ILLINOIS ENVIRONMENTAL CASE LAW UPDATE

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The following Illinois Case law summary presents a survey of some of the most important environmental law cases decided by Illinois state courts in 2015. This article discusses the decisions addressing the following: the potential retroactive application of an amendment to the Illinois Environmental Protection Act ("IEPA") increasing liability for past conduct; whether the disposing of hazardous waste in oil and gas injection wells falls exclusively under the Department of Nature Resources's ("DNR") jurisdiction rather than IEPA's; the appropriate methods for determining Leaking Underground Storage Tank ("LUST") fund reimbursement deductibles when the IEPA and the State Fire Marshal issue conflicting determinations; environmental nonprofits' concerns regarding new mercury air pollution controls at a power plant causing ash pond runoff that would further impair the waters of the Illinois River; and the denial of a request to preliminarily enjoin DNR's implementation of new fracking regulations.

A. Landfills: Statutory Amendment Authorizing Mandatory Injunctions Is a Substantive Change Increasing Liability for Past Conduct and Thus Applicable Only Prospectively: *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193

This appeal followed a bench trial ruling against several defendant owner-operators of an unpermitted landfill near Lynwood, Illinois, that was affirmed by the First District Appellate Court.[1] The landfill had been accepting construction and demolition debris ("CDD"), which includes both clean construction and demolition debris ("CCDD") and general construction demolition debris ("GCDD").[2] The Illinois Environmental Protection Act ("the Act") defines CCDD as "uncontaminated broken concrete without

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1. People ex rel. Madigan v. J.T. Einoder, Inc., 2015 IL 117193, ¶¶ 1–4.
2. *Id.* at ¶¶ 5–6.

protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities" while GCDD includes such "non-hazardous, uncontaminated" items as "bricks, concrete, . . . wood, . . . and plaster."[3] The IEPA had notified the owner-operators that the facility would require a permit as a "waste transfer station" because the mixing of recyclable CCDD and non-recyclable GCDD prior to their arrival at the landfill rendered all of the deposits to be "solid waste"[4] despite the fact that subsequent investigation from 10 test pits revealed 99.99% of the material was CCDD.[5] The IEPA also sought to address the defendants' independent violation of Section 31(b) of the Act by allowing the site to grow ninety feet above grade, regardless of whether CCDD or GCDD was used as the fill.[6] The site ceased operating in 2003 after the circuit court issued a preliminary injunction.[7] The circuit court held the individual defendants, John Einoder and Janice Einoder, and their closely held businesses, Tri-State and JTE, were each liable for operating a waste disposal site and depositing CCDD above grade without a permit.[8] The court imposed monetary penalties in a total amount of approximately $1.8 million and issued a mandatory injunction, pursuant to the 2004 amended version of Section 42(e) of the Act, ordering defendants to remove all above-grade waste.[9] The parties disputed the anticipated total cost of removal, but the IEPA's expert opined that the removal of 750,000 cubic yards of material (48,000 truckloads) could take more than five years and cost approximately $6.8 million.[10] The First District Appellate Court upheld the ruling, but one justice dissented in part and would have held that the 2004 amended version of Section 42(e) cannot be applied retroactively to this case and that no mandatory injunctive relief is available.[11]

The Illinois Supreme Court granted the defendants' petition for leave to appeal, and agreed to resolve two disputed issues: (1) whether the 2004 amendment to Section 42(e) of the Illinois Environmental Protection Act could be applied retroactively; and (2) whether the finding that Janice Einoder's involvement with site operations was sufficient to hold her liable as an individual (rather than merely in her capacity as a corporate officer) was against the manifest weight of the evidence.[12] Prior to the 2004 amendment, Section 42(e) only authorized prohibitory injunctions that

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3. *Id.*; 415 ILL. COMP. STAT. 5/3.78a (2002).
4. *Madigan*, 2015 IL 117193, ¶ 8.
5. *Id.* at ¶ 12.
6. *Id.* at ¶¶ 12, 17.
7. *Id.* at ¶ 14.
8. *Id.* at ¶ 16.
9. *Id.* at ¶ 19.
10. *Id.* at ¶ 18.
11. *Id.* at ¶ 20.
12. *Id.* at ¶ 19.

restrain future action.[13] The 2004 amendment permits mandatory injunctions to "require such other actions as may be necessary to address violations of this Act."[14] The Illinois Supreme Court applied the U.S. Supreme Court's test from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which requires the courts to follow the legislature's explicit intent in the amendment itself (rather than the entire Act) to determine whether an amendment applies retroactively.[15] If the legislature is silent, then prospective application is the default, and no retroactive application is available where it would impair rights possessed by a party when she acted, increase a party's liability for past conduct, or impose new duties with respect to completed transactions.[16] In Illinois, Section 4 of the Statute on Statutes (5 ILCS 70/4) "represents a clear legislative directive as to the temporal reach of statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not."[17] The Illinois Supreme Court held that the creation of a new area of liability (here, mandatory injunctions) would impose new liability on the parties' past conduct and represented a substantive amendment.[18] Thus, the mandatory injunction was vacated.[19] On the second issue on appeal, Janice Einoder argued that she did not have day-to-day involvement with site operations.[20] The Illinois Supreme Court held that it was not against the manifest weight of the evidence to find that Janice Einoder's execution of over 250 contracts authorizing third parties to dump CCDD and GCDD at the site (many of which were executed after IEPA scrutiny had begun) was enough involvement to hold her individually liable under the Act.[21]

B. Injection Wells—IEPA Has Exclusive Jurisdiction Over Hazardous Waste Rather than DNR, Even if the Waste is Claimed to be a "Product" Used for Petroleum Extraction: *E.O.R. Energy, LLC v. Pollution Control Bd.*, 2015 IL App (4th) 130443

In March 2007, the IEPA charged two closely related companies, E.O.R. Energy, LLC (EOR) and AET Environmental, Inc. (AET), with violations of the Act and its associated regulations for the transportation and storage of hazardous-waste acid in Illinois.[22] The companies had accepted the acid material for disposal after it was involved in a July 2002 fire at a

13. *Id.* at ¶ 29.
14. *Id.* at ¶ 27.
15. *Id.* at ¶¶ 33–34.
16. *Id.* at ¶¶ 29–30.
17. *Id.* at ¶¶ 31–32.
18. *Id.* at ¶¶ 36–37.
19. *Id.* at ¶ 37.
20. *Id.* at ¶ 41.
21. *Id.* at ¶¶ 41–42.
22. E.O.R. Energy, LLC v. Pollution Control Bd., 2015 IL App (4th) 130443, ¶ 1.

custom chrome automobile manufacturing plant in Grand Junction, Colorado.[23] AET had put the acid into eight (eventually diluted into twelve) 275-gallon plastic totes and attempted to dispose of them at two Colorado facilities. Those facilities rejected the totes of acid material because they were off-gassing a red/orange gas.[24] A third facility recommended disposal via underground injection well.[25] In August 2002, EOR and AET transported the totes to Illinois where EOR stored the waste before disposing of it through injection into EOR's industrial wells in Sangamon and Christian counties, one of which was in fact a salt-water disposal well.[26] EOR failed to inform its workers that the totes contained hazardous waste and that the acid material could react violently with spilled hydrated lime powder that was being stored adjacent to the totes.[27] In February 2004, the USEPA discovered the totes (though only three had any liquid remaining) while executing a search warrant.[28] Subsequent testing revealed the acid material contained greater than 5 mg/L of leachable chromium.[29]

In June 2012, the IEPA filed motions for summary judgment.[30] In response, the companies—for the first time in the litigation—argued that the acid "at issue was not a 'waste' . . . because it was neither 'used' nor 'discarded.'"[31] Instead the acid was a product used to aid in petroleum extraction.[32] The companies claimed their conduct fell within the exclusive regulatory jurisdiction of the Illinois Department of Natural Resources (DNR) under the Illinois Oil and Gas Act (Oil and Gas Act) (225 ILCS 725/1 to 28.1).[33] The Board granted summary judgment in IEPA's favor after concluding that DNR's regulatory authority over the injection of fluids into oil and gas wells did not encompass the injection of hazardous waste.[34] The Board imposed sanctions of $60,000 against AET and $200,000 against EOR.[35] The companies appealed the Board's decision directly to the Fourth District Appellate Court pursuant to Section 41(a) of the Act, and the Fourth District affirmed the Board's decision.[36] DNR's exclusive jurisdiction only extended to preventing "the intrusion of water into oil, gas or coal strata and to prevent the pollution of fresh water supplies by oil, gas or salt water or oil field wastes," and if DNR failed to act within 10 days of receiving a

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23. *Id.* at ¶ 30.
24. *Id.* at ¶¶ 32–35.
25. *Id.* at ¶ 36.
26. *Id.* at ¶¶ 1, 38–44.
27. *Id.* at ¶ 40.
28. *Id.* at ¶ 46.
29. *Id.*
30. *Id.* at ¶ 1
31. *Id.* at ¶ 76.
32. *Id.* at ¶ 78.
33. *Id.* at ¶¶ 86–87.
34. *Id.* at ¶ 1.
35. *Id.*
36. *Id.* at ¶¶ 2–3.

complaint, then IEPA may proceed with enforcement.[37] The Fourth District held that it was clear this exclusive jurisdiction did not apply to hazardous wastes, such as the acid material in this case.[38]

Interestingly, both companies tried to represent themselves through non-attorney corporate officers before the Board hearing officer required them to hire an attorney. They jointly hired an attorney who represented them for about three months before withdrawing from representation.[39] This unstable representation appears to have cost the companies the chance to fully litigate arguments regarding the sufficiency of IEPA's complaint.[40] They both failed to initially respond to IEPA's motion for summary judgment,[41] and forfeited their chance to object to IEPA's affidavits attached to its motion.[42] Further, a large number of facts were admitted against the companies after they failed to properly respond to the IEPA's Requests to Admit Facts with a sworn statement denying specifically the matters of which admission was requested.[43]

After this decision, both companies filed petitions for leave to appeal to the Illinois Supreme Court. AET's was denied (39 N.E.3d 999 (Table), 396 Ill.Dec. 173) while EOR's was still pending at the time of this writing.

C. Leaking Underground Storage Tank (LUST)—IEPA LUST Removal Deductible Determination Made Pursuant to IPCB Administrative Rule Was Not Authorized by the Underlying Statute: *Estate of Slightom v. Pollution Control Bd.,* 2015 IL App (4th) 140593

In 1991 Gerald D. Slightom reported a release of gasoline, used oil, and heating oil from several leaking underground storage tanks (LUSTs) on his property.[44] All of the USTs were removed shortly thereafter.[45] Mr. Slightom applied to the IEPA for reimbursement for corrective action costs on his property due to the LUSTs from the LUST Fund.[46] On December 20, 1991, IEPA determined that because none of the LUSTs were registered with the State Fire Marshal prior to July 28, 1989, a $100,000 deductible would be subtracted from any reimbursement Mr. Slightom could receive from the LUST Fund.[47]

37. *Id.* at ¶¶ 89–90.
38. *Id.* at ¶¶ 90–91.
39. *Id.* at ¶¶ 13–14.
40. *Id.* at ¶¶ 62–65.
41. *Id.* at ¶¶ 51–59, 93.
42. *Id.* at ¶¶ 96–97.
43. *Id.* at ¶¶ 15–18.
44. Estate of Slightom v. Pollution Control Bd., 2015 IL App (4th) 140593, ¶ 2.
45. *Id.*
46. *Id.* at ¶ 4.
47. *Id.*

In 1993, Title XVI of the Act, known as the LUST Program, went into effect and replaced a prior version of the reimbursement eligibility requirements for the LUST Fund.[48] Under the new version of the law, the responsibility for determining the appropriate deductible for LUST Fund reimbursements for corrective action costs was transferred from IEPA to the State Fire Marshal.[49] In 1997 the Board amended its administrative regulations to allow either the State Fire Marshal or the IEPA to determine the appropriate amount for the deductible, and in 2002 the Board amended its administrative regulations to add the provision: "Where more than one deductible determination is made, the higher deductible shall apply."[50]

Mr. Slightom passed away in 2007, and his estate hired a consulting firm to determine whether the contaminated property could be remediated to a sufficient degree so that IEPA would issue a "No Further Remediation Letter" for less than $15,000 total.[51] The consultant reviewed the State Fire Marshal's online database, issued a FOIA request to the State Fire Marshal, and determined that the Estate would be eligible for a $15,000 deductible—the consultant failed to discover IEPA's 1991 determination that a $100,000 deductible should apply.[52] The Estate, through its consultant, applied to the State Fire Marshal for an eligibility and deductibility determination, the State Fire Marshal determined a mere $10,000 deductible would apply to reimbursement from the LUST Fund, and the Estate then irrevocably elected to proceed as an "owner" of the property.[53] The IEPA accepted the Election form and during the Estate's remediation efforts in 2008, 2009, and 2010 authorized and began to process reimbursements from the LUST Fund totaling approximately $101,000 after applying the $10,000 deductible set by the State Fire Marshal.[54]

Then, in October 2010, the IEPA apparently discovered the prior 1991 IEPA determination that a $100,000 deductible should apply and sought to withhold from the Estate about $84,000 in pending reimbursements.[55] The Estate appealed to the Board.[56] In 2013 during the proceedings before the Board, the IEPA reversed itself and agreed that the $10,000 deductible should apply, issued the $84,000 in reimbursement funds, and sought to dismiss the Board action as moot.[57] The Board denied the motion to dismiss and held that the IEPA had no jurisdiction to reconsider its 1991 determination that a $100,000 deductible should apply.

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48. *Id.* at ¶ 5; *see* 415 ILL. COMP. STAT. 5/57-57.17 (1994).
49. *Slightom*, 2015 IL App (4th) 140593, ¶ 5.
50. *Id.* at ¶ 6.
51. *Id.* at ¶ 7.
52. *Id.*
53. *Id.* at ¶¶ 8–9.
54. *Id.*
55. *Id.* at ¶ 14.
56. *Id.* at ¶ 15.
57. *Id.* at ¶¶ 15–16.

On Appeal, the Fourth District Appellate Court reversed the Board's deductibility determination, holding that the Board improperly promulgated the 1997 and 2002 rules amending the deductible regulations.[58] The Court reasoned that while the Board decision was correct under the administrative regulations, the regulations themselves violated the plain language of Title XVI of the Act (the LUST Program) which states that the State Fire Marshal is responsible for LUST Fund reimbursement eligibility and deductible determinations (415 ILCS 5/57.9(c)) and that the IEPA is responsible for processing and auditing payments (415 ILCS 5/57.8).[59] Finally, the Court remanded the case for the Board to consider the Estate's request for legal defense costs pursuant to 415 ILCS 5/57.8(l).[60]

D. Power Plants—NPDES Permit Upheld Allowing Installation of Particulate Air Pollution Controls That Could Increase Mercury Discharge into Illinois River: *Natural Resource Defense Council v. Pollution Control Bd.*, 2015 IL App (4th) 140644

Dynegy Midwest Generation, Inc. (Dynegy) operates an oil and coal-fired, six-unit steam-electric generating facility, the Havana Power Station abutting the Illinois River in Mason County.[61] Beginning in 2006, Dynegy sought formal approvals to construct an activated carbon mercury sorbent injection (ACI) system as an air pollution control.[62] The ACI system would inject activated carbon into the flue gas to absorb airborne mercury that would then be captured by a particulate removal system and stored at the rate of 2.6 tons/day of mercury-bearing sorbent residue (along with 27.4 tons/day of other particulate residue) in an on-site ash pond.[63] The IEPA tentatively agreed the permit would reduce 0-0.6 total pounds of mercury per day from entering the environment from air deposition even if undefined "low levels" of mercury discharged from the ash pond into the Illinois River.[64] During the public comment on the period, several nonprofits argued that IEPA failed to use its best professional judgment to determine the best available technology to control the discharge of mercury.[65] The USEPA recommended that IEPA increase the collection of mercury data from a quarterly to monthly

58. *Id.* at ¶¶ 26–27.
59. *Id.*
60. *Id.* at ¶ 29 (referencing section 57.8(*l*), which reads: "(*l*) Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.")
61. Nat. Res. Def. Council v. Pollution Control Bd., 2015 IL App (4th) 140644, ¶ 4.
62. *Id.* at ¶ 5.
63. *Id.*
64. *Id.* at ¶ 6.
65. *Id.* at ¶¶ 7–9.

period but stated it would not object to the issuance of the permit as drafted.[66] IEPA revised the draft permit to extend the duration of period water testing from 12 total quarterly samples to quarterly samples throughout the full life of the permit.[67]

In September 2012, the IEPA issued a National Pollution Discharge Elimination System (NPDES) permit pursuant to the Clean Water Act (CWA) to Dynegy for the discharge of mercury water pollution from the ash pond into the Illinois River.[68] Several nonprofits—the Natural Resources Defense Council (NRDC), Prairie Rivers Network, and the Sierra Club—filed a petition for review before the Pollution Control Board.[69] In June 2014, the Board granted the nonprofit-petitioners' motion for summary judgment in part and remanded the permit to IEPA to amend it to require monthly (rather than quarterly) monitoring of mercury discharges.[70] The Board denied the remainder of the petitioners' motion, and the nonprofits appealed to the Fourth District Appellate Court alleging the Board erred (1) in failing to require IEPA to establish a case-by-case technology-based effluent limitation (TBEL) for the permit based on the best available technology and (2) in failing to enforce regulations requiring IEPA to respond to significant comments.[71]

The question on appeal became whether USEPA national effluent limitation guidelines from 1982 (the 1982 ELGs) for mercury applied to Dynegy's Havana Power Station.[72] The CWA requires USEPA to establish effluent limitations for toxic pollutants, including mercury, on an industry-specific basis using the "best available technology economically achievable" standard.[73] If the 1982 ELGs applied to Havana, then the CWA requires that effluent limitation be used in all permits, whether issued by the USEPA, or any state agency, pursuant to delegated authority, such as the IEPA.[74] If the USEPA had not yet established a national effluent limitation that applied to Havana, then USEPA regulations instructed IEPA to establish technology-based treatment requirements on a case-by-case basis using a "best professional judgment standard."[75] The petitioner-nonprofits argued that the 1982 ELGs did not apply to Havana's scrubber/ACI system and that no TBEL for mercury was included in the permit while Dynegy, IEPA, and the Board argued the 1982 ELGs applied.[76] The Court held that the 1982 ELGs

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66. *Id.* at ¶ 9.
67. *Id.* at ¶ 10.
68. *Id.* at ¶ 1.
69. *Id.*
70. *Id.*
71. *Id.* at ¶ 2.
72. *Id.* at ¶¶ 24–25.
73. *Id.* at ¶ 22 (*citing* 33 U.S.C. § 1311(b)(2)(A), (b)(2)(C)(2012)).
74. *Slightom,* 2015 IL App (4th) 140593, ¶ 22.
75. *Id.* at ¶ 23.
76. *Id.* at ¶¶ 24–25.

did apply to Havana based upon (1) the plain language of the 1982 ELG regulation for low volume waste sources that includes "wastewaters from wet scrubber air pollution control systems";[77] (2) USEPA's 2010 NPDES Permit Writers' Manual administrative guidance that instructs permit writers to establish case-by-case TBELs only if USEPA had not considered the specific pollutant at issue in establishing the effluent limitation in question, and here the 1982 ELG's low volume waste source regulations specifically considered mercury;[78] (3) USEPA's approval of the draft permit that constituted implicit agreement with IEPA's decision not to create a case-by-case best professional judgment TBEL for Havana's ACI scrubber waste stream;[79] and (4) USEPA's interpretation of the 1982 ELG in a proposed ELG for steam electric power plants that explicitly defined flue gas mercury control wastewater to include wastewater from ACI scrubbers under the definition of low volume wastes.[80]

The Fourth District also held against the petitioner-nonprofits in agreeing with IEPA's decision not to respond to the petitioners' public comments regarding the necessity of a TBEL for mercury.[81] The Board's administrative regulations require IEPA to respond to "all significant [public] comments, criticisms, and suggestions."[82] To be considered "significant," comments must do more that state a particular mistake was made; the comments "must [also] show why the mistake was of possible significance in the results."[83] The Court reasoned that the Board did not err in deferring to IEPA's discretion and that IEPA did not act in an arbitrary or capricious manner in failing to address the petitioner-nonprofit's specific TBEL concerns, especially because multiple responses dealt with the issue of mercury.[84]

E. Fracking—Request to Preliminarily Enjoin DNR's New Fracking Regulations Denied Based on Speculative Claims of Irreparable Harm: *Smith v. Department of Natural Resources*, 2015 IL App (5th) 140583

Several landowners near anticipated fracking sites and the nonprofit Southern Illinoisans Against Fracturing our Environment (SAFE) brought an action seeking declaratory judgment, and preliminary and permanent injunctive relief to prevent DNR from implementing its new fracking

77. *Id.* at ¶ 26.
78. *Id.* at ¶¶ 27–28.
79. *Id.* at ¶ 29.
80. *Id.* at ¶¶ 30–31.
81. *Id.* at ¶ 40.
82. *Id.* at ¶ 36.
83. *Id.* at ¶ 37.
84. *Id.* at ¶¶ 38–40.

regulations.[85] DNR's fracking regulatory scheme to implement Illinois' 2013 Hydraulic Fracturing Act became effective November 14, 2014 after substantial public debate.[86] As part of the regulatory rulemaking, DNR held five public hearings, received 38,000 public comments, received 43,000 pages of written comments, and consulted over 200 sources in preparing the revised proposed rules and responses to public comments.[87] On November 6, 2014, the legislative Joint Committee on Administrative Rules (JCAR), with authority over adoption of the rules, "voted to adopt the revised proposed rules."[88] On November 10, 2014, the plaintiffs filed their complaint.[89]

The plaintiffs alleged DNR failed to comply with a number of Administrative Procedure Act rulemaking procedures regarding summarizing proposed rules, providing sufficient notice of public hearings, holding public hearings of adequate duration, disclosing published reports and data underlying the proposed rules, and the like.[90] The plaintiffs had sought an injunction preventing DNR from filing the finalized rules with the Secretary of State, but the hearing on the motion was not held until after the rules became effective.[91] The circuit court accepted the facts pled as true for the purposes of the hearing and "did not allow presentation of witnesses or affidavits, but rather relied solely on arguments of counsel."[92] The circuit court denied the motion for a preliminary injunction.[93] To be entitled to a preliminary injunction, a plaintiff must raise a fair questions as to: (1) a clear right or interest in need of protection; (2) the lack of an adequate remedy at law; (3) irreparable harm in the absence of the injunction (i.e. harm that cannot be adequately addressed through monetary damages or damages cannot be measured with certainty); and (4) a reasonable likelihood of success on the merits.[94] The court held that the plaintiffs failed to show irreparable harm because they alleged only conclusory allegations that some landowners were located near areas where someone may file an application for a fracking permit in the future.[95]

On appeal, the plaintiffs argued that pursuant to the rule in *People ex rel. Sherman v. Cryns*, 203 Ill. App. 2d 264, 277 (2003), courts should presume irreparable harm when mandatory statutory rulemaking provisions

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85. Smith v. Dep't of Nat. Res., 2015 IL App (5th) 140583, ¶¶ 1–2.
86. *Id.* at ¶¶ 3, 5, 10.
87. *Id.* at ¶¶ 4–5.
88. *Id.* at ¶¶ 5–6.
89. *Id.* at ¶ 6.
90. *Id.* at ¶ 7.
91. *Id.* at ¶¶ 8–13.
92. *Id.* at ¶ 13.
93. *Id.* at ¶ 14.
94. *Id.* at ¶¶ 15, 21, 27.
95. *Id.* at ¶¶ 17–18.

are violated.[96] The *Sherman* rule states that "where an injunction is sought by the State or a governmental agency pursuant to express authorization of a statute, the requisite elements necessary to obtain an injunction need not be satisfied." Instead, the State or agency . . . only need to show the statute was violated and that the statute . . . specifically allows for injunctive relief."[97] The Fifth District held that the *Sherman* rule did not apply as plaintiffs were private entities and the Administrative Procedure Act "does not explicitly provide for injunctive relief" when its rulemaking provisions have been violated.[98] The Fifth District affirmed the circuit court and reasoned the plaintiffs had only speculatively alleged that invalid permits for high-volume horizontal hydraulic fracturing operations *could* be approved on, under, or near their property during the pendency of any continuing litigation.[99]

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96. *Id.* at ¶ 24.
97. *Id.*
98. *Id.* at ¶ 26.
99. *Id.* at ¶¶ 28–31.