

# Recent Houston Court of Appeals opinion regarding Texas Commission on Environmental Quality's (TCEQ) Brownfields program

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A recently issued opinion from the Houston Court of Appeals will significantly impact real estate, development, lending, and insurance markets, as well as certain benefits of Texas Commission on Environmental Quality's (TCEQ) Brownfields programs by allowing a permanent loss in market value damages for properties temporarily impacted by contamination (e.g. permanent damage even though contamination is remediated to state standards). We believe this will have devastating impacts not only for companies facing potential environmental issues, but also property developers, insurers, and real property lenders.

## Key Issues

- The Court of Appeals created a **new cause of action**, that "stigma" from only *temporary* environmental contamination can cause *permanent* economic damage, allowing the plaintiff to recover permanent diminution in lost market value damages. The Court of Appeals departed from the great majority of jurisdictions that have held that diminution in market value damages requires injuries that are both permanent and physical.
- The Court of Appeals also departed from multiple Texas cases that have held that meeting TCEQ action levels displaces any common law duty, instead holding the defendant can still be liable for permanent stigma damages, even when all constituents of concern fall below TCEQ action levels.

## Background

Our client, an oilfield pipe manufacturer in Washington County, experienced a brief pipe leak that raised the level of one constituent – copper – above recommended levels in a neighboring property's pond. The pipe leak was fixed, and within weeks, all constituents in the pond that could have originated from our client were found to be below TCEQ action levels. This occurred through natural attenuation – no onsite remediation was required. However, the landowner sued, claiming permanent injury.

The jury correctly found that no permanent injury occurred to the property. Unfortunately, the trial court allowed the plaintiff to recover diminution in market value under a basic negligence question that did not require a finding of permanent injury. **So, the plaintiff landowner was allowed to recover permanent lost market value damages without showing any permanent contamination.**

## Court of Appeals Decision

The Houston Court of Appeals returned a split decision where the court created a **new environmental tort cause of action**. Even though plaintiff's property only experienced temporary contamination, the court of appeals held that the plaintiff could recover permanent injury damages (lost market value).

While, the Court of Appeals did not grant our motion for en banc rehearing (Justices Frost, Brown and Boyce would have granted en banc rehearing) we believe the Texas Supreme Court will take note that these well-respected justices made up the dissent of the en banc panel.

## Important Issues for Amicus Support

We believe this will have devastating impacts not only on our clients facing potential environmental issues, but also property developers, insurers, and real property lenders. Obviously companies that commonly deal in areas with environmental concerns will appreciate the seriousness of being held liable for permanent diminution in value damages for only a temporary impact that is remediated or otherwise attenuates to below TCEQ action levels. Similarly, property owners, developers and lenders should be concerned that this case sets the stage allowing for a history of any environmental impacts on real property (even if resolved to TCEQ's satisfaction) will have lasting adverse effects on the property's market value.

**Thus, we strongly encourage you to consider lending support to this important appeal.** While it can be a formal/traditional amicus brief, it can also be as informal as a letter. For your convenience, an explanation of amicus briefs in Texas can be found at: <http://www.financialappellatevoice.com/amicus-brief.html>. Because we recently filed the Petition for Review, the “clock is ticking” and the Texas Supreme Court may be looking at this as early as **March 6th**. In addition to our firm, Winstead PC, the defendant in this case has also hired James Smith of Porter Hedges. We can recommend appellate specialists for you who are familiar with the case law and issues presented in this matter. Additionally, to help manage legal fees, we are more than willing to contribute to the efficiency by providing material, cases, etc. and assisting your attorneys (of course at no cost to you.)

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