the specific facts of this case. An example of the latter would be the migration of nonhazardous contaminants into an aquifer with greater than 10,000 mg/l salinity is not an actionable trespass.

Similarly, the court could rule that an action for trespass with respect to deep subsurface groundwater

does not lie unless the landowner can prove actual damages. As EPS argues, landowners like FPL would not be left without a remedy in the event the court were to issue a broad ruling that an action for trespass does not lie. If the landowner suffered damages, it could bring an action for negligence.

Even if the court were to rule in FPL's favor, to recover on claims of trespass, a landowner would face a number of difficult matters of proof. For example, landowners would have to prove that wastewater injected deep into the subsurface, or the fluids from hydraulic fracturing operations, migrated under the landowner's property. Proof of such issues would likely require expert testimony, sampling and monitoring data, and reliable modeling outputs since direct proof of migration is likely to be difficult and expensive to obtain.

Finally, whether it would be difficult to prevail or not, parties opposing either wastewater disposal or exploration and production activities could rely on a ruling in favor of FPL to use the judicial system to stop or delay such activities.

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