

# PUBLICATION

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## Texas Supreme Court Leaves Trespass Question Unanswered

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Last week, the Texas Supreme Court issued its opinion in *Environmental Processing Systems LC v. FPL Farming Ltd.*, case number 12-0905, and specifically declined to address the issue of whether wastewater that migrates under neighboring land can be considered a trespass. The Court, in a unanimous decision, reversed the judgment of the court of appeals and reinstated the trial court's judgment that the landowner take nothing. Further the Court declined the invitation to address the remaining question presented in this appeal — namely, whether deep subsurface wastewater migration is actionable as a common law trespass in Texas.

The Court addressed the issue of whether consent is an element of a trespass cause of action or is an affirmative defense. After a lengthy historical review of the elements of trespass, beginning with an 1841 Supreme Court of the Republic of Texas case *Hall v. Phelps*, Dallam 435,436 (Tex. 1841), the Court held "Thus, to maintain an action for trespass, it is the plaintiff's burden to prove that the entry was wrongful, and the plaintiff must do so by establishing that entry was unauthorized or without its consent." The Court in *Environmental Processing Systems LC v. FPL Farming Ltd.*, effectively dealt with the case without addressing any other issues including whether deep subsurface wastewater migration is actionable as a common law trespass in Texas.