No. 12-0905

IN THE TEXAS SUPREME COURT

ENVIRONMENTAL PROCESSING SYSTEMS, L.C.,

Petitioner,

vs.

FPL FARMING LTD.,

Respondent.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE TEXAS OIL AND GAS ASSOCIATION IN SUPPORT OF PETITIONER ENVIRONMENTAL PROCESSING SYSTEMS L.C.

BAKER BOTTS L.L.P.
Samara L. Kline
State Bar No. 11786920
samara.kline@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6825
(214) 661-4825 Facsimile

Counsel for Texas Oil And Gas Association

IDENTIFICATION OF AMICUS CURIAE

This brief is tendered on behalf of the Texas Oil and Gas Association (TXOGA), which is paying the fee for its preparation. TXOGA is the largest and oldest petroleum organization in Texas, representing more than 5,000 members. The membership of TXOGA produces in excess of 90 percent of Texas' crude oil and natural gas, operates 100 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. According to the most recent data, the oil and gas industry employs 352,000 Texans, providing payroll and benefits of over $41 billion in Texas alone. In addition, large associated capital investments by the oil and gas industry generate significant secondary economic benefits for Texas. TXOGA member companies produce a quarter of the nation's oil, a third of its natural gas and account for one-fourth of the U.S. refining capacity. As detailed below, permitted injection wells are essential to oil and gas production in the State and the operations of many of TXOGA's members.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE
TEXAS OIL AND GAS ASSOCIATION

TXOGA submitted an amicus brief on January 7, 2013, supporting EPS's petition for review. TXOGA incorporates that brief by reference and provides this additional response to FPL's merits brief, in which FPL argues that this case has "no effect" on the oil and gas industry. To the contrary, by introducing a new cause of action for subsurface trespass arising from permitted injection well operations, the court of appeals's opinion threatens to significantly and adversely affect exploration and production of oil and gas in Texas.

The court of appeals's opinion draws no distinction between a Class I industrial wastewater injection well, which is at issue here, and a Class II injection well, which is related to oil and gas production or storage. As detailed in TXOGA's earlier brief, Class II injection wells are critical to the production of oil and gas. *See* Jan. 7, 2013 Br. at 12-15. The Railroad Commission has permitted more than 50,000 Class II injection wells. TXOGA members throughout the state depend upon injection wells to dispose of produced water, which is a necessary byproduct of oil and gas extraction. After this produced water is injected into non-productive formations, horizontal migration miles below ground is inevitable, but it is impossible for an injection well operator to predict or control the precise path of migration within a formation that could span dozens of square miles. If anyone who owned an interest in property above a conceivable migration path could

prevent an injection well from operating (either by suing for an injunction or holding out for excessive compensation), the ability to dispose of produced water, and in turn the ability to produce oil and gas, would be significantly compromised.

TXOGA members also employ Class II injection wells to enhance recovery and prevent waste using technologies such as water and CO_2 flooding. The very purpose of this injection is to cause horizontal migration of fluids to release trapped oil and gas. Operators that fail to use these injection techniques potentially face claims by mineral interest holders for breach of the duty to prudently develop the leased premises. The Beaumont court's decision puts these operators in a liable-if-you-do, liable-if-you don't situation.

While both Class I and Class II well operators are affected by the Beaumont court's decision, unique factors in the Class II well context make the case for not recognizing a subsurface trespass claim even stronger. As TXOGA's earlier brief and the parties' briefs detail, Texas jurisprudence demonstrates that subsurface property rights in the context of oil and gas production are not absolute. Under settled oil and gas law precedent, property owner A has no reasonable expectation that he can preclude adjacent property owner B from undertaking authorized activities incident to oil and gas production on B's property merely because they affect the movement of fluids miles below the surface of A's property. *See, e.g.*, *Coastal Oil Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 29 (Tex. 2008); *R.R.*

Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 568 (Tex. 1962). These decisions appropriately reflect the fact that there are no "property lines" in the deep subsurface. Contrary to FPL's argument, there also is no "tradition" of liability for operating a permitted well that causes no actual, recoverable damages.

Additionally, just as it is "obvious that secondary recovery programs could not and would not be conducted if any adjoining operator could stop the project on the ground of subsurface trespass," *Manziel,* 361 S.W.2d at 568, injection wells necessary to recovery of oil and gas will not be drilled and operated if any adjoining owner could stop them with a subsurface trespass claim. Because the ability to produce oil and gas is inextricably tied to the availability of injection wells, a new common law cause of action that threatens operation of injection wells likewise threatens oil and gas production. The Court previously noted that *Manziel* and *Garza* are "factually similar" to this case, but do not dictate the result in a case involving a Class I well. *FPL Farming Ltd.,* 351 S.W.3d at 314. Those cases and their progeny do dictate, however, that the Court refuse to recognize a subsurface trespass claim premised on authorized operation of a Class II well that causes no actual resulting harm.

Neither party to this case and none of the multiple amici can locate another case in the country—in any context—that allowed a trespass claim based solely on migration of fluids in the deep subsurface. The court of appeals also

acknowledged finding no precedent applying this new trespass theory. For the reasons stated above and in TXOGA's earlier brief, the court of appeals's decision is erroneous, and Texas law should not be the first to embrace the novel cause of action FPL advocates.

Respectfully submitted,

BAKER BOTTS L.L.P.

/s/ Samara L. Kline
Samara L. Kline
State Bar No. 11786920
samara.kline@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6825
(214) 661-4825 Facsimile

Counsel for Texas Oil And Gas Association

CERTIFICATE OF COMPLIANCE

I certify that this Supplemental Brief of Amicus Curiae contains 789 words, according to the word processing software used to prepare it.

/s/ Samara L. Kline
Samara L. Kline

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent via U.S. mail, return receipt requested on this the 24th day of September, 2013, to counsel for all parties to this appeal:

Claudia Wilson Frost
Christopher J. Richart
Pillsbury Winthrop Shaw LLP
909 Fannin, Suite 2000
Houston, Texas 77010

Richard G. Baker
Baker & Zbranek
P.O. Box 10066
Liberty, Texas 77575

Craig T. Enoch
Melissa A. Lorber
Enoch Kever PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701

/s/ Samara L. Kline
Samara L. Kline