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NAVIGATING ACCOUNTABILITY IN SWAMPED FIELDS: WHY TEXAS NEEDS UNIFORM REGULATION FOR WELL COLLISION LIABILITY

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Abstract

The lack of a uniform standard for liability of well collisions in Texas is a severe injustice to operators and interest owners in the oil and gas industry alike. The common law theories that are currently relied upon are not only time-consuming but are likely inadequate methods for recovery of subsurface frac hit claims. Operators who develop within the state guidelines should reap the fruits of their labor but instead are often threatened by stalls in production, well collisions, and blowouts instigated by their neighboring competitors. As the demand for oil and gas grows so do these threats, as operators flood the reservoir and cast aside “good neighbor” techniques.

Currently, the Texas oil and gas industry is susceptible to subsurface collisions because of the swamped fields in the Permian Basin and Eagle Ford Shale. As a result, injured operators are usually left searching for an adequate path to recovery of subsurface damages. However, seeking such remedies is usually in vain, as Texas courts do not acknowledge trespass by frac claims—a common law claim that most operators often resort to. Moreover, Texas courts give great deference to the Texas Railroad Commission (the regulatory agency of oil and gas operations in the state) and often refuse to issue a technical opinion without some guidance from the regulatory agency. Even then, the Texas Railroad Commission currently does not have a regulation directly speaking to liability of subsurface collisions, leaving operators drowning in their production loss.

To remedy these operators, the Texas Railroad Commission should adopt a regulation that directly speaks to liability for well collisions and add guidelines that operators must abide by to conform with “good neighbor” standards. This set of guidelines will help operators take preventative

measures before a collision occurs and will allow courts to issue adequate remedies based on compliance or non-compliance with the regulation. Additionally, the criteria would reduce the need for costly, frequent litigation, mitigate the technical harms of well collisions, and provide courts with more authority over subsurface liability claims.

I. Introduction

Texas oil and gas operators face a debilitating dilemma each time they break ground: Can profitable production be achieved while avoiding subsurface well collisions? This can be difficult to accomplish, as state regulatory agencies across the nation have different standards to determine the process of drilling into a reservoir.¹ Due to the varying standards, many operators are regularly forced to reduce production—even ceasing altogether at times.² Despite this, the fluctuating demand in the market often causes increasing pressure on operators to create a profit.³ As a result of these pressures, operators are increasingly disregarding standards and employing techniques such as infill drilling, a method that is meant to improve the efficiency of the reservoir “by increasing the number of wells in an area.”⁴ Wellbore collisions are most common at shallow depths; a shallow collision impacts the well because it subjects the well to a high-pressure reservoir without sufficient counteracting hydrostatic pressure or formation strength.⁵ Even so, well spacing is often reduced as a result of infill drilling.⁶ Thus, it is not uncommon that the standards set to prevent well collisions are often cast aside, leaving wells susceptible to subsurface collisions.

1. See generally Michael P. Joy & Sashe D. Dimitroff, *Oil and Gas Regulation in the United States: Overview*, BAKERHOSTETLER (Jun. 1, 2016), [https://1.next.westlaw.com/Document/I466099551e9011e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&isplus=true&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/I466099551e9011e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&isplus=true&firstPage=true&bhcp=1) (stating that post-2016 cost-cutting measures resulted in declining production and that capital investments hinge on regulatory policies).

2. See generally *id.*

3. Clifford Krauss, ‘I’m Just Living a Nightmare’: Oil Industry Braces for Devastation, N.Y. TIMES (April 21, 2020), <https://www.nytimes.com/2020/04/21/business/energy-environment/coronavirus-oil-pricescollapse.html>.

4. JOHN R. FANCHI, INTEGRATED RESERVOIR ASSET MANAGEMENT: PRINCIPLES AND BEST PRACTICES 279 (2010).

5. Robert Bacon et al., *Well Collision Avoidance and Interceptions—State of the Art*, J. PETROL. TECH. (Feb. 27, 2013), <https://jpt.spe.org/wellbore-collision-avoidance-and-interceptionsstate-art>.

6. See FANCHI, *supra* note 4.

As a result of these intricacies, there is no uniform rule for the liability of well collisions under current oil and gas industry practices across the state. While some states have proposed legislation, others are at an impasse on allowing recovery for collisions to go forward. The most effective way to combat this in Texas is to implement a specified regulation for the industry, creating a framework that addresses the avenues for recovery after frac hits⁷—cross-well communications—occur. Using this framework allows operators to take preventative measures before engaging in expensive litigation efforts. At the same time, it allows susceptible operators to determine whether a damaging operator has acted prudently and used a good faith effort to prevent the collision before holding them liable for a frac hit. Operators currently choose to share technical information that alerts nearby operators of potential well damages rather than sit idly by and risk an interruption to production via a frac hit. Operators heavily rely on technical data reports and notification systems for their success in drilling successful producing wells.⁸ While current liability claims that rely on common law theories might provide a remedy, there is not a clear standard that a court could apply that will hold operators liable for well collisions⁹; therefore, Texas’s regulatory agencies or legislature should act to clearly designate the structure operators should follow to prevail in a frac hit liability suit.

This Article discusses liability for well collisions and potential regulations that the Texas Railroad Commission could employ while providing a potential solution that the Texas legislature could reach. Part II provides a background in well collisions and how injured operators in various states currently pursue recovery.¹⁰ Part III analyzes why operators

7. A “frac hit” occurs when there is cross-well communication through hydraulic fracturing, typically between an offset well and a child well. Frac hits can cause extensive damage to both the producing well and any neighboring wells. Trent Jacobs, *Oil and Gas Producers Find Frac Hits in Shale Wells a Major Challenge*, J. PETROL. TECH. (Mar. 31, 2017), <https://jpt.spe.org/oil-and-gas-producers-find-frac-hits-shale-wells-major-challenge#:~:text=The%20main%20reason%20frac%20hits,available%20reservoir%20area%20as%20possible>.

8. See Ferry Grijpink et al., *How Tapping Connectivity in Oil and Gas can Fuel Higher Performance*, MCKINSEY & CO. (Nov. 6, 2020), <https://www.mckinsey.com/industries/oil-and-gas/our-insights/how-tapping-connectivity-in-oil-and-gas-can-fuel-higher-performance>.

9. See generally Alex Kuiper, *Frac Hits: Horizontal and Vertical Well Interference*, KUIPER L. FIRM BLOG, OIL & GAS (Oct. 14, 2021), <https://www.kuiperlawfirm.com/frac-hits-horizontal-and-vertical-well-interference/>.

10. See *Infra* Part II.

should be held liable for well collisions, and what a proposed Texas regulation would entail.¹¹

II. The Emergence of Oil Well Collisions and the Industry's Response

As technologies advance and horizontal drilling techniques become more common, developers turn towards hydraulic fracturing to utilize the available reservoir.¹² Hydraulic fracturing has been prevalent in the oil and gas industry since 2010 to stimulate production.¹³ Hydraulic fracturing, or fracing, can occur through horizontal or vertical wells that extend hundreds to thousands of feet into the subsurface.¹⁴ The fractures themselves become very large, extending “several hundred feet away from the wellbore.”¹⁵ This “unconventional gas production” requires stimulation techniques, often because the minerals are trapped in tight formations rather than occurring in flowing concentrations.¹⁶

Well collisions occur when a child well collides with a pre-existing parent well.¹⁷ Collisions, or frac hits, in this context are physical intrusions of fractures or fluids, or drastic changes in pressure.¹⁸ The most common frac hits occur through changes in pressure but are usually not detrimental

11. See *Infra* Part III.

12. See Jacobs, *supra* note 7.

13. See Troy Cook et al., *Hydraulically Fractured Wells Account for Most New Oil and Natural Gas Wells*, EIA (Jan. 30, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=34732>.

14. See *id.* “Frac” is defined as a “high pressure or explosive method of fracturing rock formations.” *Glossary*, R.R. COMM’N TEX. http://webapps2.rrc.state.tx.us/EWA/help/P-5_gloss.htm#head_F (last visited Jan. 27, 2023).

15. See Mohammed Haroun, *Hydraulic Fracture Propagation and Analysis in Heterogeneous Middle Eastern Tight Gas Reservoirs: Influence of Natural Fractures and Well Placement*, NAT’L LIBR. OF MED. (Jan. 12, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7808139/>.

16. See *id.*

17. See Jacobs, *supra* note 7. A “parent well” is a well that exists before a subsequent child well is drilled. An “orphan well” is one that has no identifiable or solvent operator; See also Megan Milliken Biven & Virginia Palacios, *Eliminating Orphan Wells and Sites in Texas: A Toolkit for Redesigning the Railroad Commission’s Oil and Gas Well Plugging and Cleanup Programs*, COMM’N SHIFT 1 (2022), https://commissionshift.org/wp-content/uploads/2022/01/Eliminating-Orphan-Wells-and-Sites-in-Texas_CommissionShift.pdf. Orphan wells, unfortunately, are common in Texas because divestment from depleted wells allows operators to avoid asset retirement obligations. *Id.* If the RRC reforms their regulations, the agency could be eligible to receive funds from the Infrastructure Investment and Jobs Act to plug the orphaned wells. *Id.*

18. See Jacobs, *supra* note 7.

to production unless the change is significant.¹⁹ Well spacing issues are often to blame for pressure changes, bringing existing parent wells to below production values.²⁰ Frac hits from fluid intrusions are usually more impactful, affecting not only production quantities but the well itself—even risking damages to surrounding wells.²¹

To be sure, well collisions are not always undesirable in the industry.²² Controlled collisions can stimulate production and recover hydrocarbons that would otherwise be left in the reservoir—it is when collisions are sudden and unexpected that operators face major negative consequences.²³ To combat production loss and damage, operators in the state routinely turn to the Texas Railroad Commission for guidance.²⁴

A. The Texas Railroad Commission's Authority over the Oil and Gas Industry

The oil and gas industry has been dominant in Texas for hundreds of years. In 1919, the Texas Legislature gave authority to the Texas Railroad Commission (RRC) “to establish order and regulate all aspects of oil and gas production in Texas.”²⁵ As such, modern Texas oil and gas operators are bound by the rules of the RRC.²⁶ The jurisdiction of the RRC is limited in some subject areas, which are not covered in the Article.²⁷

19. See Shahlā Feizi Masouleh et al., *Three-Dimensional Geomechanical Modeling and Analysis of Refracturing and “Frac-Hits” in Unconventional Reservoirs*, 13 *ENERGIES* 5352 (2020) (stating that high, nonuniform reduction of the reservoir pore pressure adversely affects the productivity of both parent and child wells).

20. See Trent Jacobs, *Frac Hits Reveal Well Spacing May be Too Tight, Completion Volumes Too Large*, *JPT DIGITAL EDITOR* (Nov. 2017), <https://www.slb.com/-/media/files/stimulation/industry-article/201711-jpt-frac-hits-tight-spacing-large-completion-volumes>.

21. See Kuiper, *supra* note 9.

22. See Rosemary Jackson, *Calculating EUR Change for a Frac Hit Parent Well: Positive/Negative/Neutral*, *PETRO AI* (July 29, 2021), <https://petro.ai/blog/calculating-eur-change-for-a-frac-hit-parent-well-positive-negative-neutral/> (“The effect of frac hits on productivity can be positive, increasing the [estimated ultimate recovery] of the parent well . . .”).

23. See *id.*

24. See *infra* Part II.B-C.

25. Biven & Palacios, *supra* note 17, at 1.

26. See *id.*

27. See Tim George, *What You Need to Know About the Railroad Commission of Texas*, *THE UNIV. OF TEX. SCH. OF L. CONTINUING LEGAL EDUC.* 2 (2016), https://www.mcginnislaw.com/media/publication/15281_2016_WhatYouNeedToKnowAboutTheRailroadCommissionOfTexas_2016FundamentalsOfOilGasAndMineralLaw.pdf.

Title 3 of the Texas Natural Resources Code contains the state provisions that relate to oil and gas.²⁸ Under Chapter 81 of the Code, the RRC has jurisdiction over “all persons owning or engaged in drilling or operating oil or gas wells in Texas, and [has] the authority to adopt all necessary rules for governing and regulating persons and their operations.”²⁹ This includes authority over:

[O]il and gas well drilling, completion, production, and abandonment; protection of water resources from oil and gas operations; oil and gas waste disposal and clean up; underground injection for: disposal of salt water or other oil and gas waste, secondary or enhanced recovery, and storage of gas or liquid hydrocarbons; gathering line and pipeline design, installation, maintenance, and operation; and transportation and takes by interstate gas utilities, common carriers, and common purchasers.³⁰

Operators, as defined by the RRC, include “[a] person, acting for himself or as an agent for others and designated to the commission as the one who has the primary responsibility for complying with its rules and regulations in any and all acts subject to the jurisdiction of the commission.”³¹ While the operator is required to submit proof of financial security and basic business organization information, they are not required to show proof of ownership or contractual right to operate.³² These issues typically only come up if there is a complaint filed against the operator, leading to a contested case investigation of whether the operator acted in “good faith.”³³

Further, the RRC has authority, as a state agency, to “conduct rulemaking proceedings to adopt rules of general applicability across the State and to conduct evidentiary hearings to enforce rules or to resolve specific disputes between competing parties.”³⁴ Under this, the RRC has adopted Statewide Rules to govern typical day-to-day interactions of oil and gas operators.³⁵ The Statewide Rules are developed through administrative proceedings and go through a process of formal proposal, public peer

28. *See* Tex. Nat. Res. Code Ann. tit. 3.

29. Tex. Nat. Res. Code §§ 81.051-52.

30. George, *supra* note 27, at 1.

31. *Id.*

32. *See id.*

33. *See id.*

34. *Id.* at 2.

35. *See id.*

review, and industry education before being adopted by the RRC and officially published in the Texas Administrative Code.³⁶

While the agency has Statewide Rules, it can also effectuate special field rules.³⁷ Special field rules apply “to operator activities in a specific reservoir or geographic area that the RRC designates as a field.”³⁸ Typically, the special field rules are more flexible in the amending process, and operators can request for an amendment to the rule that better reflects the true nature of the field.³⁹ These rules can also be brought about by contested cases.⁴⁰

Some common special field rules that operators must abide by have to do with well spacing and allowable production values. Well spacing rules generally restrict the number of wells that can be placed in a given area, defining minimum distances to property lines and to neighboring wells.⁴¹ In Texas, wells nearer than 1,200 feet are prohibited from “any well completed in or drilling to the same horizon on the same tract or farm.”⁴² Allowables regulate the amount of oil and gas that can be produced from a field in a given time period. These regulations were enacted in an effort to manage supply and market fluctuations. In Texas, regulations on allowable production values were largely written off as demand grew.⁴³

While the RRC generally has jurisdiction over the oil and gas industry in Texas, there are instances where the Texas Legislature has chosen to directly act. In May of 2015, Governor Greg Abbott signed a law limiting how local governments can regulate oil and gas drilling within their jurisdiction, effectively voiding any regulations that municipalities had

36. *See id.*

37. *See id.*

38. *Id.* at 3.

39. *See id.*

40. *See* Danielle Craig, *Texas Statewide & Field Rules*, HOLLIDAY ENERGY L. GRP. <https://theenergylawgroup.com/wp-content/uploads/2019/11/Texas-Field-Rules.pdf> (last visited Jan. 27, 2023).

41. *See* C.D.S. Keuengoua & W. P. Haseman, *A Theory of Well Spacing*, TRANS. 86 (1930), <https://onepetro.org/TRANS/article/86/01/146/161386/A-Theory-of-Well-Spacing>; Richard Amorin, *Well Spacing for Horizontal Wells*, 3 RSCH J. APPLIED SCIS ENG'G & TECH. 486 (2011); 16 Tex. Admin. Code § 3.37.

42. 16 Tex. Admin. Code § 3.37.

43. *See generally* Robert Rapier, *What is Holding Back U.S. Oil Production?*, FORBES (Mar. 11, 2022), <https://www.forbes.com/sites/rrapier/2022/03/11/what-is-holding-back-us-oil-production/?sh=7273d8fe6b6f> (stating that until recently, “a producer planning to significantly grow production [rather than act right away] would likely have been punished by investors.”).

developed.⁴⁴ H.B. 40 “preempts regulation of oil and gas activity at the city level and resides that duty with the state, and ensures that any local regulation of surface activity is commercially reasonable and does not effectively prohibit an oil and gas operation.”⁴⁵ Governor Abbott’s main justification in supporting this bill was to ensure that Texas “avoid[ed] a patchwork quilt of regulations.”⁴⁶

The effects of H.B. 40 were felt immediately across the state. Supporters of the bill say that it is a fair proposition that “balances local control and property rights,” and “affirm[s] that regulation of oil and gas operations . . . is under the exclusive jurisdiction of the state.”⁴⁷

B. Texas Natural Resources Code Chapter 85: Conservation of Oil and Gas

Chapter 85 of the Texas Natural Resources Code states that a cause of action for damage to the production of oil and gas requires a violation of a Texas Railroad Commission rule or a showing of negligence; otherwise, no recovery is guaranteed.⁴⁸ Specifically, § 85.321 a Suit for Damages states:

A party who owns an interest in property or production that may be damaged by another party violating the provisions of this chapter . . . or another law of this state prohibiting waste or a valid rule or order of the commission may sue for and recover damages and have any other relief to which he may be entitled at law or in equity. Provided, however, that in any action brought under this section or otherwise, alleging waste to have been caused by an act or omission of a lease owner or operator, it shall be a defense that the lease owner or operator was acting as a reasonably prudent operator would act under the same or similar facts and circumstances.⁴⁹

To be sure, the Texas Supreme Court in *Exxon Corp. v. Emerald Oil & Gas Co.* found that this statute permits operators whose “property interest is damaged by another party who violates the state’s conservation laws or a

44. *Governor Abbott Signs HB 40 Into Law (84R)*, OFF. OF THE TEX. GOVERNOR (May 18, 2015), https://gov.texas.gov/news/post/governor_abbott_signs_hb_40_into_law; *See also* H.B. 40, 84th Leg., Reg. Sess. (Tex. 2015)

45. *Governor Abbott Signs HB 40 Into Law (84R)*, OFF. OF THE TEX. GOVERNOR (May 18, 2015), https://gov.texas.gov/news/post/governor_abbott_signs_hb_40_into_law.

46. *Id.*

47. *Id.*

48. 3 Tex. Nat. Res. Code Ann. tit. 3, Ch. 85; *See also* Kuiper, *supra* note 9.

49. 16 Texas Admin. Code § 85.321.

Railroad Commission rule or order to sue to recover damages.”⁵⁰ The scope of Section 85.321 is expressly stated in the provision and extends to any violation of Railroad Commission rules or orders.⁵¹ It was further noted by the Court that this Section allows for a private cause of action.⁵² Notably, operators who are bringing suits for damages have to rely on common law causes of action, frequently alleging trespass, nuisance, or negligence.⁵³

Further, under Chapter 85, section 202 of the Texas Natural Resources Code, the RRC has a duty to provide rules and orders for “wells to be drilled and operated in a manner that will prevent injury to adjoining property.”⁵⁴ To successfully raise a claim under this provision, a plaintiff must “present sufficient evidence to show a reduced recovery or performance of wells.”⁵⁵ If a plaintiff voluntarily chooses to cease production, then there will likely be a finding of insufficient evidence by the court.⁵⁶ Suits under this rule typically arise when there is resulting damage to nearby operators who are seeking recovery.⁵⁷

These statutory authorities directly embody the legislative efforts that Texas has made to address complicated issues within the oil and gas sector and suggest that additional legislative action could remedy the ongoing complications with well collision liability.

C. Cases that Recognize a Common Law Claim for Recovery of Oil Well Collisions

In addition to statutory authority on point, there are various common law claims that courts have historically recognized for attempts at recovery in the oil and gas sphere. As noted in scholarly literature, “[t]he common law remedy for enforcing an owner’s exclusive possessory interest in land is the

50. Charlie Sartain & Jorge Gutierrez, *Oil and Gas Operator Liability Addressed in Recent Texas Supreme Court Rulings*, LOOPER REED & MCGRAW P.C. 2 (2009), <https://www.grayreed.com/portalresource/lookup/poid/Z1tO19NPluKPtDNIqLMRVPMQILsSwKJcM0!/document.name=/ALERT-Exxon-v-Emerald.pdf>.

51. *See* Tex. Nat. Res. Code Ann. tit. 3, § 85.321.

52. *See* Sartain & Gutierrez, *supra* note 50.

53. *Infra* Part II.C.

54. Tex. Nat. Res. Code § 85.202(a)(4).

55. Proposal for Decision, *Capital Star Oil & Gas, Inc. v. XTO Energy, Inc.* 56 (June 29, 2020) (Oil and Gas Docket No. 01-0309061), <https://portalvhdszkzlf8q9lqr9.blob.core.windows.net/media/59524/01-0309061-capital-star-pfd.pdf>.

56. *Id.*

57. *Id.*

tort of trespass.”⁵⁸ In the past, it was common for “indirect and consequential” injuries arising from nonphysical invasions to be remedied under a trespass claim.⁵⁹ More modern remedies for a finding of trespass include: “injunctive relief, ejectment, restitution, and nominal and compensatory damages.”⁶⁰ While most states have adopted trespass claims to be satisfied under an indirect invasion, some states still follow the traditional rule “requiring a direct invasion by an object that is visible to the human eye.”⁶¹

Claims of nuisance were commonly brought as claims for trespass under the writ system.⁶² Nuisance typically has greater flexibility in the courts when creating “efficient and equitable remedies” after an unjust experience.⁶³ To be sure, courts often apply nuisance principles when a claim requires trespass theory.⁶⁴ These common law claims are often the first line of action for injured operators and have been readily employed by operators throughout the United States for recovery of production loss or injury to wells.

1. Various States Rely on Common Law Claims for Subsurface Well Damages

Several states use common law approaches of trespass or nuisance when seeking relief for a subsurface well collision. Oklahoma is one of the few states with developed case law on this issue.⁶⁵ In *H&S Equipment Inc. v. Felix Energy, L.L.C.*, H&S Equipment Inc. sued to recover damages to their vertical well based on subsurface trespass, nuisance, and negligence.⁶⁶ The court found that there was no negligence as a matter of law, and the jury

58. Joseph A. Schremmer, *Getting Past Possession: Subsurface Property Disputes as Nuisances*, 95 WASH. L. REV. 315, 326 (2020).

59. *Id.* at 327.

60. *Id.*

61. *Id.* at 328.

62. *See id.* at 327.

63. *Id.* at 333.

64. *See id.* (“Courts often conflate trespass with nuisance, labeling conduct a “trespass” but applying nuisance standards to resolve it.”).

65. Paul Monies, *Federal Jury Awards Oklahoma Oil Companies \$220,000 in ‘Well-Bashing’ Case*, THE OKLAHOMAN (Aug. 18, 2017), <https://www.oklahoman.com/story/business/energy-resource/2017/08/18/federal-jury-awards-oklahoma-oil-companies-220000-in-well-bashing-case/60581029007/>.

66. *See H&S Equip., Inc. v. Felix Energy, L.L.C.*, No. CIV-15-1244, 2017 WL 5760122, at *1 (W.D. Okla., Oct. 10, 2017).

awarded damages for trespass and nuisance.⁶⁷ In 2017, the Oklahoma Energy Producers Alliance Report was presented at the Legislative Session.⁶⁸ This report suggested that at least 450 vertical wells in Kingfisher County were damaged during new development.⁶⁹ The report also suggests that both royalty owners and producers were harmed because of the damages.⁷⁰ Further, 80% of the affected wells are outside of spacing boundaries.⁷¹

In Colorado, there are rules that require operators to notify those with wells nearby at least 90 days before fracking takes place.⁷² This warning system would allow operators to implement safeguards before any damage was done.⁷³ In Pennsylvania, the state's Department of Environmental Protection is considering a regulation that "require[s] companies to post notices when fracturing is planned"⁷⁴ This is akin to industry practices in Colorado, where they must provide a notice hearing before fracking in the area.⁷⁵

Likewise, in New Mexico, case law is currently underdeveloped. In *Snyder Ranches v. Oil Conservation Com.*, the court speculates on subsurface trespass.⁷⁶ Here, salt water was injected into the subsurface. The court said that the commission's approval alone "does not authorize trespass."⁷⁷ New Mexico's industrial regulations currently do not cover well collisions.⁷⁸

67. *Id.* at *4.

68. Joe Wertz, *Report by Oil Group Suggests Hundreds of Vertical Wells Damaged by Bigger Horizontal Wells*, STATEIMPACT OKLA. (Sept. 20, 2017), <https://stateimpact.npr.org/oklahoma/2017/09/20/report-by-oil-group-suggests-hundreds-of-vertical-wells-damaged-by-bigger-horizontal-wells/>.

69. *Id.*

70. *Id.*

71. *Id.*

72. Kuiper, *supra* note 9.

73. *Id.*

74. Stephen Rassenfoss, *Operators Share Frac Schedules to Know When Wells Are at Risk*, J. PETROL. TECH. (Sept. 18, 2017), <https://jpt.spe.org/operators-share-frac-schedules-know-when-wells-are-risk>.

75. Kuiper, *supra* note 9.

76. *Snyder Ranches v. Oil Conservation Com.*, 110 N.M. 637, 798 P.2d 587 (N.M. 1990).

77. *Id.* ¶ 8.

78. Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017).

2. *Texas Operators Historically Rely on Common Law Claims for Subsurface Well Damages*

In Texas, there is currently no developed case law on liability for well collisions.⁷⁹ Typically, like in other places across the nation, Texas developers have to rely on causes of action such as trespass, nuisance, or negligence to attempt recovery for their damaged wells.⁸⁰ However, these causes of action are inadequate because they do not always guarantee recovery for the damaged well.⁸¹ In *Elliff v. Texon Drilling Co.*, Elliff was seeking damages for the destruction of his well.⁸² Texas Drilling, the lessee, drilled a well on adjacent property; that well and Elliff's well were cratered, causing 60 acres on Elliff's land to subside.⁸³ Arguing the rule of capture, Texon claimed that they were protected from liability because the blowout was on adjacent property.⁸⁴ The Texas Supreme Court said that the rule of capture would not preclude liability for grossly negligent behavior and found Texon was negligent for the blowout that damaged Elliff's neighboring well.⁸⁵

In *Coastal Oil v. Garza Energy Trust*, a trespass claim was brought against Coastal Oil based on a belief that subsurface fractures on one lot were crossing into the adjacent lot and draining gas.⁸⁶ The Texas Supreme Court here looked past the trespass claim and to the injury; it said that the rule of capture prevented the mineral owner from recovering damages for lost minerals.⁸⁷ Here, since the plaintiff was a "non-possessory" claimant, the Court said that a trespass claim required an actual injury; since the only claim here was drainage through hydraulic fracturing, which is not an actionable injury, it was protected by the rule of capture.⁸⁸ Garza Energy

79. See generally Kuiper, *supra* note 9.

80. See Marcy L. Rothman, *Liability in the Oil and Gas Fields: Shooting the Gap Between Your Company and Its Employees*, KANE RUSSELL COLEMAN LOGAN P.C. (Aug. 22, 2017), <https://www.krcl.com/insights/liability-oil-gas-fields-shooting-gap-company-employees>.

81. See generally Ryan Clinton & Jad Davis, *Oil and Gas Damages*, DAVIS GERALD & CREMER (Feb. 2015), <https://www.ryanclinton.org/oil-and-gas-damages> (explaining that exemplary damages are not recoverable under tort claims unless traditional prerequisites are met).

82. *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1948).

83. *Id.* at 560.

84. *Id.* at 561-62.

85. *Id.* at 563.

86. *Coastal Oil & Gas Co. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

87. *Id.* at 9-11.

88. *Id.* at 13-17.

Trust was precluded from recovery, and Coastal Oil was not liable for any injury.⁸⁹ In his concurrence, Justice Willett advocates for a “no trespass by frac” finding; he states that fracking should not be viewed as a wrongful act, and that claims of this nature should not be viable in a court of law.⁹⁰ Conversely, Justice Johnson in his dissent said that the majority’s opinion left an avenue for lessees to expand the boundaries of their lease by fracturing their wells.⁹¹

More recently, in *Geo-Viking, Inc. v. Tex-Lee Operating Co.*, the Court was in conflict over whether subsurface fracking constituted an actionable trespass claim.⁹² In a *per curiam* opinion, the Court stated that fracking is a subsurface trespass. However, in a subsequent opinion, the court withdrew its first ruling and took no position on the matter.⁹³ As noted above, trespass claims require physical invasion; it is uncertain if frac hits from pressure changes qualify as trespass, so it is difficult to recover under this common law theory when seeking recovery for wells damaged by hydraulic fracturing.⁹⁴

Although the court in *Gregg v. Delhi-Taylor Oil Corp.* stated that a Railroad Commission permit does not necessarily absolve a party of liability,⁹⁵ Texas primarily relies on the authority of the RRC to determine whether there is a cause of action capable of recovery.⁹⁶ For example, in *Railroad Commission of Texas v. Manziel*, the Texas Supreme Court ruled against the damaged neighbor after a waterflood occurred, relying primarily on the Railroad Commission’s approval of the ongoing operations.⁹⁷ Similarly, the Court in *Coastal Oil* also stated that the RRC’s approval was considered heavily when deciding the case.⁹⁸

89. *Id.* at 26.

90. *Id.* The majority in this case declined to create a new common law cause of action—“trespass by fracture”—deferring to the lack of current legislation or regulations: “[The Commission] could do administratively what other states (notably not Texas) have done legislatively and require operators to obtain a permit before fracking a well. But it has not done so, and this restraint, far from showing the absence of public policy, demonstrates the Commission pursues its legislative charge in a manner that facilitates technological innovation.” *Id.* at 39.

91. *Id.*

92. *Geo-Viking, Inc. v. Tex-Lee Operating Co.*, 817 S.W.2d 357 (Tex. App.—Texarkana 1991).

93. *Id.*

94. Wertz, *supra* note 69.

95. *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 416-17 (Tex. 1961).

96. *See R.R. Comm’n of Tex. v. Manziel*, 361 S.W.2d 560 (Tex. 1962).

97. *Id.*

98. *See Coastal Oil & Gas Co. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

D. Case Study of a Texas Operator Alleging Frac Hits

While there is currently no direct authority on liability for well collisions, Texas courts are encountering cases that are ripe for regulatory action. In *Capital Star Oil & Gas, Inc. v. XTO Energy, Inc.*, the Examiners of the case⁹⁹ found that there was not substantial evidence of interference of Capital Star’s various wells after XTO Energy performed stimulations on their wells.¹⁰⁰ In relevant part, Capital Star alleged that the Commission failed to abide by Texas Natural Resources Code Chapter 85 when they did not implement rules to “protect offset operators from the consequences of ‘shooting wells’ in such a manner as to cause waste or injury to offset operators.”¹⁰¹ Turning to statutory interpretation, the Examiners note that “shooting wells” is not explicitly defined in the Code; they instead must look to various oil and gas treatises to define the term.¹⁰² They also consider that Chapter 85 was adopted well before the advent of modern hydraulic fracture stimulation techniques (FST), suggesting that the regulatory intent did not extend to these techniques.¹⁰³

Capital Star also alleged that XTO violated statewide rules that would have mitigated the fractures if properly complied with.¹⁰⁴ However, it is noted that these allegations were first brought during written closing and were never alleged at any time during the hearing.¹⁰⁵ Capital Star’s statewide arguments include alleged fracturing outside of the specific formation, purposefully placing wells within pressure communication, and allowing migration of fluids between different strata.¹⁰⁶ While Capital Star suffered thousands of dollars in damages to several of their wells—even

99. “The Examiners” refers to the Technical Examiner and Administrative Law Judge. Proposal for Decision, *supra* note 29, at 5.

100. *Id.*

101. *Id.* at 47 (“Shooting wells” is a method for stimulating well production, usually done by fracturing subsurface rocks). *See id.* at 58 (The Examiners in this case relied on the language of industry treatises to define this term, defining “shooting a well as ‘exploding nitroglycerine or other high explosive in a hole, to shatter the rock and increase the flow of oil or gas’”). *Id.*

102. *Id.* at 58.

103. *Id.* (The Examiners even go so far as to say that “tens of thousands of FST operations completed without incident throughout the State during the previous twenty years do not suggest that the Commission has been remiss in exercising its rulemaking authority in this regard.”).

104. *See id.* at 42.

105. *See id.*

106. *See id.* at 42–44 (In relevant part, Capital Star is alleging violation of Statewide Rules 7, 10, and 13, among others not discussed in this Article). *Id.*

resulting in a surface blowout—the Examiners found that there was insufficient evidence to show that XTO violated these rules, stating that the evidence presented did not support Capital Star’s overly broad assertions.¹⁰⁷

Interestingly, this case turned on whether there was sufficient evidence to prove that XTO violated Statewide Rules and the Texas Natural Resources Code through its fracking operations.¹⁰⁸ While XTO does not dispute that there was well interference from their fracture operations,¹⁰⁹ they do take issue with Capital Star’s allegation that “every issue with [their] wells was caused by XTO[’s] fracking operations in the vicinity.”¹¹⁰ Further, testimony of XTO Energy’s expert witness, a regional geologist, suggested that XTO acted prudently and took “appropriate measures to ensure and maintain well bores”¹¹¹ The Examiners, too, thought that the evidence provided was insufficient, and recommended that the Commission dismiss the complaint altogether.¹¹²

Even then, The Examiners here reiterate that “when an operator assumes regulatory responsibility for a well, it is responsible for operating the well within Commission rules.”¹¹³ They suggest that even if the evidence was substantial, the rules that Capital Star relies on do not apply to a third party in the vicinity, but rather to the operations of the operator.¹¹⁴ This case is one of the most recent that speaks directly to the issue of this Article—and shows the need for a more direct route of recovery for injured operators.

107. *See id.* at 50–55.

108. *See id.* at 63.

109. *Id.* at 26 *construing* Hearing Tr. Vol. 1 at 21–22 (Even while XTO admits that there was well interference, the Examiners do not find that the admission “proves the violations alleged by Capital Star. While an admission against interest may be considered proof of something, it is only proof as to what was admitted, it is not proof of the argued consequences of the admission. XTO’s admission does not prove the violations alleged in and of themselves.”). *Id.* at 50.

110. *Id.* at 26 *construing* Hearing Tr. Vol. 1 at 21–22 (emphasis added).

111. *Id.* at 30.

112. *Id.* at 64 (After hearing testimony from both parties and viewing all the evidence presented, the examiners found that “Capital Star did not provide evidence sufficient to support its argument that [their well] was adversely impacted through [fracturing] operations”). *Id.* at 62.

113. *Id.* at 58.

114. *Id.*

*III. A Texas Regulation Should Be Created Through the Texas Railroad
Commission to Implement a Framework That Addresses Mitigation
Standards as a Prerequisite to Recovery*

Under current oil and gas industry practices across the United States, there is no uniform rule for the liability of well collisions.¹¹⁵ While some states have proposed legislation, others are at an impasse on allowing recovery for collisions to go forward.¹¹⁶ States' current reliance on self-reporting is largely unreliable, making it difficult for injured parties to recover when there is no surefire documentation of prior knowledge.¹¹⁷ State-specific statutory remedies are supposed to provide a clear path toward recovery, but oftentimes struggle to meet their purpose.¹¹⁸ Therefore, it is prudent that the Texas Railroad Commission recognizes a standard that will ensure liability for those who are injured through well collisions.¹¹⁹

Case law in the United States provides practitioners little to no guidance on how to determine the applicable legal standard.¹²⁰ Many states rely on common law claims such as trespass and nuisance to seek recovery or choose to leave it up to the practitioners' discretion.¹²¹ However, courts often confuse these common law claims, calling a subsurface invasion a trespass while relying on nuisance arguments.¹²² This leaves the industry uncertain about which claim to bring to the court, and ultimately how to succeed in recovering damages from well collisions.¹²³ Furthermore, the lack of a uniform disclosure standard leaves many oil and gas companies across the nation susceptible to lost profits.¹²⁴ Fracking techniques have

115. *See generally* Kuiper, *supra* note 9 (stating that recourse for frac hits remains unclear in several states).

116. *See generally id.* (explaining that current state recovery techniques are not always applicable to frac hit liability claims).

117. *See generally id.*

118. *See generally id.* (highlighting various state approaches to applying liability in frac hits).

119. *Supra* Part I.B–C (emphasizing the shortcomings of current common law claims and the necessity of a regulation in the well collision space).

120. *See generally* Kuiper, *supra* note 9.

121. *See generally* Michael Goldman, *A Survey of Typical Claims and Key Defenses Asserted in Recent Hydraulic Fracturing Litigation*, 1 TEX. A&M L. REV. 305 (2013).

122. *See* Schremmer, *supra* note 58, at 329.

123. *See generally* Schremmer, *supra* note 58 (emphasizing that modern production techniques have resulted in largely inconsistent court decisions).

124. *See generally* Brandon S. Tracy, *Revenues and Disbursements from Oil and Natural Gas Production on Federal Lands*, CONGR. RSCH. SERV. (2020), <https://crsreports>.

been observed in at least twenty-nine states, but only fourteen have existing disclosure requirements.¹²⁵ Even then, oil companies may still withhold information that they claim is confidential.¹²⁶ Overall, the industry needs to have a clear standard; operating without a clearly defined way to recover for well collisions leaves all parties reliant on ineffective tort claims, and the problem frequently results in a loss of discovery, production, and ultimately revenue.¹²⁷ These avoidable losses compel the need for a standardized state regulation capable of successfully guiding the development of the oil and gas industry.

In order to achieve a uniform standard, Texas regulatory agencies must demand compliance of oil and gas companies to act with reasonable care and good faith.¹²⁸ The determinative question should revolve around both of these inquiries and, when coupled with state regulation, should leave injured operators with a direct path to recovery from well collisions.¹²⁹ As discussed *infra*, there might be certain situations where a case-by-case analysis is necessary, such as when both operating parties are acting prudently and complying with the uniform standard.¹³⁰ Moreover, reliance on current industrial standards has proved to be effective only if operators are truly forthcoming and comprehensive in their disclosures to the public.¹³¹ While several operators provide adequate information, many face substantive issues with being truly accessible.¹³² Additionally, comprehensive compliance has proved difficult for operators and regulators and leads to complex litigation.¹³³ If there was a clear regulation, operators would avoid costly litigation and have a clear path to hold other operators liable.¹³⁴ Consequently, the regulation that the Texas Railroad Commission

congress.gov/product/pdf/R/R46537 (explaining common production inputs for the oil and gas industry and how regulations might affect revenue allocation).

125. Matthew McFeeley, *State Hydraulic Fracturing Disclosure Rules and Enforcement: A Comparison*, NAT. RES. DEF. COUNCIL 7 (July 2012), <https://www.nrdc.org/sites/default/files/Fracking-Disclosure-IB.pdf>.

126. *See generally id.*

127. *Supra* Part I.A–C.

128. *Infra* Part III.A; *See also* Associated Indemnity Corp. v. CAT Contracting, Inc., 964 S.W.2d 285 (Tex. 1998) (stating that good faith conduct commonly “refers to conduct which is honest in fact [and] free of improper notice or willful ignorance of the facts at hand.”).

129. *Infra* Part III.A.

130. *Id.*

131. *See* McFeeley, *supra* note 125, at 14.

132. *See id.*

133. *See id.* at 8.

134. *See generally id.*; *see also infra* Part III.A.

should adopt in recovery for well collisions is: (1) Would a good neighbor operator take remedial steps to prevent a well collision; and (2) Did the collision occur despite compliance with mandated safeguards.

A. The Proposed Regulatory Framework on Mitigation Standards for Liability of Subsurface Well Collisions

This Section provides a regulatory framework for the liability of well collisions. To be considered in compliance, these standards should be implemented prior to the commencement of production. The proposed framework is largely modeled after currently enacted oil and gas provisions in the Texas Natural Resources Code.¹³⁵

Texas Natural Resources Code: Proposed Provision for Liability of Well Collisions

- (a) *To prevent unreasonable loss or waste of injured operators, the commission shall require reasonable safeguards of a good faith operator, which include:*
 - 1. *Insurance Policies;*
 - 2. *Deed Agreements;*
 - 3. *Technical Data Surveys; and*
 - 4. *Notification Requirements.*
- (b) *These requirements shall be of uniform application throughout the state and follow the application provision of § 85.043.*
- (c) *If, on written complaint by an affected party or on its own initiative and after notice and opportunity for a hearing, the commission finds that well interference occurred without regard for the proposed provision, the Commission shall inquire into the methods of operation and shall determine whether the alternative methods otherwise satisfy the safeguards against well interference.*
 - a. *For the purposes of this provision, hearing proceedings should follow the provisions set out at § 85.050.*
- (d) *On judgment against an operator for violating the proposed provision, the court may, if in its judgment public interest requires, either:*
 - a. *Order the defendant operator to compensate the affected party for damages and have any other relief to which he may be entitled at law or in equity; or*

135. See generally Tex. Nat. Res. Code, tit. 3.

- b. Forfeit the license rights and privileges of the defendant operator.

Texas Natural Resources Code: Definitions for Proposed Provision
for Liability of Well Collisions

- (a) “Well Collisions”: (Also “Well Interference,” “Frac Hits”); “Well collisions” means the collision of a child well and a pre-existing parent well.
1. Under this Chapter, “Well Collisions” are physical intrusions of fractures or fluids or drastic changes in pressure.
- (b) “Insurance Policies”: “Insurance policies” means compliance with a well-specific plugging insurance policy, as defined in Texas Natural Resources Code § 91.104(c).
- (c) “Deed Agreements”: “Deed Agreements” means deeds or signed written documents that identify a grantor and grantee, provide a reasonably accurate description of the property, and clearly contains the intention to convey.
1. Under this Chapter, “Deed Agreements” should contain provisions of liability in anticipation of well collision occurrence.
- (d) “Technical Data Surveys”: “Technical Data Surveys” means professional surveying by a land surveyor of the land in use, including consulting, investigating, evaluating, analyzing, planning, providing an expert surveying opinion or testimony, acquiring survey data, preparing technical reports, and mapping to the extent those acts are performed in connection with acts described in Texas Occupations Code § 1071.002(6).
- (e) “Notification Requirements”: “Notification Requirements” means providing prompt, accurate notification of the drilling, redrilling, or deepening of wells to neighboring operators, as well as providing prompt, accurate record requirements to the Commission, to comply with the Statewide Wellbore Collision Prevention Program.
1. Under this Chapter, compliance with the “Statewide Wellbore Collision Prevention Program” requires an operator to perform an anti-collision evaluation of all active (producing, shut-in, or temporarily abandoned) offset wellbores that have the potential of being within 150 feet or a proposed Well prior to drilling operations

for the proposed Well. The Operator will give notice to all neighboring Operators prior to drilling.

2. *Under this Chapter, “Notification Requirements” to neighboring operators may be redacted under the Trade Secret Exception so long as the notification provides enough information for the potential well collisions to be sufficiently mitigated.*
3. *Under this Chapter, “Record Requirements” to the Commission are as defined in 16 Texas Administrative Code §3.1(b).*

The new Section is proposed to implement changes within Texas Natural Resources Code § 85.321: A Suit for Damages. Definitions in this Section are taken from common industry definitions, as well as other official, Texas implemented Codes.

It has been a longstanding trend that operators want to serve their own interests by dominating a particular reservoir to utilize the most of the natural resources and garner the most profit.¹³⁶

The framework of the Texas regulation would focus on ways that injured operators would be able to recover, and it would propose a “laundry list” scheme to achieve that goal. An avenue for recovery would be provided through compliance with mandated (1) insurance policies, (2) deed agreements, (3) technical data surveys, and (4) notification requirements. Its foundation would be rooted in the “good neighbor” operating standard; what a reasonably prudent operator should do when acting as a good neighbor for the benefit of himself and others. To be viable, the RRC would oversee such regulation and provide guidance when necessary.¹³⁷

Insurance policies and deed agreements are necessary because reliance on leases that do not contain such provisions has proven to be ineffective.¹³⁸ Lease agreements typically do not address such collisions or are

136. See Donald Norcross, *Stop Making Excuses for Greedy Gas and Oil Companies*, COURIER-POST (June 2, 2022), <https://www.courierpostonline.com/story/opinion/2022/06/02/stop-making-excuses-greedy-gas-and-oil-companies/7473860001/> (stating that U.S. oil companies “looked out for themselves and made record profits” rather than keep prices stable during times of market uncertainty).

137. See *supra* Part III.

138. See generally Practical L. Oil & Gas, *Oil & Gas Lease (TX)*, THOMSON REUTERS (2022), <https://1.next.westlaw.com/Document/1f94b2cea8b0d11ea80afece799150095/View/FullText.html> (noting that typical standard oil and gas leases in Texas does not include provisions for frac hit liability or insurance policy clauses).

contradictory when they do.¹³⁹ Standardizing such language and including liability and insurance provisions would serve to “improve[] efficiency and reduce[] implementation errors.”¹⁴⁰ Without such provisions, unprotected well collisions could result in financial loss or even complete production shut-off.¹⁴¹ Provisions within the lease should include minimum distance to lease line, which surveying techniques will be employed, and any other procedures that might be prevalent to collision avoidance.¹⁴² By including this language in the deed instrument, efficiency and implementation errors can be accounted for prior to ensuing litigation.¹⁴³

Technical data surveys would be required by operators who are planning to drill near an existing well to account for pressure changes, natural fracture clusters, and rock-fluid interactions within and near the wellbore.¹⁴⁴ Baseline testing such as this provides parties with a foundation for determining any preexisting problems that could arise while drilling in a currently (or historically) active area.¹⁴⁵ Identifying these issues at the outset of operation is beneficial because prudent operators can take action to protect their well and preclude themselves from any liability in the future.¹⁴⁶ For instance, pressure reports are used to determine whether a “well’s structural integrity is maintained throughout fracturing.”¹⁴⁷ If a pressure spike has been reported, the well bore is likely not structurally sound and is more susceptible to frac hits.¹⁴⁸ By conducting and providing

139. *See generally id.*

140. S.J. Sawaryn et al., *Well-Collision-Avoidance Management and Principles*, 33 SPE DRILL & COMPL. 335 (Nov. 20, 2018), <https://onepetro.org/DC/article-abstract/33/04/335/207492/Well-Collision-Avoidance-Management-and-Principles?redirectedFrom=fulltext>.

141. *Id.*

142. *See generally* Paul D. Clote & Austin W. Brister, *Tips for Mediating Your Next Oil & Gas Dispute*, 4 PRODUCER’S EDGE 11,12 (2022) (noting that oil and gas disputes often include well interference claims, negligence claims, and damage models, to name a few).

143. *See generally id.*

144. *See* Kevin Wutherich, *Using Data from Drilling to Guide Completion Designs*, WORLD OIL (May 2022), <https://www.worldoil.com/magazine/2022/may-2022/special-focus-well-completion-technology/using-data-from-drilling-to-guide-completion-designs/> (identifying data that could be used to enhance well completion design and provide valuable information to operators).

145. *Id.*

146. *See id.*

147. McFeeley, *supra* note 125, at 10.

148. *Id.*

technical data surveys, operators can preclude themselves from liability while still maintaining producing values.¹⁴⁹

Geological and environmental information should also be included when conducting a survey at this stage.¹⁵⁰ Not only are there nearby resources that are at risk of being contaminated, there are also abandoned oil and gas wells that need to be identified.¹⁵¹ Shut-in or abandoned wells are at a high risk of collision solely because of their inactive status.¹⁵² More often than not, abandoned wells are not actively monitored and rarely come with a full history of survivorship.¹⁵³

Notification requirements provide a robust disclosure mechanism that “serve[s] as a basis for well-informed policies to protect the public.”¹⁵⁴ Disclosure requirements not only “provide an array of information,”¹⁵⁵ but they also provide operators with the necessary information to determine when a potential collision is likely to occur.¹⁵⁶ Many states have developed a “good neighbor” standard of reporting potential hits so that the existing operators can employ cautionary measures, several of which are usually determined through the technical data survey.¹⁵⁷ While nearby operators

149. See generally Wutherich, *supra* note 144 (suggesting that better completion designs resulting from technical data could benefit the operator and negate the need for litigation).

150. *Supra* Part III.

151. See Tex. Occ. Code Ann. tit. 6, § 1071.002(6)(A) (defining “professional surveying” as including “the measurement or location of sites, . . . natural features, and existing man-made works in the air, on the earth’s surface, within underground workings, and on the beds of bodies of water . . .”). See also Sergio Chapa, *How Last Century’s Oil Wells are Messing with Texas Right Now*, BLOOMBERG (June 29, 2021), <https://www.bloomberg.com/news/features/2021-06-29/how-last-century-s-oil-wells-are-messing-with-texas>.

152. See generally Bret Wells & Tracy Hester, *Abandoned but Not Forgotten: Improperly Plugged and Orphaned Wells May Pose Serious Concerns for Shale Development*, 8 MICH. J. OF ENVTL. & ADMIN. L. 115 (2018). See also Joshua W. Brownlow et al., *Spatial Risk Analysis of Hydraulic Fracturing near Abandoned and Converted Oil and Gas Wells*, 55 GROUNDWATER 268 (2017).

153. See Bret Wells & Tracy Hester, *Abandoned but Not Forgotten: Improperly Plugged and Orphaned Wells May Pose Serious Concerns for Shale Development*, 8 MICH. J. OF ENVTL. & ADMIN. L. 115 (2018).

154. McFeeley, *supra* note 125, at 4.

155. *Id.* at 5.

156. *Id.*

157. See Susan Carroll & Matt Dempsey, *Fracking Research Hits Roadblock with Texas Law*, HOUSTON CHRON. (Feb. 8, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Fracking-research-hits-roadblock-with-Texas-law-6812820.php> (Texas was one of the first states to pass law for disclosure of fracking. This law requires that operators list chemicals that were used in the fracturing simulations, but it also provides a trade secret exception. This law served as a model for ALEC legislation, and it has been

might fail to disclose this type of information in person, several states have developed a notice reporting interface online (many using sites such as FracFocus to streamline communications).¹⁵⁸ However, reporting software severely limits the amount of information that is shared amongst practitioners: “Because the information provided . . . is so limited, there is not a single state in which disclosures on the site contain all information required by the state rule.”¹⁵⁹ To overcome these obstacles, there should be a state-wide reporting database that all operators are required to use.¹⁶⁰ A singular interface would allow not only neighboring operators within the same state to disclose information, but it would also provide a direct avenue for operators drilling on or near state boundaries to gather valuable information without physically going to the well site or neighboring municipality agencies to examine records.¹⁶¹ The database should contain all information that is required for compliance: exact concentrations, distances from wellbores, and drilling techniques, to name a few.¹⁶²

The requirements of the proposed regulation would ensure that injured operators have an avenue for recovery after suffering damage from a well collision. By utilizing the laundry list scheme, an offending or injured operator would state a case for compliance or non-compliance. If an operator is found largely in compliance and acting within “good neighbor” standards, then recovery will likely be precluded under this scheme. Alternatively, if an operator is not in compliance or has operated in bad faith under “good neighbor” standards, damages will be awarded. While compliance with all listed techniques favor preclusion, a case-by-case analysis might be implemented if both operating parties are acting prudently. There, it would be a fact-determinative exercise to ascertain liability, if any.

modeled in other states such as Pennsylvania, Illinois, Indiana, New York, and Ohio). *Texas and Fracking*, GLOBAL ENERGY MONITOR (Apr. 30, 2021, 11:06 AM) https://www.gem.wiki/Texas_and_fracking.

158. McFeeley, *supra* note 125.

159. *Id.* at 8.

160. *Supra* Part III.

161. See generally Kate Galbraith, *Fracking Disclosure to Start in February*, TEX. TRIB. (Dec. 13, 2011), <https://www.texastribune.org/2011/12/13/fracking-disclosure-rules-passed-texas-win-praise/> (reporting that disclosure of hydraulic fracturing chemicals on a public website was unanimously approved by the Texas Railroad Commission and similar laws have been adopted in Montana, Louisiana, New Mexico, and Colorado).

162. See *Regulations*, FRACFOCUS, <https://www.fracfocus.org/explore/regulations> (last visited Jan. 27, 2023).

B. The Necessity of a Uniform Regulatory Framework Through the Texas Railroad Commission

The regulatory framework requires not only compliance by individual operators, but oversight by the Texas Railroad Commission. While state regulatory agencies might not have first-hand exposure to local operating issues, they do have the means to identify and resolve such issues through their enforcement powers.¹⁶³ The RRC, through the Texas Constitution, has the authority to “exercise[] its statutory responsibilities under state and federal laws for regulation and enforcement of the state’s energy industries.”¹⁶⁴ While a national regulation would likely bring more uniformity to the industry, it could be harder to implement.¹⁶⁵ State agencies, on the other hand, have the means to regulate their jurisdiction more readily.¹⁶⁶ Thus, because they are more directly connected to the implementation of statewide rules, the RRC is the proper regulatory body to oversee such issues.¹⁶⁷

For instance, the outcome of the *Capital Star* case would be drastically different if the proposed framework was implemented statewide by the RRC.¹⁶⁸ The RRC has a special interest in ensuring that statewide operators are in compliance with the rules; they want to promote discovery while still preserving the natural resource.¹⁶⁹ By utilizing insurance policies, deed agreements, technical data surveys, and notification requirements, *Capital Star* would likely have a stronger case that XTO was in violation of the statewide rules, and—more importantly—they would have a more direct route to recovery.¹⁷⁰

Further, the state has historically “been responsible for the majority of oil and gas regulations.”¹⁷¹ Federal regulations present several additional

163. See Tex. Nat. Res. Code Ann. tit. 3, Ch. 81–111 (granting the Texas Railroad Commission enabling power over oil and gas operators).

164. *RRC’s Authority and Jurisdiction*, R.R. COMM’N TEX. (2022), <https://www.rrc.texas.gov/about-us/faqs/rrc-authority-and-jurisdiction/>.

165. See David Blackmon, *Why Oil & Gas Should be Regulated by The States*, FORBES (Oct. 15, 2013), <https://www.forbes.com/sites/davidblackmon/2013/10/15/why-oil-gas-should-be-regulated-by-the-states/?sh=2b91db6b1b8c>.

166. See *id.*

167. See *id.*

168. See generally Proposal for Decision, *supra* note 29.

169. See Blackmon, *supra* note 165.

170. See *infra* Part III.A.

171. House Comm. on Energy Res., Bill Analysis, Tex. H.B. 40, 84th Leg., R.S. (2015).

obstacles before implementation.¹⁷² The cyclical nature of the industry shows that “over-regulation of [the industry by the federal government] is counterproductive and only serves to create shortages and increase costs to the consumer.”¹⁷³ Upstream regulations on a federal scope do not usually recognize the various entities that are available on a state level, and it could take time for federal agencies to identify and resolve issues, whereas state regulators could utilize lower-level municipalities to address matters quickly.¹⁷⁴

To be sure, the *Capital Star* case on a nationally regulated scheme would not have yielded timely support for the injured operators, if any was granted at all.¹⁷⁵ Since national agencies usually do not have a vested interest in the operations of local industries, they are less likely to know the hierarchical strategies of the operators. *Capital Star* would be forced to spend valuable time explaining not only their corporate strategies but would likely have to educate a national regulator on the local operating rules. The resulting process is counterproductive, costly, and time-consuming, and would still not provide a guaranteed method for recovery to the injured operator.¹⁷⁶

Critics might say that state agencies are susceptible to corruption or outside influence by operators; however, this is an obstacle that could occur at any level of implementation.¹⁷⁷ Since state agencies regulate a smaller scope than their federal counterparts, they likely will encounter fewer operators who are vying for control of the reservoir using corrupt tactics.¹⁷⁸ As a result, federal regulation of the industry could favor larger companies while disregarding smaller ones.¹⁷⁹

1. Current Avenues of Recovery are Inadequate and Ambiguous

A statewide regulation should be implemented because Texas currently “do[es] not require operators to obtain a permit specifically for fracturing

172. See generally Blackmon, *supra* note 165 (discussing the shortfalls of demanding federal government action in the oil and gas industry).

173. *Id.*

174. See *Should the Federal Government Regulate Fracking?*, WALL ST. J. (Apr. 14, 2013), <https://www.wsj.com/articles/SB10001424127887323495104578314302738867078>.

175. See generally Proposal for Decision, *supra* note 29.

176. See generally Blackmon, *supra* note 165.

177. See House Comm. on Energy Res., Bill Analysis, Tex. H.B. 40, 84th Leg., R.S. (2015).

178. See WALL ST. J., *supra* note 174.

179. See *How do Government Regulations Impact the Oil and Gas Drilling Sector?*, INVESTOPEDIA (July 18, 2022), <https://www.investopedia.com/ask/answers/012715/how-does-government-regulation-impact-oil-gas-drilling-sector.asp>.

operations.”¹⁸⁰ As noted in Part I, states such as Oklahoma and Colorado require prior notification, while New Mexico and Texas do not.¹⁸¹ Moreover, the current state regulations are usually meant to prevent blowout situations and premature depletion, and they are often not enough to impose liability standards for well collisions.¹⁸² Even more common is the notion that states with strong requirements in one sector hardly require anything in others.¹⁸³ Many states apply disclosure requirements randomly, or even accept incomplete or inaccurate reports.¹⁸⁴ Worse still, these inadequate disclosures are accepted as if they contained all the required information that is demanded.¹⁸⁵ Speculation can be made as to how such poor compliance and enforcement has been tolerated by several state agencies; whether it be due to “overburdened state enforcement staff or an overly-cozy relationship with industry,” the drastic variance and indirect reliance across state boundaries make industry compliance difficult, and recovery for damages even harder.¹⁸⁶ Left to their current devices, Texas municipalities would likely set varying standards and specificities, fail to adequately administer the standards, or even leave off liability measures altogether.¹⁸⁷

Additionally, a statewide regulation is crucial to the survival of the oil and gas industry and its role in spurring new discovery.¹⁸⁸ With the recent uptick in frac hits and a loss of production quantities, operators are desperate to garner as much of the reservoir as they can to account for the deficit.¹⁸⁹ A uniform standard encourages production, discovery, and development by allowing operators to produce from reserves that would otherwise be inundated by pre-existing wells.¹⁹⁰ It would also encourage development in lease or deed agreements where a lessee-operator can insert

180. Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, 82 Fed. Reg. 61924, 61937 (Dec. 29, 2017).

181. *Supra* Part I.

182. *See generally* Tex. Nat. Res. Code Ann. tit. 3.

183. *See* McFeeley, *supra* note 125.

184. *Id.*

185. *Id.* at 8.

186. *Id.* at 8.

187. House Comm. on Energy Res., Bill Analysis, Tex. H.B. 40, 84th Leg., R.S. (2015).

188. *See generally* Todd Staples, *Staples: A Smart Fix for Oil and Gas Regulation in Texas*, TEX. OIL & GAS. ASSO. (Apr. 13, 2015), <https://www.txoga.org/staples-a-smart-fix-for-oil-and-gas-regulation-in-texas/> (stating that enacting consistent regulations supports Texas’ economy and fuels the success of the oil and gas industry).

189. *See* Jacobs, *supra* note 7.

190. *See id.*

preceding requirements that may preclude collisions and determine a liable party.¹⁹¹ Thus, a uniform statewide regulation is imperative for surface owners and operators alike.¹⁹²

Common law claims do not adequately address well collision liability.¹⁹³ Subsurface claims of trespass and negligence are often used by operators to seek redressability after a frac hit occurs.¹⁹⁴ Trespass claims typically turn on whether there was “wrongful interference with the right of exclusive possession of real property.”¹⁹⁵ Common remedies under this tort are meant to “enforce the owner’s exclusivity of possession.”¹⁹⁶ There is typically a presumption of damages associated with these types of remedies, but certain state case law has since contradicted the presumption of damages, instead requiring a showing of actual damages before recovery is available.¹⁹⁷ Nuisance claims, on the other hand, are more flexible in determining whether there are viable remedies post-well collisions.¹⁹⁸ Many courts use nuisance theories to justify decisions, despite discussing the case using trespass theories.¹⁹⁹ The goal of achieving “efficient and equitable solutions to problems created by discordant land uses” makes nuisance claims attractive.²⁰⁰ However, nuisance law is also varying across jurisdictions, leaving operators guessing as to which claims would be the most successful in a court setting.²⁰¹

While common law claims are unworkable as to well collision liability, critics might argue that a statewide regulation is an overreach of the judicial system and that municipalities in their respective jurisdictions are better

191. *Supra* Part III.

192. See generally Mella McEwen, ‘Frac Hits’ Growing Issue as Infill Drilling, *Frac Stages Rise*, MIDLAND REP.-TELEGRAM (Feb. 20, 2018), <https://www.mrt.com/business/oil/article/Frac-hits-growing-issue-as-infill-drilling-12617883.php> (stating that frac hits are becoming more prevalent in the Permian Basin and that mitigation techniques are necessary).

193. *Supra* Part II.C.

194. *Supra* Part II.C.

195. Schremmer, *supra* note 59, at 327.

196. *Id.*

197. *See id.*

198. *See id.* See also Edward Clark Lewis & Jeffrey A. Webb, *Texas Supreme Court Clarifies Private Nuisance Law*, NORTON ROSE FULBRIGHT, (Jul. 2016), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/0fcfd384/texas-supreme-court-clarifies-private-nuisance-law>.

199. *See* Schremmer, *supra* note 59.

200. *Id.* at 334.

201. *See id.*

equipped to decide such technical issues.²⁰² However, current industry standards vary from county to county, leaving operators to juggle a “patchwork of rules and jurisdictions riddled with gaps and inconsistencies.”²⁰³ Presently, no state has regulations that “require[] the same best practices across the board.”²⁰⁴ In some states, multiple regulatory agencies have a hand in management.²⁰⁵ Further, the majority of states that do have regulations do not include liability for well collisions in their provisions.²⁰⁶ By adopting this regulation, Texas would be at the forefront of well collision liability, paving the way for other states to adopt model provisions.

Further, while many might believe that municipal agencies have the most pull with respect to their local operators, state-specific oversight of such a lucrative and expansive industry is beneficial.²⁰⁷ No municipality currently has a comprehensive disclosure rule.²⁰⁸ All current municipality standards have conflicting guidelines and omissions in direct authority.²⁰⁹ Worse still, even in places where there are outlined standards, compliance is not always enforced.²¹⁰ Municipalities heavily rely on local industry knowledge to determine best practices regarding remedies and recovery for well

202. See House Comm. on Energy Resources, Bill Analysis, Tex. H.R. 40, 84th Leg., R.S. (2015) (“Although state agencies may have more expertise surrounding oil and gas operations, municipalities are better equipped to understand the effects of the operations on their communities and would be under more pressure to respond to local resident concerns.”).

203. *How is Fracking Regulated in the United States?*, HACTIVATEED (Oct. 9, 2019), <https://hacktivateed.org/how-is-fracking-regulated-in-the-united-states/>.

204. Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, 82 Fed. Reg. 61936 (Dec. 29, 2017).

205. See House Comm. on Energy Resources, *supra* note 204 (“Even if state agencies adequately enforced existing regulations, gaps in state subsurface rules and regulations currently are filled by local ordinances.”).

206. Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, 82 Fed. Reg. 61937 (Dec. 29, 2017) (acknowledging that New Mexico’s hydraulic fracturing regulation does not include provisions to prevent “frac hits”).

207. See House Comm. on Energy Resources, *supra* note 204 (“The state historically has been responsible for the majority of oil and gas regulations. State agencies, therefore, are the most experienced regulatory bodies and have highly specialized subdivisions equipped to handle highly specialized issues.”).

208. See *id.* (stating that the lack of a state regulation does not “justify turning to a patchwork set of municipal ordinances.”).

209. See *id.*

210. See *generally id.* (emphasizing that municipalities can be “heavily influenced by operators, even more so if the municipality is small and the operator is influential.”).

collisions.²¹¹ However, operators are often failing to abide by the “good neighbor” standard and are instead choosing to do what is beneficial for their own production streams.²¹²

Critics of a statewide regulation might say that the Bureau of Land Management (BLM) is better equipped to oversee such expansive matters of the oil and gas industry.²¹³ However, the BLM previously tried to mandate disclosure and compliance on a federal level, and ultimately failed.²¹⁴ The BLM rescinded a 2015 rule, suggesting a national compliance standard, because of “administrative burdens and compliance costs that [were] not justified.”²¹⁵ Allowing the BLM to codify and oversee such a standard would impose substantial financial and administrative burdens on the operator, many of which could be mitigated—or avoided altogether—if regulated by a statewide agency.²¹⁶ A statewide standard would guarantee injured parties had a direct path to recovery rather than sit idly by and wait to be compensated through a common law claim or suffer through the tedious timeline of a national agency.²¹⁷ After all, a major driving factor in the recession of the BLM 2015 rule was Executive Order 13783, which announced the official governmental policy on energy resources within the United States:

(1) Executive departments and agencies immediately review regulations that potentially burden the development or use of domestically produced energy resources and, as appropriate, suspend, review, or rescind those that unduly burden domestic energy resources development “beyond the degree necessary to

211. See generally Mose Buchele, *After HB 40, What’s Next for Local Drilling Rules in Texas?*, STATEIMPACT TEX. (Jul. 2, 2015) <https://stateimpact.npr.org/texas/2015/07/02/after-hb-40-whats-next-for-local-drilling-bans-in-texas/> (explaining that the passing of HB 40 now allows municipal regulations only if they are “commercially reasonable”—a standard that is typically from the industry’s perspective).

212. See generally *id.*

213. See generally WALL ST. J., *supra* note 175 (arguing that the federal government should regulate fracking over state agencies, because of environmental impacts and other hazards that have the potential to become a national problem).

214. Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017).

215. *Id.*

216. See generally WALL ST. J., *supra* note 175 (further explaining that states [and not the federal government] are in the best position to “figure out how best to balance fracking’s costs and benefits.”).

217. See generally *id.* (highlighting that state agencies are adapting to modern industry practices and “coming up with regulatory systems that fit local conditions.”).

protect the public interest or otherwise comply with the law”;
and (2) To the extent permitted by law, agencies should promote clean air and clean water, while respecting the proper roles of the Congress and the States concerning these matters; and (3) Necessary and appropriate environmental regulations comply with the law, reflect greater benefit than cost, when permissible, achieve environmental improvements, and are developed through transparent processes using the best available peer-reviewed science and economics.²¹⁸

Thus, the BLM issued a rescission of the 2015 rule after a closer look at the determining criteria found that the rule was “unnecessarily duplicative of state . . . regulations and imposes burdensome reporting requirements and other unjustified costs on the oil and gas industry.”²¹⁹ The revocation of the BLM rule left the industry more flexible with regard to well collisions and questions of how one should pursue recovery, allowing state agencies to fill the gap.²²⁰

Even then, there might be arguments that disclosure of any kind, such as that required in the proposed legislation, would qualify as exempt under trade secret protection.²²¹ However, trade secret exemption claims are only legitimate in a limited number of cases.²²² A trade secret is normally information about a technique or product that “gives a company a competitive advantage in the marketplace.”²²³ To determine if a disclosure qualifies as exempt, operators should “be made to provide specific factual justification which demonstrates that they are entitled to prevent public disclosure of the information.”²²⁴ If such a finding fails, then disclosure to the public must be made.²²⁵ Conversely, if protection is warranted,

218. Exec. Order No. 13,783, 82 FR 16093 (Mar. 28, 2017).

219. Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, *supra* 13 (Dec. 29, 2017).

220. *See id.*

221. McFeeley, *supra* note 126.

222. *See* Cody B. Johnson, *Intellectual Property and the Law of Fracking Fluid Disclosures: Tensions and Trends*, 6 OIL & GAS, NAT. RES. & ENERGY J. 443, 449 (2021), <https://digitalcommons.law.ou.edu/onej/vol6/iss3/7> (“While trade secret law has historically been grounded in doctrines of tort law and property rights, the modern approach has been to view trade secrets as intellectual property rights that incentivize innovation in the marketplace.”).

223. McFeeley, *supra* note 126, at 12.

224. *Id.* at 6.

225. *See* Johnson, *supra* note 224.

information should be divulged to regulators only; this “ensures that the state can respond appropriately in case of emergency.”²²⁶ Many states have allowed current industry standards to fly under the radar by way of the trade secret exception, with some agencies allowing techniques to continue without disclosure even when the operator cannot provide a legitimate justification that would qualify such exemption.²²⁷

To determine if a portion of the mandated notice requirements is protected by an exemption, the RRC should evaluate each challenged notice on a case-by-case basis.²²⁸ Oversight of such determination will allow the oil and gas industry to maintain a level of discretion while still abiding by the regulation.²²⁹ In fact, many states already have developed trade secret protocols for other spheres that could be readily adapted to accommodate the oil and gas industry.²³⁰

For example, Texas currently hears challenges from landowners who own land on or near the developing area.²³¹ But, operators are not required to submit disclosures of their actual justifications, so landowner claims often go unsubstantiated.²³² By adopting a disclosure requirement in the proposed regulation, operators would be required to disclose all protected information, and even if exempted, would be required to submit specific substantiating facts to successfully avoid liability.²³³ This would ensure that operators are complying with the rules while still affording them a level of secrecy as to their trade practices.²³⁴

2. *Public Policy Demands a Standard*

Several operators in the industry face public scrutiny because of their current controversial practices.²³⁵ Many have taken the first steps toward

226. McFeeley, *supra* note 126, at 6.

227. *Id.*

228. See Keith B. Hall, *Hydraulic Fracturing: Trade Secrets and the Mandatory Disclosure of Fracturing Water Composition*, 49 IDAHO L. REV. 399, 417 (2013), https://digitalcommons.law.lsu.edu/faculty_scholarship/189 (“For now, the best regulatory approach for most states will be to give their agencies discretion to challenge trade secret claims . . .”).

229. *See id.*

230. McFeeley, *supra* note 126, at 6.

231. *Id.*

232. See Hall, *supra* note 230, at 414.

233. *Supra* Part III.

234. *See id.*

235. See generally Haley Samsel, *In Texas, Environmental Activists Renew Fight Against Fracking*, USA TODAY (Oct. 22, 2020), <https://www.usatoday.com/story/opinion/2020/>

carbon-neutral emissions, issuing clean energy statements and committing to take a stand against climate change. To further these initiatives, the proposed statewide regulation would help garner community trust, as public perceptions continue to change as a result of the “war on climate.”²³⁶ Many citizens have taken a personal interest in climate change and its environmental impacts, forcing localities across the state to adopt regulations that address these issues.²³⁷ Some might argue that providing a concise legal framework for liability in these frac hit situations would “set forth a common standard of environmental protection at hydraulic fracturing sites.”²³⁸ Ultimately, if a statewide regulation was adopted for frac hit liability, public concern would be curtailed, and perceptions of the oil and gas industry would likely shift toward a more positive light.²³⁹

Currently, disclosure practices and public policy demands do not align.²⁴⁰ The current industry standards of voluntary notice and common law claims come with significant obstacles for the general public.²⁴¹ Since many want to see a standard that has environmental protection and public access at its core, the sporadic reporting and limited publication makes it difficult for people to determine if they are playing a significant role in allowing this issue to go forward, to the detriment of society.²⁴²

While many advocate for more oversight of the industry, many critics say that the RRC has not yet acted in this space, so a regulation for well collisions would be an overreach.²⁴³ They cite unreasonable expenses and burden on operators who would have to overhaul their operating processes just to comply with the proposed regulation.²⁴⁴ Critics also say that the RRC

10/22/environmentalists-renew-battle-against-fracking-north-texas-column/6003574002/ (stating that expansive administrative approvals in the Texas oil and gas sector have pushed local activists to advocate for more stringent regulations).

236. *See id.*

237. *See id.*

238. *See generally* Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, *supra* note 13, 61936 (Dec. 29, 2017) (highlighting how members of society prefer a uniform rule that can be easily referenced for consistent implementation).

239. *See generally* Samsel, *supra* note 237; Hydraulic Fracturing on Federal and Indian Lands Rescission of a 2015 Rule, *supra* note 13, 61936 (Dec. 29, 2017).

240. *See* Samsel, *supra* note 237.

241. McFeeley, *supra* note 126.

242. *See generally id.*

243. *See generally* House Comm. on Energy Resources, *supra* note 204 (stating that a Texas Railroad Commission regulation expressly preempting local rules would be an overreach).

244. *See generally id.* (explaining that Texas regulations are notoriously weak, ignore modern problems, and lack proper operations to be viable in practice).

has operated in the same fashion for several decades.²⁴⁵ However, comprehensive reviews of the Railroad Commission show that changes are needed.²⁴⁶ As reported by a state oversight agency, Texas Sunset Commission, the RRC “has a ‘lack of strategic approach to enforcement and inability to provide basic performance information[,]’ . . . [and] ‘cannot guarantee that major violations . . . are being appropriately addressed.’”²⁴⁷ Their reports suggest that while the RRC has had jurisdiction over oil and gas matters since its inception, they might benefit from structural reform.²⁴⁸ These reports further the position that both the public community and the private industry are interested in seeing reform in the oil and gas sector.²⁴⁹ To be sure, the RRC has allowed great strides in oil and gas development in the state; however, to keep up with the times, new regulations and structural changes could prove beneficial not only to injured operators but to the industry overall.²⁵⁰

Even with the support of public and private sectors, some operators are still reluctant to accept the need for regulatory reform.²⁵¹ Their arguments largely stem from economic concerns associated with enforcing a new regulation for well collision liability.²⁵² Well collisions occur on a scale from low-range pressure hits to well bashing, spanning across a large scale in terms of economic damage.²⁵³ While it is true that upfront costs to mitigate and prevent frac hits might be costly, the consequences of refusing to do so could be even more detrimental.²⁵⁴ From an economic perspective, well collisions could mean losing “millions of dollars per day.”²⁵⁵ Reliance on the current voluntary compliance coalition is not reliable; voluntary compliance is only sustainable as long as there is economic growth from

245. See generally *An Introduction to the Railroad Commission of Texas*, COMM’N SHIFT, <https://commissionshift.org/rrc101/> (last visited Jan. 27, 2023) (stating that the Texas Railroad Commission has not adequately managed the modern-day transitions of the energy sector).

246. See *id.*

247. Andrew Dobbs, *Enforcing Texas’ Oil & Gas Laws*, TCE BLOG, (May 9, 2016), <https://www.texasenvironment.org/enforcing-texas-oil-gas-laws/>.

248. *Id.*

249. *Id.*

250. See *An Introduction to the Railroad Commission of Texas*, *supra* note 247.

251. See generally House Comm. on Energy Resources, *supra* note 204.

252. See generally *id.*

253. Bacon, *supra* note 5.

254. See *id.*

255. Faseeh Khan, *Frac Hits: What Are We Doing About It?*, LINKEDIN (Dec. 20, 2018), <https://www.linkedin.com/pulse/frac-hits-what-we-doing-faseeh-khan/>.

doing so.²⁵⁶ Once producing values start to decline, developers are once again fending for themselves.²⁵⁷

Admittedly, economic incentives from the industry typically spur the development of codified law.²⁵⁸ Thus, the proposed regulation has impliedly intertwined such incentives into its language in the form of damage recovery.²⁵⁹ Doing so allows operators to recognize the viability of such a regulation, while still maintaining strict requirements to advance public policy initiatives. Further, by utilizing public interest groups or political advocates, operators will begin to recognize the importance of a strong community endorsement, and will likely be more willing to accept the requirements of the regulation.

C. In Lieu of Texas Railroad Commission Action, the Texas Legislature Should Directly Address Well Collision Liability

In lieu of a statewide regulation, Texas, through the state legislature, should codify a rule that addresses recovery after frac hits.²⁶⁰ Legislative efforts are essential in implementing important changes in Texas statutory law.²⁶¹ The legislature should look to H.B. 40 as a stepping stone for this rule, amending the bill such that provisions for liability are included.²⁶²

Texas is touted as the leading producer of crude oil in the United States.²⁶³ As such, developers in the area strive to utilize more of the resource and often resort to fracking techniques to do so.²⁶⁴ Texas Governor Gregg Abbott's main justification in signing H.B. 40 was that the law would help avoid "a patchwork quilt of regulations that differ from region

256. See generally Amy Mall, *Why Voluntary Disclosure of Hydraulic Fracturing is Insufficient*, NAT. RES. DEF. COUNCIL (May 18, 2011), <https://www.nrdc.org/experts/amy-mall/why-voluntary-disclosure-hydraulic-fracturing-insufficient> (stating that the current fracking disclosure system that the industry uses—FracFocus—is purely voluntary).

257. See generally Khan, *supra* note 257 (explaining that in terms of economics, frac hits can "mean[] losses of millions of dollars per day . . . giving shale producers sleepless nights without a definitive solution.").

258. See *id.*

259. See *supra* Part III.

260. *Supra* Part II.A (highlighting examples of Texas legislature acting in the oil and gas space).

261. *Supra* Part II.A.

262. See *supra* Part III; see also House Comm. on Energy Resources, *supra* note 204.

263. *Texas State Energy Profile*, U.S. ENERGY INFO. ADMIN. (May 19, 2022), <https://www.eia.gov/state/print.php?sid=TX> ("Texas has led all states in crude oil production in every year but one since at least 1970.").

264. See generally *id.* (stating increased crude oil production resulted after hydraulically fracturing wells in Texas shale formations).

to region, differ from country to country or city to city.”²⁶⁵ While it is true that this bill limits the number of various regulations, there are other ways to accomplish this goal while keeping best practices and prudent “good neighbor” standards viable; instead, the bill unilaterally allows operators to use drilling techniques that could result in harm to existing wells, essentially forcing other operators to rely on common law claims instead of providing them safeguards through local or state legislation.²⁶⁶

Admittedly, the Texas legislature recognized the possible infringements on private property rights and chose to give more deference to the oil and gas industry.²⁶⁷ However, H.B. 40, now codified in the Texas Natural Resources Code at § 81.0523, could have gone the other way.²⁶⁸ The Texas legislature has acknowledged that it is “in the state’s interest to affirm the authority for regulation [of] oil and gas activities within the state.”²⁶⁹ Using the same logic, a legislative effort that demands state agency compliance—such as the one proposed in this Section—would function to “prevent a patchwork of regulation[s],” “protect mineral rights holders,” and “prevent encroachment on private property.”²⁷⁰ State agencies have “highly specialized subdivisions equipped to handle highly specialized issues.”²⁷¹ Thus, a codified, comprehensive state regulation that promotes discovery and development while addressing local liability concerns would not only be commercially viable and adhere to the “good neighbor” standard, but would provide the industry with a clear path to recovery when well collisions occur.²⁷²

Considering H.B. 40 and the proposed regulation together is favorable when seeking recovery for well collisions. Again, we look to *Capital Star* to determine the efficiency of H.B. 40, with the proposed regulation in mind.²⁷³ There, while *Capital Star* suffered thousands of dollars in damages to several of their wells, the court found that there was insufficient evidence to show that XTO violated statewide RRC rules and that *capital Star*’s

265. *Governor Abbott Signs HB 40 Into Law (84R)*, *supra* note 44.

266. *See* Tex. Nat. Res. Code Ann. tit 3, § 81.0523.

267. *See* House Comm. on Energy Resources, *supra* note 204. (“Mineral rights are just as important to protect as surface rights, but municipal regulations that effectively ban attempts to exploit resources deprive minerals rights owners of their property.”).

268. *See id.* (offering opposing arguments to the codification of HB 40).

269. *Governor Abbott Signs HB 40 Into Law (84R)*, *supra* note 44.

270. *Id.*

271. House Comm. on Energy Resources, *supra* note 204.

272. *See supra* Part III; *see generally id.*

273. *Supra* Part II.C (giving a general factual statement of the *Capital Star* case); *supra* Part III.A (explaining the proposed framework for recovery after well collisions).

assertions were too broad for their sought-after relief.²⁷⁴ If H.B. 40 was *amended* and applied, Capital Star would have to prove that XTO violated the rules and did not act in good faith while conducting their fracturing operations, with respect to neighboring wells.²⁷⁵ Capital Star could use evidence on record such as XTO's compliance (or non-compliance) with (1) insurance policies, (2) deed agreements, (3) technical data surveys, and (4) notification requirements to supplement their position and obtain a favorable judgment.²⁷⁶ If XTO is able to show that they were largely in compliance and operated in good faith, then Capital Star would be precluded from recovery.²⁷⁷ In that case, Capital Star would likely be able to prove that they were entitled to damages under H.B. 40, as *amended* by the proposed regulation.²⁷⁸

To be sure, H.B. 40 is an important first step towards creating an industry standard at the state level.²⁷⁹ Preempting municipal regulations prevents operators from encountering conflicting local ordinances.²⁸⁰ However, H.B. 40 as it stands is incomplete; the bill should include a provision that addresses liability or alternatively places more guidelines on the operator.²⁸¹ As it is currently written, it is not clear what would happen if a prudent operator develops according to the test, yet is suspected of causing frac hits.²⁸² By codifying this Article's proposed regulation, operators not only guarantee their right to recovery after a well collision, but are reassured that the "patchwork of regulations" is no longer a threat to their economic gains.²⁸³

Legislative efforts in the oil and gas industry have proven to be beneficial in a variety of circumstances.²⁸⁴ To be sure, state legislatures across the nation have successfully implemented bills that would promote

274. *Supra* Part II.C.

275. *Supra* Part III.A.

276. *Supra* Part III.A.

277. *Supra* Part III.A.

278. *Supra* Part III.A.

279. *See Governor Abbott Signs HB 40 Into Law (84R)*, *supra* note 44.

280. *Id.* ("[HB 40] ensures that Texas avoids a patchwork quilt of regulations that differ from region to region, differ from county to county or city to city.")

281. *See supra* Part III.

282. *See* Tex. Nat. Res. Code Ann. tit. 3, § 81.0523.

283. *See supra* Part III.A.

284. *See supra* Part II.A.

the industry while leaving all parties content.²⁸⁵ One of the reasons that legislative efforts, specifically in Texas, have proved to be so successful is because of an acute awareness of the standard that operators and interest owners must abide by.²⁸⁶ Recognizing their obligations at the outset of the agreement allows operators and other interested parties to more seamlessly participate in the discovery, development, and recovery process—suggesting that a legislative effort could prove effective for well collision liability.

There have been numerous legislative efforts to pass bills that will promote the well-being of the Texas oil and gas industry.²⁸⁷ This industry is touted as the “lifeblood of the Texas economy,” and legislators are apt to find solutions that will keep operators up and running for as long as possible.²⁸⁸ As such, legislative action has routinely been employed to adopt rules that are lucrative to the industry.²⁸⁹

Opposition to legislative initiatives is not an anomaly in the oil and gas industry.²⁹⁰ Critics have argued that legislation within the industry is largely a result of “lobbying and monetary contributions . . . to Texan politicians.”²⁹¹ However, legislation in this field is essential for the safety and security of Texans, whether they are operators or not.²⁹² The effects of legislation can benefit many sectors across the state, and it provides necessary guidance to operators who are looking to receive compensation after well interference injuries.

Further, by adopting the proposed legislation, Texas politicians and operators can combat critics who say that the failure to deter is proof of

285. *E.g.*, House Comm. on Energy Resources, *supra* note 204 (promoting state-wide, uniform regulations but providing that a municipal ordinance could be imposed if not “commercially reasonable”).

286. *See* Caraway, *supra* note 3.

287. Erin Douglas, *Texas Legislature Advances Bills to Shield Oil and Gas from Climate Initiatives*, TEX. TRIB. (May 3, 2021), <https://www.texastribune.org/2021/05/03/texas-house-fossil-fuel-oil-divest/>.

288. *Id.*

289. *See supra* Part II.A.

290. *See, e.g.*, Matthew Choi, *Texas Democrats in Congress Balance Climate Concerns and Fossil Fuel Constituencies as they consider Landmark Bill*, TEX. TRIB. (Aug. 6, 2022), <https://www.texastribune.org/2022/08/06/texas-democrats-climate-oil-gas-ira/> (“During an April House Energy and Commerce hearing with the top executives of the country’s biggest oil firms, [U.S. Representative Lizzie] Fletcher pushed back on the party-line back-and-forth between Democrats, who accused oil firms of greedily inflating prices, and Republicans, who accused the Biden administration of actively killing oil production.”).

291. *Texas House Bill 40 (2015)*, *supra* note 47.

292. *See id.*

condoning the harmful effects of the industry.²⁹³ To be sure, efforts to reform the RRC regulations have been proposed before and were even argued as being necessary to “meet the very tall test of balancing the protection of Texans and our environment while at the same time ensuring that the oil and gas industry remains vibrant in Texas.”²⁹⁴

IV. Conclusion

When an operator suffers a subsurface well collision where there is no viable chance at liability recovery, the operator risks not only loss of minerals but also loss of profit. The Texas Railroad Commission must afford operators with an adequate path to recovery to ensure that such an obstacle is resolved. There are many instances where operators have been left to their own devices because there is not an adequate legal procedure to make them whole again. Although several well-meaning operators in the industry have taken measures into their own hands, their sporadic reporting efforts suggest that more stringent regulation of frac hits is necessary as market demands and reservoir interplays continue to grow. There have been many instances of regulatory success within the industry, suggesting that the RRC should specifically speak to this issue. Further still, precedent dictates that Texas courts are willing to give deference to RRC guidelines when determining outcomes within the oil and gas industry.

The Texas Railroad Commission needs to adopt a uniform regulation for determining when an operator can be held liable for a frac hit. Given the compilation of current reporting techniques and patchwork of local approaches, a single regulation that provides operators with an adequate remedy would give the industry and the courts clear guidance on how to provide redress. Given the court’s consistent deference to the regulatory agency, Texas should have a list of criteria that operators must comply with to be shielded from frac hit liability. Additionally, non-compliance with the proposed regulation’s criteria would weigh in favor of the injured party, providing them with a more apparent path to recovery.

The proposed criteria within the regulation will help operators to abide by a “good neighbor” standard through more frequent reporting and closer monitoring. Employing these techniques would allow for more consistent

293. See Douglas, *supra* note 289.

294. David Hasemyer, et. al., *Saturated with Oil Money, Texas Legislature Saved Industry from Pollution Rule*, CTR. FOR PUB. INTEGRITY (Feb. 18, 2014), <https://publicintegrity.org/environment/saturated-with-oil-money-texas-legislature-saved-industry-from-pollution-rule/>.

detection of potential well collisions and would provide several chances at addressing this issue through deed agreements or insurance policies before an actual hit occurs and litigation ensues. Given the court's consistent deference to the RRC, a regulatory approach to this issue will allow courts to competently rule on frac hit claims without "legislating from the bench."

Alternatively, the Texas legislature should codify a rule like that of the proposed RRC regulation. Several bills passed by the Texas legislature have already proved to make significant strides in the industry. By codifying liability for well collisions, state-wide operators would have clear authority to turn to, rather than waiting for the RRC or Texas courts to act voluntarily. Further, a legislative effort that reinforces the state's authority over oil and gas operations would foster positive public sentiment within the industry and alleviate the necessity for roundabout litigation.