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JUST A CLEAN BLUE FLAME? ENVIRONMENTAL ISSUES IN THE BARNETT SHALE

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I. INTRODUCTION: HOW CLEAN IS THE BLUE FLAME?

Like the prospectors scouring the hills for gold in "The Treasure of the Sierra Madre," the old-time Fort Worth oil and gas operators never suspected that the mother of all lodes was right under their feet. Through the happy coincidence of price increase and technological advancement, however, significant deposits of clean-burning natural gas were located in and around Fort Worth, brought to the surface, gathered into pipelines, and sent on to the burners. Almost overnight, people who grew up dreaming of the gusher at Spindletop and the derrick-filled lots in Kilgore found themselves sharing their streets with tank trucks hauling saltwater waste and pick-ups bearing the logos of the newest barons of the Barnett Shale gas boom. The clean blue flame of relatively accessible, economical, and environmentally friendly natural gas brought a return to the oil patch for Fort Worth and many other cities located near shale deposits. Development of the Barnett Shale also illuminated conflicts that arise when twenty-first century urban life intersects with oil and gas exploration and production. The flame was clean and blue for the ultimate customer, but getting it to that point was neither easy for the gas producer nor free of hazard to surrounding persons or property.

This paper addresses current environmental law issues affecting the Barnett Shale and the businesses and people who are impacted by development activities in the play. It will look first at recent scientific studies suggesting that production of natural gas in the Dallas-Fort Worth Metroplex may have a greater impact on the region's air pollution challenges than previously thought. The article next examines air permitting requirements relating to gas production equipment and facilities. The article discusses oil and gas disposal wells and recent cases examining regulatory issues affecting permits for these wells. Finally, the paper spotlights two common law causes of action asserted in cases between landowners and companies engaged in activities related to the Barnett Shale and the impact of administrative jurisdiction on common law claims.

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II. Scientific Debate Versus Legal Realities: Causes and Effects of Gas Production and Air Pollution

As if Ozone Action Days, Air Pollution Warnings, and concerns about even warmer global weather did not already cause enough worries for city dwellers, a dispute arose in early 2009 concerning the effect of oil and gas drilling, completion, and production in the Barnett Shale on air quality in the Dallas-Fort Worth Metroplex (DFW) and surrounding counties. Like all good battles in environmental law, the two sides of the debate armed themselves with well-qualified experts. Critics concerned with the impact of oil and gas activities on DFW air pollution relied on a recent study published by Al Armendariz, Ph.D., a research associate professor in the Department of Environmental and Civil Engineering at Southern Methodist University, which was commissioned by the Environmental Defense Fund.[1] More skeptical observers of potential air impacts took comfort in the rebuttal to the Armendariz report generated by Al Ireland, Ph.D., Executive Director of the Barnett Shale Energy Education Council (BSEEC). The BSEEC bills itself as a "community resource that provides information to the public about gas drilling and production in the Barnett Shale region in North Texas."[2]

Released to the public on January 23, 2009, the Armendariz report generated quite a stir in local environmental and industry circles primarily because of its conclusion that "[e]missions of NO_x [nitrous oxide] and VOC [volatile organic compounds] in the summer of 2009 from all oil and gas sources in the Barnett Shale 21-county area will exceed emissions from on-road mobile sources in the D-FW metropolitan area by more than 30 tons per day (tpd) (307 vs. 273 tpd)."[3] The report also concluded that emissions of NO_x and VOC from Barnett Shale compressor engines or condensate tanks alone would amount to many times the anticipated emissions of similar compounds by all of the airports in the DFW Metroplex.[4] Less publicized, but potentially more important to air quality than the report's conclusions, were Professor Armendariz's proposed changes to drilling, completion, and production methods: (1) extend the limitations on NO_x production by engines that exceed fifty horsepower to all of the counties in the Barnett Shale, not just the nine DFW Metro counties; (2) use electric motors, not gas power or other internal combustion engines, to run

1. Al Armendariz, Emissions from Natural Gas Production in the Barnett Shale Area and Opportunities for Cost-Effective Improvements, *available at* http://www.edf.org/documents/9235_Barnett_Shale_Report.pdf. While the Texas Commission of Environmental Quality has not taken a formal position on the Armendariz study, it has issued informal guidance to the media which is available through the TCEQ.

2. Barnett Shale Energy Education Council, About BSEEC, http://www.bseec.org/index.php/content/about/bseec/ (last visited July 7, 2009).

3. Armendariz, *supra* note 1, at 25.

4. *Id.*

compressors; (3) employ vapor recovery units on oil and condensate tanks; (4) use enclosed flares on tanks; (5) employ so-called green well completion technologies; (6) implement advanced leak detection and repair procedures for production wells, processing, and transmission facilities; and (7) eliminate gas-actuated pneumatic devices.[5]

In response to the Armendariz report, the BSEEC released a brief, but substantive, rebuttal of the conclusions and methodology of the study.[6] While agreeing that oil and gas activities in the Barnett Shale impact air quality, the BSEEC rejected the Armendariz report's conclusion that those impacts exceed the total of mobile sources and airports combined. The primary thrust of the criticism was that the impact of Barnett Shale oil and gas activities must not have contributed as much to air pollution as Armendariz suggested because eight-hour ozone levels in the nine-county DFW non-attainment area decreased since 2000 just as the number of Barnett Shale wells drilled in those counties dramatically increased year over year.[7] The BSEEC suggested that the Armendariz report overstated its conclusions because of three fatal errors.[8] First, the report assumed that Barnett Shale wells produced more condensate than they actually did.[9] Second, it assumed that condensate-producing wells produced the same amount of VOCs per barrel of condensate regardless of pressure, and it overstated the effect of hot weather on VOC production.[10] Third, wind pattern data suggested that any impact on ozone levels from oil and gas activities in the western counties of the Barnett Shale, such as Denton, Wise, and Parker, would be minimal since the prevailing wind patterns would be expected to carry emissions away from, not toward, the heart of the DFW Metroplex.[11]

Setting aside personal or client-driven allegiance to one of the battle lines, it seems clear that oil and gas activities in the Barnett Shale affect air quality in the local region and must be included in any plans to address air pollution in North Texas. Supplemental data submitted by the Texas Commission on Environmental Quality (TCEQ) to Region VI of the Environmental Protection Agency concerning the Dallas-Fort Worth Eight Hour Ozone State Implementation Plan confirm that emissions from compressors in the Barnett Shale are not an inconsequential potential source of ozone in the Metroplex.[12] The im-

5. *Id.* at 28–36.

6. Ed Ireland, Air Quality and the Barnett Shale, Barnett Shale Energy Education Council (2009), http://www.bseec.org/index.php/content/news_detail/air_quality_and_the_barnett_shale/.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Letter from Susana M. Hildebrand, P.E., Dir., Air Quality Div., Tex. Comm'n on Envtl. Quality to Thomas Diggs, Assoc. Div. Dir. for Air Programs,

plementation of the new 50 horsepower engine emission limits should address at least some of the concerns for emissions coming from compressor installations. Finally, the suggestions for modification of Barnett Shale gas facilities contained in the Armendariz report and elsewhere should also contribute to a reduction in emissions or at least slow the rate of growth in emissions that are linked to gas production in and near the DFW Metroplex area. The ultimate winner of the scientific battle between gas production critics and supporters is yet to be determined, but the issues relating to air pollution raised by the Armendariz report and responses such as those made by the BSEEC will continue to impact activities in the Barnett Shale for years to come.

III. YOU HAVE TO HAVE A PERMIT: REGULATORY CONTROLS ON SOURCES OF AIR POLLUTION FROM GAS FACILITIES

Although owners of new oil and gas facilities potentially impacting air quality always have the option of applying for a regular permit from the TCEQ, owners of such facilities generally seek an alternative path to regulatory compliance, either through a standard permit, a flexible permit, a permit by rule, or exemption from permitting due to the source or facility being classified as "de minimis."[13] A standard permit, as it relates to oil and gas, is one issued by the agency for a particular purpose.[14] A flexible permit allows for changes to be made at a facility without the necessity of obtaining a new permit, if the requirements of the regulation are met.[15] De minimis sources and facilities are governed by chapter 30, section 116.119 of the Texas Administrative Code and include facilities listed on the de minimis list and those that meet the requirements of the de minimis rule.[16]

The vast majority of oil and gas facilities comply with Texas air pollution regulations through operation of a permit by rule. Separate permits by rule exist for petroleum salt water disposal facilities,[17] oil and gas production facilities, including compressors and flairs,[18] temporary oil and gas facilities,[19] iron sponge gas treating units,[20] and pipeline metering, purging, and maintenance operations.[21] Each permit by rule contains specific requirements that must be met, and gen-

Envtl. Prot. Agency and Supp. (Apr. 23, 2008), http://www.tceq.state.tx.us/assets/public/implementation/air/sip/dfw/TCEQ_Response.pdf.

13. 30 TEX. ADMIN. CODE §§ 116.601, 116.710, 116.119, 106.351–.354, 106.355, 106.6(a) (2009).

14. *Id.* § 116.601.

15. *Id.* § 116.710.

16. *See id.* § 116.119.

17. *See id.* § 106.351.

18. *See id.* § 106.352.

19. *See* 30 TEX. ADMIN. CODE § 106.353 (2009).

20. *See* 30 TEX. ADMIN. CODE § 106.354 (2009).

21. *See* 30 TEX. ADMIN. CODE § 106.355 (2009).

erally sets emission limits beyond which the permit is inapplicable. It should be noted that an owner or operator may certify and register emission levels that exceed those generally provided in a permit by rule in certain circumstances under section 106.6(a).[22] One commentator has noted that "[t]his process . . . can also be used for some activities that don't qualify for permits by rule to avoid federal permits, because the difference between the potential emissions and the certified emissions may be sufficient to keep a source from being classified as a major source or a major modification."[23] Additionally, well tests do not require an air permit because the action of testing the productive capability of a well and similar activities do not qualify as "facilities" under section 382.003(6) of the Texas Health and Safety Code,[24] and only a "facility" must be permitted.[25]

IV. OIL AND GAS DISPOSAL WELLS OR HOW DO WE GET TO THE ELLENBERGER?

One of the more contentious interactions between people and oil and gas activities in the Barnett Shale concerns the installation of injection wells for saltwater or other petroleum waste disposal near residential or commercial properties. So long as commercial disposal wells were located in remote areas of the oil patch, neighboring landowners generally did not oppose or comment on proposed new permit applications. Perhaps this helps explain why the administrative approval rate for applications in the latest year reported, fiscal 2006, was approximately 80%.[26] When the proposed well locations moved closer to the city and developed residential and commercial properties, would-be neighbors took note and became aware of the regulatory framework that seemed to accommodate locations that some viewed as problematic.

As mentioned above, a permit by rule governs the emission of air pollutants by commercial saltwater disposal wells.[27] Railroad Commission Statewide Rule 9 governs disposal wells for saltwater and other oil and gas wastes.[28] The statutory basis for oil and gas related disposal wells is section 27.051 of the Texas Water Code.[29] Section 27.051(a) concerns the procedure followed by the TCEQ for consider-

22. 30 TEX. ADMIN. CODE § 106.6(a) (2009).

23. Robert T. Stewart, *Compliance with Air Emissions Standards in the Oil & Gas Industry*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, 22ND ANNUAL ADVANCED OIL, GAS & ENERGY RESOURCES LAW COURSE 5, 5 (2004).

24. TEX. HEALTH & SAFETY CODE § 382.003(6) (Vernon 2001 & Supp. 2008).

25. 30 TEX. ADMIN. CODE § 116.110(a) (2009).

26. *See* Railroad Commission of Texas, Saltwater Disposal Wells Frequently Asked Questions, http://www.rrc.state.tx.us/about/faqs/saltwaterwells.php (last visited July 20, 2009).

27. *See* 30 TEX. ADMIN. CODE § 106.351 (2009).

28. 16 TEX. ADMIN. CODE § 3.9 (2004).

29. TEX. WATER CODE ANN. § 27.051 (Vernon 2008).

ing permit applications involving commercial or municipal waste injection wells.[30] Section 27.051(b) lists several factors the Railroad Commission considers when acting on oil and gas waste disposal well applications.[31] These include whether: the use or installation of the well will be in the public interest; the well will not damage any oil, gas, or other mineral formation; the well, with proper safeguards, will be protective of ground and surface water; and the applicant has satisfactory financial assurance to support its application.[32]

What constitutes "the public interest" in section 27.051(b) of the Water Code is a vitally important question for people and businesses located in proximity to the proposed commercial disposal wells and for oil and gas producers and commercial disposal well operators. Two recent court of appeals cases consider this question and illustrate the administrative process involved in disposal well permitting and the judicial hurdle that participants in the permitting process face once the Railroad Commission grants the application.

In *Texas Citizens for a Safe Future and Clean Water and Popp v. Railroad Commission of Texas* (*Texas Citizens*),[33] the Austin Court of Appeals affirmed the district court's judgment that the Railroad Commission had not deprived disposal well permit opponents of their due process rights in granting the permit, but remanded the case to the Commission to more broadly consider the public interest as provided in § 27.051(b) of the Water Code.[34] In *Texas Citizens*, Pioneer Exploration applied to the Commission for a permit to convert a producing well in Wise County to an oil and gas disposal well.[35] Local residents, including James Popp and others affiliated with the Texas Citizens group, opposed the application.[36] One of the main objections raised by the opponents was the additional truck traffic that would accompany the commercial injection well.[37] Opponents argued that the expanded traffic on narrow, winding roads would create a safety hazard for pedestrians and children who often used the road.[38]

Following a contested case hearing in which the examiners considered all evidence presented by all parties, the hearing examiners issued a proposal for decision that recommended granting the permit application.[39] The examiners expressly found that the development of additional gas wells in the Barnett Shale necessitated expanded capac-

30. *See Id.* § 27.051(a).
31. *Id.* § 27.051(b).
32. *Id.*
33. Tex. Citizens for a Safe Future & Clean Water v. R.R. Comm'n of Tex., 254 S.W.3d 492 (Tex. App.—Austin 2007, pet. filed).
34. *Id.* at 494–95; *See also* TEX. WATER CODE. ANN. § 27.051(b).
35. *Tex. Citizens for a Safe Future & Clean Water*, 254 S.W.3d at 495.
36. *Id.*
37. *Id.* at 498.
38. *Id.*
39. *Id.* at 496.

ity for disposal of wastewater following fracing operations, and that the proposed well would serve the public interest for that reason.[40] The examiners also concluded that they and the Commission were without jurisdiction to consider the opponents' objection to the proposed permit based on increased traffic and resulting public-safety concerns.[41] The final order of the Commission adopted the examiners' findings of fact and conclusions of law and granted the permit application.[42] The opponents exhausted their administrative remedies without success and appealed to the trial court, which affirmed the Commission's order.[43]

As in all appeals of a final decision from an administrative agency like the Commission, the Austin Court of Appeals reviewed the Commission's order on a substantial evidence basis.[44] Under this standard of review, the court is constrained to affirm the administrative agency's order if substantial evidence exists to support the decision.[45] In such a case, "[t]he true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency."[46] As provided in section 2001.174(2) of the Texas Government Code,[47] reversal or remand of an order following a contested case hearing is required if the agency's findings, inferences, conclusions, or decisions: (1) violated a constitutional or statutory provision; (2) exceeded the agency's statutory authority; (3) resulted from unlawful procedure; (4) resulted from other legal error; (5) were not supported by substantial evidence based on a review of the administrative record as a whole; or (6) were arbitrary or capricious or resulted from an abuse of discretion.[48]

After reviewing the evidence and noting that the Commission expressly found that it was without jurisdiction to consider increased traffic as part of its public interest analysis, the Austin Court of Appeals concluded that the permit opponents had received due process in the permitting proceedings, but remanded the case to the Commission for failure to consider the increased traffic and public safety objections.[49] A reading of the majority and two concurring opinions reveals that the court struggled with the question of exactly what constituted "the public interest" in a statutory setting such as § 27.051(b) where the Legislature did not define the term or provide guidance on

40. *Id.* at 499.
41. *Id.*
42. *Id.* at 496.
43. *Id.*
44. *Id.*
45. TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2008).
46. Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).
47. § 2001.174(2).
48. *Id.*
49. *Tex. Health Facilities Comm'n*, 665 S.W.2d at 503.

what factors should be considered.[50] As Justice Pemberton wrote in his concurrence, "[a]bout all that can be said with clarity regarding the term "public interest" is that everyone is for it—at least according to one's own perception of it."[51] Likewise, Justice Waldrop observed in his concurring opinion that "[d]eciding whether a new injection well is a good idea includes the notion of deciding whether it is a good idea in the location proposed. This may, under certain circumstances, implicate traffic-related issues and the impact an injection well in the proposed location will have on those issues."[52]

Remaining after the *Texas Citizens* decision was the question of whether the Commission could satisfy its obligation to consider the public interest by simply receiving evidence of increased traffic, public safety concerns, or location objections along with traditional evidence of expanded oil and gas waste necessities without stating that it was without jurisdiction to consider the non-oil and gas industry considerations. The decision of the court in *Berkley v. Railroad Commission of Texas*, answers this question in the affirmative.[53]

Like the permit opponents in *Texas Citizens*, the plaintiffs in *Berkley* were owners of land near a proposed saltwater injection well, this time in Montague County, who unsuccessfully opposed the permit application before the Commission and in the trial court.[54] Unlike their *Texas Citizens* counterparts, however, the objectors in *Berkley* argued that the Commission's granting of the permit allowed a trespass, unconstitutionally took their property without compensation, resulted from a failure to follow proper procedures, and was based on insufficient evidence.[55] The Amarillo Court of Appeals overruled the property owners' arguments and affirmed the Commission's order.[56] In so doing, the court employed the substantial evidence standard: "we do not re-weigh the evidence, *see* TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2008), but rather assess whether substantial evidence (*i.e.* more than a scintilla) supported the ruling."[57] With reference to the question of public interest, the court cited *Texas Citizens* for the proposition that "safety concerns are indicia that should be considered by the Commission when assessing public interests."[58] At the administrative level in *Berkley*, the Commission had considered evidence offered by the opponents that additional trucks traveling to and from

50. *Id.* at 498–507.
51. *Id.* at 503 (Pemberton, J., concurring).
52. *Id.* at 506 (Waldrop, J., concurring).
53. Berkley v. R.R. Comm'n of Tex., 282 S.W.3d 240 (Tex. App.—Amarillo 2009, no pet.).
54. *Id.* at 241–42.
55. *Id.* at 242.
56. *Id.*
57. *Id.* (citing R.R. Comm'n of Tex. v. Torch Operating Co., 912 S.W.2d 790, 792 (Tex. 1995)).
58. *Id.* at 244.

the proposed well could cause public safety hazards and could damage surrounding properties.[59] In its findings, however, the Commission concluded that the permit was in the public interest because of the need for additional disposal capacity in the Barnett Shale Field, new gas wells would require fracing that produced wastes that had to be disposed of, new disposal wells would help reduce the disposal costs, and the well would not damage productive formations.[60] Although the Commission did not discuss the public safety objections in its order, the Amarillo court concluded that "the presence of such evidence alone does not permit us to overturn the decision if the latter nonetheless enjoys the support of substantial evidence."[61] Relying on the substantial evidence standard of review, the court continued that "we do not decide whether the ruling was correct but rather if it was reasonable given the evidence and law. Nor are we entitled to re-weigh the evidence. So, because evidence appears of record supporting the Commission's ruling and that ruling comports with the law, we cannot alter it."[62]

The *Berkley* court's discussion of the opponents' trespass and taking objections to the proposed permit also bears mention.[63] Permit opponents sometimes assume that an administrative agency should not grant a permit if the resulting activity will injure property at common law or damage or take property in violation of article I, section 17, of the Texas Constitution. In fact, the issue of whether a party can act under a permit without incurring civil liability is a separate inquiry from whether a permit should be issued. In denying the opponents' objections to the permit on trespass and constitutional taking grounds, the court in *Berkley* cited the opinion of the Austin Court of Appeals in the well-written and learned, but unpublished, opinion in *FPL Farming Limited v. Texas Natural Resource Conservation Commission*,[64] for the proposition that obtaining a permit for a disposal well does not relieve its holder of civil duties or liability for harm caused by exercise of the permit.[65] As the *Berkley* court concluded, "[t]he situation is much like getting a driver's license. While some may think that the license allows them to drive upon a neighbor's lawn, it does not. The home owner may still undertake effort to protect his yard or recover for damages suffered. Nor does the license allow them to ignore

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 242–43.
64. FPL Farming Ltd. v. Tex. Natural Res. Conservation Comm'n, No. 03-02-0477-CV, 2003 Tex. App. LEXIS 1074 *15–16 (Tex. App.—Austin, Feb. 6, 2003, pet. denied) (memo. op. not designated for publication).
65. *See* TEX. WATER CODE ANN. § 27.104 (Vernon 2008) ("[T]he fact that a person has a permit issued under [Chapter 47] does not relieve him from any civil liability"); 30 TEX. ADMIN. CODE § 305.122(c) (2009) (indicating that a consolidated permit does not authorize damage or injury to persons or property).

other laws and restrictions whether related to or unrelated to driving."[66]

Given the level of interest in the *Texas Citizens* and *Berkley* decisions by the citizen opponents, the Commission, and amici curiae, the Austin and Amarillo court opinions likely will not be the final word on the scope of the Commission's consideration of public interest in disposal well permit applications. Until the Texas Supreme Court decides the issue, permit applicants and opponents should not assume that the scope of the Commission's review of permit applications is limited to a narrow interpretation of public interest as was advanced by the Commission in *Texas Citizens*. Instead, the determination will likely involve a broad examination of all evidence presented that might bear on the impact of the proposed permit on human health and safety and the environment in addition to the traditional oil and gas industry implications of the proposed well and the remaining factors listed in § 27.051(b) of the Water Code.

V. Common Law Remedies for Oil and Gas Activities

If the statutory and administrative requirements for air and disposal well permits are sometimes confusing and strange to lawyers who do not practice in environmental law, the common law remedies available to aggrieved parties are familiar old favorites. Those remedies include negligence, negligence per se, strict liability, and intentional torts. Two of the most commonly asserted causes of action for damages due to oil and gas activities that cause harm to property are trespass and nuisance.

Trespass to real property, simply stated, includes any entry by a person on another's property without consent.[67] A party is entitled to at least nominal damages for a trespass, even if no actual damages are shown.[68] To recover damages, a claimant must show ownership or legal right of possession; physical, intentional, and voluntary entry by the defendant on claimant's property; and injury to the claimant caused by the entry.[69] In a trespass action at common law, exemplary damages could be recovered if there was sufficient evidence of willful, wanton, malicious, or evil intent.[70] To recover exemplary damages under the Texas Civil Practice and Remedies Code, the claimant must prove by clear and convincing evidence that the harm for which exemplary damages are sought resulted from fraud, malice, or gross negli-

66. *Berkley*, 282 S.W.3d at 243.

67. Gen. Mills Rests., Inc. v. Tex. Wings, Inc., 12 S.W.3d 827, 833 (Tex. App.—Dallas 2000, no pet.).

68. *Id.*

69. Wilen v. Falkenstein, 191 S.W.3d 791, 798 (Tex. App.—Fort Worth 2006, pet. denied).

70. Teledyne Exploration Co. v. Klotz, 694 S.W.2d 109, 110–11 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

gence.[71] The jury must reach a unanimous verdict as to the amount of exemplary damages to be awarded.[72]

Although the elements of trespass are easily understood, proving an actionable trespass and keeping a jury award on appeal have not always been so simple. For instance, in a Wise County suit for contamination of groundwater alleged caused by oil and gas wells, complaining landowners won the jury trial and a $200 million punitive damage award in a case brought on theories of trespass, nuisance, negligence, violation of Railroad Commission statewide and field rules, and fraud.[73] On appeal, the Fort Worth Court of Appeals reversed the judgment, holding that the great bulk of the landowners' claims were time-barred and remaining claims failed for lack of proper scientific proof of causation.[74]

In the recent well-publicized and long-awaited case of *Coastal Oil & Gas Corporation v. Garza Energy Trust*,[75] the Texas Supreme Court held, among other things, that there was no cause of action for trespass arising from drainage of gas caused by subsurface fracing operations.[76] Although Justice Willett would have held otherwise,[77] the court left open the possibility that fracing might give rise to a trespass claim outside of the context of drainage.[78] In addition to the significant holding, the *Garza* opinion also confirms that the Texas Supreme Court is conversant with horizontal oil and gas drilling, hydraulic fracing, gas production and related topics, and appears poised to consider other questions raised by activities in and around the Barnett Shale.

As the Texas Supreme Court stated in *Schneider National Carriers, Incorporated v. Bates*,[79] "a 'nuisance' is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities. There is no question that foul odors, dust, noise, and bright lights—if sufficiently extreme—may constitute a nuisance."[80] Nuisances are either temporary or permanent, and the cause of action for permanent nuisance accrues when injury first occurs or is discovered, while accrual of temporary nuisances occurs upon each injury.[81] A nuisance can also be public or private. "A nuisance is public if it affects a community at large, or if it affects a place where the public have a right to and

71. TEX. CIV. PRAC. & REM. CODE § 41.003(a)(1)–(3) (Vernon 2008).
72. *Id.* § 41.003(d).
73. Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430 (Tex. App.—Fort Worth 1997, pet. denied).
74. *Id.* at 437–44.
75. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008).
76. *Id.* at 4.
77. *Id.* at 30 (Willett, J., concurring).
78. *Id.* at 12 ("We need not decide the broader issue here.").
79. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004).
80. *Id.* at 269.
81. *Id.* at 270.

do go, such as a park, street, or alley, and which nuisance necessarily annoys, offends, or injures those who come within the scope of its influence."[82] "A private nuisance is anything done to the hurt or annoyance of the lands, tenemants [sic], or hereditaments of another; that produces damages to but one or a few persons and cannot be said to be public."[83]

In the context of drilling, production, and completion of Barnett Shale gas wells, disposal wells, and other appurtenant facilities, nuisance claims will likely be raised in future litigation. Although several lawsuits have been filed claiming nuisance in connection with compressor stations, none of the cases has reached the appellate court level. The blanket language of the Texas Supreme Court in *Schneider*, however, would support a cause of action for odor, dust, noise, and light pollution in the event of a serious, compelling set of facts.[84]

One complaint voiced by some gas well critics is the aesthetic damage to views of the horizon and rural vistas caused by oil and gas production facilities. The recent case of *Rankin v. FPL Energy, LLC*,[85] casts doubt on the viability of such claims. In *Rankin*, several people and a corporation sued operators of a wind farm in southwest Taylor County for injunctive relief and for public and private nuisance.[86] The operator filed a motion for partial summary judgment on the private nuisance claim that alleged damages due to loss of view.[87] The trial court granted the motion as to that part of the nuisance claim, and the remaining claims went to jury trial.[88] Based on the verdict, the trial court entered judgment against the plaintiffs.[89]

In affirming, the Eastland Court of Appeals held that Texas law does not recognize a cause of action in nuisance for a lawful activity on one's land (a wind farm in this case) that interferes with the views of neighboring landowners.[90] Although the Eastland court acknowl-

82. Soap Corp. of Am. v. Balis, 223 S.W.2d 957, 960 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.) (citing State v. Rabinowitz, 118 P. 1040, 1042 (1911)).

83. *Id.* (citing King v. Columbian Carbon Co., 152 F.2d 957, 960 (5th Cir. 1946) (applying Texas law)).

84. *Schneider Nat. Carriers, Inc.*, 147 S.W.3d at 269; *see also* GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet, 61 S.W.3d 599, 616 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (floodlights left on overnight and loud air conditioning constituted nuisance); Lamesa Coop. Gin v. Peltier, 342 S.W.2d 613, 614 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.) (bright lights, loud noise, and dust, lint, and burrs produced by cotton gin constituted nuisance).

85. Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. App.—Eastland 2008, pet. denied).

86. *Id.* at 508.

87. *See id.*

88. *Id.*

89. *Id.*

90. *Id.* at 513; *see also* Shamburger v. Scheurrer, 198 S.W. 1069, 1071–72 (Tex. Civ. App.—Fort Worth 1917, no writ) (finding that a lumberyard in a residential neighborhood was not a nuisance just because it was "unsightly or disfigured, . . . not in a proper or suitable condition, or . . . unpleasant to the eye and a violation of the rules

edged that the wind farm had impacted the plaintiffs and conceded that "[u]nobstructed sunsets, panoramic landscapes, and starlit skies have inspired countless artists and authors and have brought great pleasure to those fortunate enough to live in scenic rural settings,"[91] impacted vistas would not support a claim for nuisance.[92]

VI. HANGING OUT OF COURT: THE EFFECT OF THE RAILROAD COMMISSION'S EXCLUSIVE AND PRIMARY JURISDICTION ON COMMON LAW CLAIMS

Those representing claimants and defendants in lawsuits asserting common-law claims or violation of administrative rules involving oil and gas subjects should also be aware that administrative-law principles may not prevent such claims from moving forward despite pending administrative proceedings.[93]

In the *Discovery Operating* case, an operator of an oil and gas lease sued BP America, the operator of a neighboring lease, for damages allegedly resulting from British Petroleum's (BP) use of injection wells on its lease.[94] Discovery claimed that BP was liable for violating its permits for the injection wells issued by the Railroad Commission, for violating Commission rules and regulations, and for negligence, negligence per se, and common law and statutory waste.[95] BP successfully convinced the trial court to abate the action pending a determination from the Commission on whether BP violated any permit, rule, or regulation.[96] In conditionally granting a writ of mandamus, the Eastland Court of Appeals held that abatement was improper because the Commission did not have exclusive or primary jurisdiction over the claims asserted by Discovery.[97] Mandamus was available for review of the trial court order because Discovery had no adequate remedy through appeal.[98]

In similar fashion, the Amarillo Court of Appeals in *Apache* determined that the Commission did not have exclusive or primary jurisdiction over common law claims for contamination of groundwater

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of propriety and good taste"); Dallas Land & Loan Co. v. Garrett, 276 S.W. 471, 474 (Tex. Civ. App.—Dallas 1925, no writ) ("Matters that annoy by being disagreeable, unsightly, and undesirable are not nuisances simply because they may to some extent affect the value of property.").

91. *Rankin*, 266 S.W.3d at 512.

92. *Id.*

93. *In re* Discovery Operating, Inc., 216 S.W.3d 898, 905 (Tex. App.—Eastland 2007, mand. denied); *In re* Apache Corp., 61 S.W.3d 432 (Tex. App.—Amarillo 2001, orig. proceeding mand. denied).

94. *In re Discovery Operating*, 216 S.W.3d at 901.

95. *Id.*

96. *Id.*

97. *Id.* at 905.

98. *Id.*

allegedly caused by oil and gas operations.[99] In that case, the claimants alleged that Apache had polluted their groundwater through the operation of oil and gas wells that leaked into aquifers used to irrigate crops.[100] The claimants sought damages under theories of negligence, negligence per se, trespass, intentional infliction of severe emotional distress, nuisance, and strict liability.[101] Apache sought an order from the trial court abating the suit until a pending Commission proceeding could be concluded.[102] The trial court denied the request for abatement, and the court of appeals affirmed.[103] In denying Apache's claims on appeal, the court concluded instead that the plaintiffs' claims were those traditionally adjudicated by the courts, and no statute reserved such claims to the exclusive or primary jurisdiction of the Commission.

VII. CONCLUSION

As Barnett Shale gas exploration and development has increased over the last few years, environmental issues relating to those activities likewise have gradually emerged. In the future, those matters involving air, water, and land impacts of oil and gas activities should increase as the field matures and more long-term effects of the Barnett Shale can be gauged. Permitting and regulatory concerns will necessarily follow additional production and development. Administrative and traditional civil disputes are likely to arise in the future as the search for the source of the clean blue flame continues.

99. *In re* Apache Corp., 61 S.W.3d 432, 433 (Tex. App.—Amarillo 2001, orig. proceeding, mand. denied).
100. *Id.*
101. *Id.*
102. *Id.* at 433–34.
103. *Id.* at 434.