

## The Lone Star Current

### TCEQ Approves Revisions to Texas Surface Water Quality Standards

by Lauren J. Kalisek

On June 30, the Texas Commission on Environmental Quality (“TCEQ”) took final action to approve revisions to the Texas Surface Water Quality Standards, 30 Texas Administrative Code, Chapter 307 (“TSWQS” or “Standards”) and the accompanying guidance document, “Procedures to Implement the Texas Surface Water Quality Standards” (“Implementation Procedures”). The Standards assign uses and set general and site-specific water quality criteria protective of such uses for all surface waterbodies in the State. The criteria are used to assess the quality of our State’s surface water and identify impairments, to establish limits in discharge permits issued pursuant to the Texas Pollution Discharge Elimination System Program (“TPDES”), and to support water quality certifications issued by the TCEQ for Section 401 certifications for Army Corps of Engineers’ dredge and fill permits under the Clean Water Act. The TSWQS serve as the foundation for the State’s surface water quality protection programs.

The TCEQ’s approval was the culmination of a four-year effort in developing the revisions, including work by TCEQ staff and stakeholder groups. The major revisions to the TSWQS include: (1) expanded classifications and criteria for contact recreation to address intermittent streams in the State that may not be suitable for full contact recreation; (2) revisions to toxic criteria to incorporate new data on toxicity effects and revisions to basic requirements for toxicity effluent testing; (3) the addition of new numerical nutrient criteria to protect numerous reservoirs from excessive

growth of aquatic vegetation related to nutrients; (4) clarification of the application of the standards in different stream flow conditions; and (5) revisions to various site-specific uses and criteria.

One of the more controversial revisions was the proposal to increase the criteria for waterbodies assigned a primary contact recreation use from 126 cfu/100 ml *E.coli* to 206 as a part of the restructuring of contact recreation categories. TCEQ staff had proposed this change based on recent guidance from EPA suggesting that 206 cfu/100 ml is adequate. This proposed change would have impacted most major waterbodies in the state that are listed as classified segments in the TSWQS, such as reservoirs, lakes and rivers, and the proposal generated a significant amount of public comment and concern. During its consideration of the revisions at its meeting on June 30, the Commissioners noted that 173 waterbodies in the State are heavily used for primary contact recreation and all but three of those meet or exceed the current 126 cfu/100 ml criteria. Therefore, the Commissioners determined to keep the current criteria of 126. In addition, the Commissioners asked to be informed about further scientific developments for nutrient criteria, asked staff to consider mechanisms to streamline the process of assigning the correct category of recreational use to waterbodies, and urged staff to continue to collect data and evaluate the proper protection levels.

However, two significant changes to the TWQS and Implementation Procedures that will have substantial impacts on

TPDES permitting were not discussed during the June 30 meeting: Whole Effluent Toxicity (“WET”) limits and nutrient screening for rivers and streams. Changes adopted in the Implementation Procedures provide new focus on WET testing for sublethal impacts. This new approach will cause the TCEQ to more closely review both lethal and sublethal WET testing results during permit renewals and amendments and will almost certainly lead to the imposition of more sublethal and lethal

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## The Lone Star Current

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Based in Austin, the Firm's attorneys represent clients before major utility and environmental agencies, in arbitration proceedings, in all levels of state and federal courts, and before the Legislature. The Firm's clients include private businesses, individuals, associations, municipalities, and other political subdivisions.

*The Lone Star Current* reviews items of interest in the areas of environmental, utility, municipal, construction, and employment law. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.



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## FIRM NEWS

### The Firm Ranks Among Best Places to Work in Central Texas

For a second year in a row, the qualities of friendliness, family and focused hard work – the three Fs of the Firm – have led to its selection as one of the best places to work in Central Texas, according to a new *Austin Business Journal* report. The honor was announced during a recent *Austin Business Journal* luncheon. We are very gratified by this honor – it's a testament to the hard work and can-do spirit of the entire Lloyd Gosselink family. For its report, the *Business Journal* distributed surveys to employees from a broad cross section of Central Texas companies. The surveys measured employee perceptions of team atmosphere, benefits and management – in short, the qualities of a great place to work – and then ranked companies from best to worst. Employees from nearly every sort of company participated anonymously in the surveys, including employees from large hospitals, tiny Internet startups, local real estate agencies, ticket services and law firms. Questions measured attitudes about senior leadership, personnel practices, the effectiveness of co-worker teams, co-worker trustworthiness, the ability for employees to make meaningful contributions, the company's retention practices, and other employee issues. As a result of responses to this survey, the Firm was ranked fourth best in Central Texas for its size category, up one spot from last year. In fact, out of a possible top score of 100, the Firm earned a 94.7.



The Firm won first place in the Austin Young Lawyers Association 2010 Softball Tournament. Bursting through the glass ceiling of second place for two years in a row, these sluggers bested the competition in grand style and won the championship game with a 10 run lead in the 6th inning. Congratulations!

Left to Right: **Top Row:** Paul Gosselink (Fearless Leader), Derek Feibel, Bill Longley, Pete Juarez, Drew Bias, David Klein, Mark Dalton, Angela Marshall. **Middle Row:** Joe Bernal, Mike Gershon, Ashley Dalton, Lacey Watson. **Bottom Row:** Dana Zoch, Karen Mallios, Erin Zoch, Sara Thornton, Melissa Long, Amy Emerson. Our fans/support that are not pictured: Mary Bernal and Marlena Johnson

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## The Lone Star Current Interview

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### Allan B. Ritter, Chair

House Committee on Natural Resources

Allan B. Ritter was first elected to the Texas House of Representatives in 1998. He represents District 21, located entirely within Jefferson County, in Southeast Texas.

In 2009, Speaker of the House Joe Straus appointed Ritter Chair of the House Committee on Natural Resources; he also serves on the Calendars Committee and the House Committee on Technology, Economic Development and Workforce. He previously served as Vice-Chair of the House Ways and Means Committee, Chair of Pension and Investments Committee, and Chair of the House Economic Development Committee.

In 1999, Rep. Ritter was honored as Freshman of the Year in a bi-partisan vote by his House colleagues and he has since been recognized by various organizations for his achievements and services as a lawmaker. Proven to be an active lawmaker, Rep. Ritter has passed legislation in a broad array of areas, ranging from criminal justice and tax policy to economic development and higher education.

Chairman Ritter is president of Triple R Brothers Ltd., his family's 60-year-old business, which operates Ritter @ Home and Ritter Forest Products retail stores in Texas and Louisiana.

*The Lone Star Current* recently had the opportunity to interview Chairman Ritter, who graciously responded to several questions. We appreciate his willingness to share his unique perspective with our readers.

**LSC: What do you think is the most important aspect of your position as Chair of the House Committee on Natural Resources?**

**Ritter:** Making sure we have a balanced approach as we look to find legislative solutions to our state's water issues is critical.

**LSC: What has been your biggest surprise or revelation since becoming Chair of the Committee?**

**Ritter:** How many different viewpoints there are on the various issues, and the degree of self-interest that often plays into those viewpoints.

**LSC: What do you view as the biggest challenges facing the Legislature over the next five years?**

**Ritter:** Funding the implementation of the State Water Plan is a big challenge, including funding the costs of infrastructure needed for new water supplies. Also, the overall management of state government is critical—as a state we need to make sure that we balance society's needs with the state's practical ability to provide for those needs. Understanding the needs and requirements of our society and what the state's economy will allow are our biggest challenges.

**LSC: What life experiences do you think have influenced your actions as a House member and committee chair?**

**Ritter:** When I was a kid, in 1962, my father tore me up for playing on the roof of our house, and that experience taught me to follow the rules. In 1969, my high school football coach, Coach Donahoue, tore me up for not executing pass patterns correctly, and I learned about discipline. In 1975, I lost \$150,000 on an accounts receivable from a close friend - I learned to take care of my business first.

**LSC: Tell us something that most people would be surprised to know about you.**

**Ritter:** I like to weld - I've actually been teaching myself.

**LSC: What was the last great book you read and movie you saw, and why did you like them?**

**Ritter:** The best book I've read lately is "River of Doubt," which is about Teddy Roosevelt's journey through the Amazon. I would have loved to have participated in that adventure. My favorite movie is "Forest Gump" - I keep seeing him every other year on the back mic of the Texas House.

**LSC: You and your family own a chain of lumber stores that have been very successful, and you've successfully represented District 21 in the Texas House of Representatives since 1998. If it was possible to pursue any trade or profession, what would it be and why?**

**Ritter:** A funeral director – the inventory is readily available, at a low cost, and the customers can't talk back!



## MUNICIPAL CORNER

**Conflicting-loyalties incompatibility does not prohibit a city manager of a general law city from serving on the board of trustees of an independent school district whose boundaries contain the municipality.**

The Attorney General's opinion was requested regarding whether a city manager of a general law city with a council-city manager form of government may serve on the board of trustees of an independent school district within the boundaries of the municipality. Specifically, the requestor asked whether the conflicting-loyalties aspect of the common law doctrine of incompatibility prevented service in both positions. The A.G. stated that conflicting-loyalties incompatibility prohibits an individual from simultaneously holding two positions that would prevent him or her from exercising independent and disinterested judgment in either or both positions. However, this only applies if a person holds two positions that each constitute an "office." A member of the board of trustees of an independent school district is an "officer" for the purpose of this analysis. However, a city manager who serves at the will of a mayor and council does not qualify as an "officer." In general law municipalities with a city manager form of government, the city manager is appointed by and serves at the will of the governing body of the municipality. The A.G. concluded that because the city manager of a general law city does not hold an office, conflicting-loyalties incompatibility does not apply and does not prohibit the city manager from occupying both positions. Tex. Att'y Gen. Op. GA-0766 (2010).

**A municipality that has adopted Chapter 174 of the Texas Local Government Code is not subject to the limits of § 143.014 thereof unless its provisions are otherwise adopted in a collective bargaining agreement.**

The Attorney General was asked how certain provisions of the Texas Local Government Code ("Code") apply to municipalities who have adopted chapter 174 of the Code, the Fire and Police Employee Relations Act ("FPERA"). Section 143.014 of the Code provides requirements for the appointment and removal of a person classified immediately below the department head of a fire or police department of a city with a population of less than 1.5 million. Subsection (c) limits the number of persons who can be appointed to such positions. For fire departments, this limitation is based on the number of certified firefighters in the city. The A.G. referred to Opinion GA-0662, which stated that a city's adoption of FPERA does not change a department head's ability to appoint persons to a classification immediately below his own classification, but removes the numerical limits established by subsection (c) unless otherwise provided by a collective bargaining agreement adopted by the city. This statute expressly states that subsection (c) does not apply to a city that has adopted FPERA

unless the appointment procedure is specifically adopted by a municipality through a collective bargaining agreement. Tex. Att'y Gen. Op. GA-0771 (2010).

**The Texas Local Government Code does not prohibit the selection of a company as a construction manager-at-risk for a city project if a related company has been selected pursuant to a separate procurement process as the design engineer for the project.**

The Attorney General was asked whether a city was prohibited from selecting a company as a construction manager-at-risk for a city project if a related company had been chosen as the city's project manager and design engineer on the project. The Texas Local Government Code ("Code") requires that before or concurrently with selecting a construction manager-at-risk, a governmental entity must select or designate a design engineer who prepares the construction documents for the project, and who is responsible for complying with statutes that govern the practice of engineering, architecture, and related practices. Section 271.118(c) of the Code expressly permits the same entity to serve as the design engineer and as the construction manager-at-risk if hired through separate procurement processes. The A.G. reasoned that if Texas statutes allowed the same entity to serve in both capacities in separately procured contracts, it would logically follow that related entities would not be prohibited from serving as the design engineer and as the construction manager-at-risk. Thus, the Code does not prohibit selection of a company as a construction manager-at-risk for a city project if a related company was selected as the design engineer for that project, as long as the related company was selected pursuant to a separate procurement process for each position. Tex. Att'y Gen. Op. GA-0782 (2010).

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WET limits for TPDES permittees. In addition, the Implementation Procedures include new provisions for nutrient screening for discharges to rivers and streams that establish a new framework for determining when nutrient limits will be placed in discharge permits.

The revisions to the TSWQS and Implementation Procedures will be effective following final publication in the *Texas Register*, currently scheduled for July 16, 2010, and will impact the State's surface water quality programs for years to come.

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# New Transmission Lines Poised to Affect Landowners Across Central and West Texas – A Primer for Property Owners

by Melissa Long

The State of Texas is pushing forward to maintain its position as the leader in wind energy production in the nation, but this new clean energy will come at the expense of many landowners in Central and West Texas. When the Texas Legislature adopted Senate Bill 7 in 1999, the Renewable Portfolio Standard (“RPS”) was established, requiring 2,000 megawatts (“MW”) of new renewable energy by 2009. In 2005, the legislature increased the RPS to 5,880 MW by 2015. Ultimately, the goal is to increase the level of wind generation capacity in Texas to 18,456 MW. Along with this increased requirement came the designation of Competitive Renewable Energy Zones (“CREZ”). CREZ are areas throughout Texas that have been determined to be best suited for developing electricity generating capacity from renewable energy technologies such as wind power.

One of the major challenges related to large wind farms, such as those being built in West Texas and the Panhandle, is that these renewable resources are not located near major load centers. Although Texas may have the ability to produce great amounts of wind energy, it does not have enough capacity on the existing Electric Reliability Council of Texas (“ERCOT”) grid to transport the energy to where it is needed. The CREZ transmission line projects are designed to transmit this renewable energy from the rural parts of Texas into the more highly populated metropolitan areas in the eastern areas of the state. The Public Utility Commission (“PUC”) expects all of the CREZ transmission lines, totaling about 2,400 miles, to be constructed and in service by the end of 2013. This increase in clean energy will improve air quality for all Texans; however, landowners in the areas surrounding the proposed transmission lines stand to be greatly impacted by the massive buildup in infrastructure as these lines are built across their property.



The legislature determined the designation of these renewable energy zones was necessary in order to encourage the development of wind energy in Texas by assigning over \$4 billion in new projects to construct new transmission lines. Initially, Transmission Service Providers (“TSP”) were reluctant to build transmission lines out to wind developers unless the developers were willing to put up a substantial amount of money to ensure that the wind turbines would be built. On the other hand, wind developers were also reluctant to begin construction of wind farms before TSPs would commit to building transmission lines to transport the power. Therefore, the PUC developed a plan to transport this power across Texas, thereby incentivizing wind energy companies

to build in the CREZs by assuring them that there will be lines available to deliver their energy to the market.

Normally, the process of building new transmission lines begins with the company demonstrating a need for the project in order to obtain a Certificate of Convenience and Necessity (“CCN”) from the PUC. However, with these new CREZ projects, the “need” has already been established by the legislature. Therefore, the pivotal determination in these CCN cases is the route selection criteria.

Transmission providers were selected by the PUC, and the transmission line projects were identified by designation of the terminal points for each line. Prior to filing its CCN application, each transmission provider must identify potential routes for the lines between the two terminal points by analyzing numerous alternative

routes that must cover a geographically diverse area. In making this assessment, the company considers factors such as the values of the communities impacted, environmental concerns, historical and aesthetic values, recreational areas, and habitable structures near the proposed lines. Additionally, the cost and length of the alternative routes and the possibility of paralleling existing compatible rights-of-way are also weighed. During this process, the transmission companies hold informational meetings for landowners in the areas to be impacted by the proposed transmission lines. At these meetings, landowners are invited to provide the companies with information about their property and the area, as well as other issues that the company may not

have been made aware of in its initial study of the area. The input from landowners at these meetings can, and often does, impact the routes the company proposes in its final CCN application.

After compiling this data and identifying the possible routes, the transmission company files a CCN application with the PUC. In the application, the company proposes numerous routes and selects one as its “preferred route.” Although the company identifies the preferred route as its first choice, any of the alternative routes proposed can be selected by the PUC for the project. This formal process is governed by the rules and regulations of the PUC with the directly affected parties having an opportunity to participate in the proceedings. These cases are similar to litigation before state courts, requiring the use of the Rules of Evidence, PUC Substantive Rules, and PUC Procedural Rules. Therefore, many landowners engage an attorney familiar with these types of cases, while

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other landowners choose to represent themselves in the proceedings. Additionally, many landowners form coalitions made up of landowners with common interests and hire an attorney to represent their group's interests collectively.

An affected landowner who wishes to actively participate in the case should file a "Request to Intervene" with the PUC. As an intervenor, the landowner is a party to the case, allowing them to file testimony, conduct discovery, and both serve and be served with any filings made by parties in the CCN proceeding. Alternatively, anyone can simply file comments in a case. But it is important to remember that these comments are not evidence and cannot be considered by the PUC or the judge when making the final determination of the route. Participation in these proceedings as an "intervenor" is very different than merely filing comments or attending one of the informal meetings with the company to give input because only an intervenor is truly a party to the case. Unless a landowner actually intervenes in the case, he or she will not be able to submit evidence or participate in discovery, and most importantly, will not have standing to appeal the PUC's route selection if the PUC selects a route adverse to that landowner.

In non-CREZ CCN cases, the PUC must issue a decision within 12 months from the date the application is filed. However, these new CREZ lines are on an expedited schedule, which statutorily requires action by the PUC within only 180 days, or six months, from the filing of the application. The sequence of events begins with the filing of the CCN application, followed by a short period of time in which affected persons can file requests to intervene. After the parties have been named, discovery is conducted. Next, all parties who wish to file direct testimony will file it in written form with the PUC prior to the hearing. At the hearing on the merits presided over by an Administrative Law Judge ("ALJ"), those witnesses who filed direct testimony will then be cross-examined by the other parties. After the hearing, the parties further support their views by filing briefs. The ALJ will issue a Proposal for Decision ("PFD") based on all of the evidence presented, and will recommend a route. Parties are then given the opportunity to file

exceptions to the PFD explaining any portions of the PFD they disagree with. Finally, during an open meeting held at the PUC in Austin, the Commissioners decide whether to grant the company's application and, if granted, determine the route to be used.

The law requires the transmission company to give notice to all landowners who own property that will be "directly affected." Property is considered to be "directly affected" if an easement would be obtained over any portion of the land because of the line or if there is a habitable structure within 500 feet of the proposed route. The company will use the current county tax rolls to determine ownership of directly affected properties, and consequently it may not know of recent transfers of title on the property. As a result, all landowners in the area should review the maps on the PUC's website to determine whether their properties are likely to be impacted by any of the numerous proposed lines ([www.puc.state.tx.us/electric/maps](http://www.puc.state.tx.us/electric/maps)). There are two different maps on this website, entitled "Competitive Renewable Energy Zones (CREZ) Map" and "Transmission for the Development of Scenario 2 of the Competitive Renewable Energy Zones (CREZ)," which depict the CREZ boundaries and an estimated location of the proposed lines. At this time, eight of these CREZ lines have been approved by the PUC, leaving the remaining 25 lines to be approved by the PUC over the coming eighteen months.

At a minimum, landowners in the vicinity of these CREZ lines should monitor the CCN case related to their area at the PUC. Those landowners with property along any of the proposed routes should seriously consider participating in the case as an intervenor in order to fully protect their rights. The most important thing to remember is that a landowner must participate as an intervenor in order to be a party in the case.

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## **Federal Crackdown on Misclassifying Employees as Independent Contractors**

*by Sheila Gladstone and Ashley Dalton*

With independent contractors ("IC") being the fastest growing segment of the American workforce, cracking down on the misclassification of ICs has become a major priority for the Department of Labor ("DOL") and the Internal Revenue Service ("IRS"). The IRS contends that 70% of ICs do not pay their own taxes and 50% of ICs are misclassified. This translates to billions of dollars in lost revenue for the IRS and significant amounts in uncollected state payroll taxes. Moreover, the DOL cites huge losses to misclassified workers in unpaid overtime, benefits, and unemployment. We have found that such misclassification is most prevalent in industries with outdoor work, such as construction,

utilities, and landscaping. Both public and private sector employers are at risk.

The IRS is well underway in its plan to conduct 6,000 random audits of organizations that utilize independent contractors. The goal of these audits, which are to take place over three years, is to determine whether these companies are in compliance with employment tax and worker classification requirements, and to quantify the revenue shortfalls created by the misclassification of employees. The IRS has stated that the results so far are

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“staggering,” and estimates that the efforts to identify misclassified ICs will bring in an extra \$7 billion cash from tax revenues.

While employers may enjoy much flexibility and considerable cost savings by hiring ICs (about a 30% savings over hiring an employee), those who misclassify employees as ICs face significant penalties, even if the misclassification was unintentional. These penalties include:

- 100% back taxes due (including the employee’s share);
- fines for failing to file or send W2s and/or 1099s;
- fines for willful misclassification; and
- fines for delinquency, fraud, and the like.

Of course, a single violation may further trigger a company-wide audit of all pay and classification status.

Employers may also be liable to the misclassified employees who have the right to sue for back pay and benefits, expense reimbursements, vacation leave and other rights, claims and benefits of employment.

Additionally, because most states share data with the IRS, a noncompliance finding by the IRS will also likely lead to issues with state labor departments and other state agencies. The State of Texas, which receives federal funding for unemployment benefits, must in turn share its findings on misclassification with the feds.

Whether a worker is truly an IC is not always intuitive and the decision is guided by state and federal regulation. Businesses that utilize ICs need to immediately conduct a self-audit, assisted by legal counsel (to maintain privilege), to verify that their ICs are properly classified. Just because a worker wants to be treated as an IC, and even signs an Independent Contractor Agreement, does not mean he or she is an independent contractor. “Employee” status cannot be waived.

Whether a person is an IC or an employee turns on the facts of the situation. The IRS and DOL consider several factors in determining whether a person is an IC or an employee:

- **Behavioral control** - The more direction and control the employer has over how, when, and where to do the work, what tools or equipment to use, where to purchase supplies, and

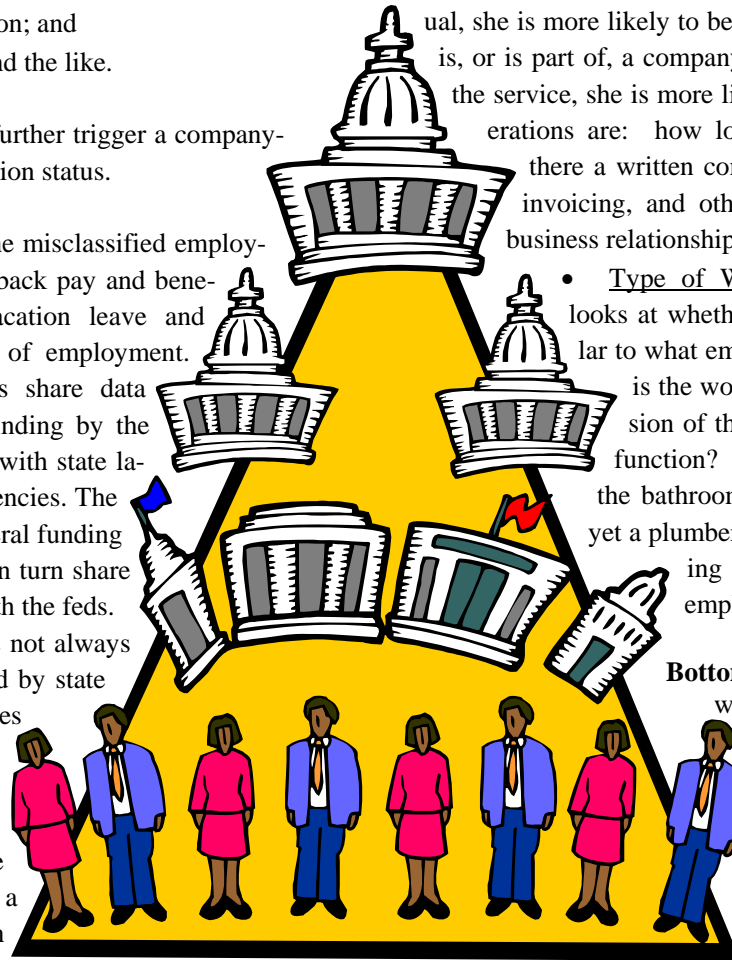
similar activities, the more likely the worker will be considered an employee.

- **Financial control** - The more workers are responsible for the costs and can benefit from potential profits, that is, the more control they have over the financial aspects of the job, the more likely they are ICs. Factors considered are: does the worker make a significant investment in his work (e.g., does he supply his own equipment and tools); does he take a risk on profit or loss (does he have to “do over” mistakes for free); does he offer the services on the open market; and how is he paid?
- **Relationship of the Parties** - If the worker is a single individual, she is more likely to be an employee, but if the worker is, or is part of, a company in the business of performing the service, she is more likely to be an IC. Other considerations are: how long-term is the relationship; is there a written contract defining the relationship, invoicing, and other evidence of a business-to-business relationship?

- **Type of Work Performed** - This factor looks at whether the work performed is similar to what employees of the organization do; is the work part of the business and mission of the employer, or is it a unrelated function? For example, a plumber fixing the bathroom of a retail business is an IC, yet a plumber providing services to a plumbing company’s clients is likely an employee.

**Bottom line:** are you doing business with an individual or a small business? A true IC is in business for himself and functions as an independent business entity, providing whatever service he has been hired to do. Most other workers are very likely misclassified employees. Because of the

crackdown on misclassifications, employers would be well-advised to jump ahead and determine that they have appropriately classified their employees and independent contractors.



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# Pipes in the Ground: A Redefined Standard Under 7 U.S.C. § 1926(b)

by David J. Klein

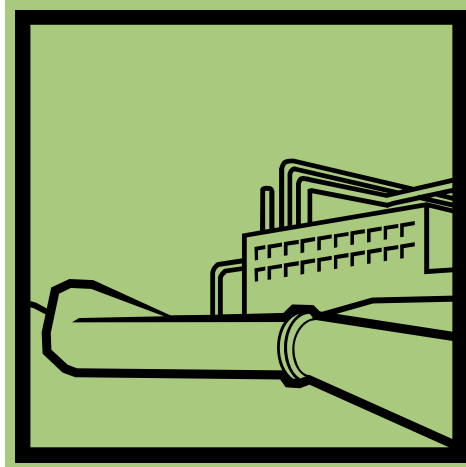
The recent opinion of the Texas Court of Appeals in *Creedmoor-Maha Water Supply Corporation v. Texas Commission on Environmental Quality and Jona Acquisition, Inc.*, 307 S.W.3d 505 (Tex. App.—Austin, 2010) has redefined the standard for determining when the service area of a water service provider indebted to the United States Department of Agriculture - Rural Development (“USDA-RD”) under 7 U.S.C. § 1926(b) has been encroached upon. Specifically, the court in *Jona* held that for a federally indebted utility to trigger the protection afforded under § 1926(b), that utility must plead facts demonstrating that it has legally and factually “provided or made [service] available,” and that such facts amount to more than (i) a general willingness to serve, or (ii) ownership of a certificate of convenience and necessity (“CCN”).

The court distinguished its new standard from the precedent established by the Fifth Circuit Court of Appeals in *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996). The court’s new standard is actually the same protocol that has been adopted by a majority of the other U. S. Court of Appeals circuits. This opinion represents a fresh look at determining the level of protection afforded to a federally indebted utility, and the new standard should remove a large obstacle often facing landowners/developers who desire to obtain water and sewer utility service from providers other than the current CCN holders.

## Background On CCNs and USDA-RD Protection Under 7 U.S.C. § 1926(b)

In Texas, the holder of a water CCN has the exclusive right to render retail water service to the customers located within the geographic boundaries of that CCN. To obtain a water CCN, a retail public utility (as defined in the Water Code) must file an application with the TCEQ and demonstrate that it has the financial, managerial, and technical capability to render continuous and adequate service to the customers within the geographic boundaries requested. However, a CCN is not a vested right. A third party or the TCEQ itself can attempt to decertify some or all of the CCN service area boundaries through the processes set forth in Texas Water Code §§ 13.254(a) and 13.255. Additionally, in 2007 a new expedited decertification process was included in Texas Water Code: § 13.254(a-1). This relatively new process provides that the owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water service may file a petition with the TCEQ to be released from the service area boundaries of the current CCN holder and receive service from another retail public utility. To succeed under a petition filed under § 13.254(a-1), the landowner must: (a) request service from the

current CCN holder; (b) have a third party service provider that can meet the petitioner’s service demands; and (c) demonstrate that the certificate holder: (i) has refused to provide the service; (ii) is not capable of providing the service on a continuous and adequate basis within the timeframe, at the level, or in the manner reasonably needed or requested by current and projected service demands in the area; or (iii) conditions the provision of service on the payment of costs not properly allocable directly to the petitioner’s service request, as determined by the TCEQ. This § 13.254(a-1) process was the procedure involved in the *Jona* case.



USDA-RD administers a loan program to assist rural utility service providers with constructing and installing water distribution infrastructure to serve their customers, secured by the assets of that service provider. Specifically, this loan program, codified under 7 U.S.C. § 1926(b), provides that “[t]he service provided or made available through any [borrower] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation . . . during the term of such loan . . .” In other words, federal debtors enjoy protection from competition during the term of such loan. Thus, interfering with a federal

debtor’s ability to provide or make service available, such as by filing a petition to decertify some or all of a CCN holder’s service area boundaries, potentially triggers federal protection under § 1926(b). Such an alleged interference was the catalyst for the *Jona* case.

## The *Jona* Case

In 1975, Creedmoor-Maha Water Supply Corporation (“Creedmoor”) obtained a water CCN from the TCEQ’s predecessor agency, and it had been providing retail water service to customers in its service area. Carma Easton, Inc. (“Carma,” formerly Jona Acquisition, Inc.), owned a 1,960 acre tract (the “Tract”) in central Texas. Carma planned to develop a master-planned, multi-use community on the Tract and planned to have the City of Austin provide water service. However, the Tract was partially included within the boundaries of Creedmoor’s water CCN. Rather than obtaining retail water service in part from Creedmoor and in part from the City of Austin, Carma instead filed a petition with TCEQ under Texas Water Code § 13.254(a-1) for an expedited release of the area from Creedmoor’s CCN boundaries so that the City of Austin could ultimately serve the entire Tract.

After considering Carma’s May 2008 petition and Creedmoor’s response, the Executive Director of the TCEQ granted Carma’s petition on August 8, 2008, and decertified the portion of Creedmoor’s water CCN service area that overlapped with the bounda-

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*(Pipes continued from page 8)*

ries of the Tract. After the TCEQ denied Creedmoor's Motion to Overturn the Executive Director's decision, Creedmoor filed a suit on December 5, 2008, seeking a declaratory judgment that the TCEQ order was invalid and enjoining Carma from seeking water service from another utility. The district court dismissed Creedmoor's suit for want of subject matter jurisdiction, and an appeal followed.

The Court of Appeals in Austin affirmed the district court's decision, holding that the district court did not have subject matter jurisdiction to consider whether the TCEQ's decision to grant Carma's petition violated 7 U.S.C. § 1926(b). In short, subject matter jurisdiction did not exist because Creedmoor's petition failed to plead sufficient facts that, if true, would trigger federal protection so as to render the TCEQ's decision to grant the expedited release unconstitutional under the Supremacy Clause. The Court held that to invoke the protections of § 1926(b), a plaintiff utility must plead: (i) the utility is an "association" under § 1926(b); (ii) the utility has a qualifying federal loan outstanding; and (iii) the utility provided or made service available to the disputed area. There was no dispute in *Jona* that the first two elements were sufficiently pled; rather, the issue was whether Creedmoor sufficiently alleged that it had provided or made service available.

Creedmoor asserted that it had pled facts that established the third element and thereby met the test established by the Fifth Circuit Court of Appeals in the *North Alamo* case. In that case, the Fifth Circuit Court held that a federal debtor was protected under § 1926 (b) from encroachments into its CCN boundaries so long as it could establish legally or factually that it provided or made service available to the disputed area. Thus, Creedmoor argued that based upon *North Alamo*, Creedmoor only needed to plead the undisputed fact that its CCN encompassed the area in dispute before the TCEQ order, because owning a CCN imposes a legal duty to serve the customers within those boundaries and this duty is legally equivalent to "making service available" under § 1926(b).

In *Jona*, the court rejected the authority of the *North Alamo* analysis in Texas courts, as well as the analysis itself. Specifically, the court noted that the Texas Court of Appeals is not obligated to follow the federal court's precedent. Instead, the court adopted the standard held by a majority of the other federal circuit courts, which require the federally indebted utility to establish "proof of both a legal right or duty to serve a particular area and a 'pipes in the ground' or 'physical ability' component that requires the utility to show that it is already providing service to the [disputed] area or presently has the physical means to do so" (the "Majority Standard"). Otherwise, the court reasoned that a federally indebted CCN holder could never be decertificated, even if the utility admitted that it could not provide water service. Ultimately, the court in *Jona* held that the general assertions made by Creedmoor in its Petition that it is the CCN holder and that it is ready, willing, and able to serve, did not meet the Majority Standard.

### **Impact of *Jona* on Decertifications of Federally Indebted CCN Holders**

While the Texas Court of Appeals' opinion in *Jona* removes some

of the ambiguity from the analysis of whether a federally indebted CCN holder has provided or made service available, the outcome of future CCN battles is still not necessarily predictable. There is no question that the Court in *Jona* has reset the standard for triggering federal protection under § 1926(b), and that this new standard has increased the burden on a federally indebted utility to prove that an encroachment has occurred. After the *Jona* opinion, a federally indebted CCN holder must now establish that there is both a legal and a factual basis for claiming that the utility provided or made service available to the disputed area. The CCN holder cannot merely rely upon the fact that it possesses a CCN that includes the land in question. Rather, it must also establish that it has taken additional actions in furtherance of providing service, such as having "pipes in the ground." Ultimately, the question remaining is one of degree. For example, are there actions other than putting pipes in the ground that a CCN holder can take that will rise to the level of service required by *Jona*? If so, what are they and how extensive must they be? These questions will likely be the next issues addressed in this evolving area of the law.

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*Ask Sheila:*

*Dear Sheila:* We have an employee who is returning from maternity leave soon and she has asked to take time during the work-day to pump breast milk. Do we really have to allow her to do this during work?!

*Signed, Wishing for the Old Days*

*Dear Wishing for the Old Days:* Yes, you do have to allow her to express (pump) breast milk at work. It's in the new health care law, and it went into effect immediately. The March 2010 Patient Protection and Affordable Care Act (H.R. 3590, Section 4207), among other things, amends the Fair Labor Standards Act to require all employers who have an employee that needs the accommodation to provide those employees "reasonable break time" to express breast milk and a comfortable, private place to do so.

The new law requires employers to provide nursing mothers reasonable break time to express the milk each time she has the need to do so, during the first year of the baby's life. Time off for this purpose need not be paid, but until the Department of Labor (DOL) issues regulations to clarify the point, employers should

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treat as compensable any time under 15 minutes spent on breast milk pumping. Furthermore, the new law requires employers to provide a place for nursing mothers to express the milk *that is not a bathroom*, and that is shielded from view and from intrusion by other people.

While we wait for more guidance in the DOL regulations, we suggest you should take the lead from similar state laws and, at a minimum, provide a 30-minute rest period to express milk during each four-hour work period. Additionally, you need to provide the employee with a private location that is close to her work area (and that is shielded from view and intrusion and is not a bathroom), with a door lock and possibly a removable sign on the door that says “private,” “do not disturb,” or words to that effect. If the nursing mother-employee has her own private office, then that should suffice if it satisfies the privacy requirements. Also consider providing a comfortable place to sit with a nearby electrical outlet and refrigeration facilities for the employee to store the breast milk.

You should also update your employee handbook or policy manual to identify this benefit and train supervisors on the new requirements.

“Ask Sheila” is prepared by Sheila Gladstone, the head of the Firm’s Employment Law Practice Group. If you would like additional information or have any questions related to this article or other matters, please contact Sheila at (512) 322-5863 or [sgladstone@lglawfirm.com](mailto:sgladstone@lglawfirm.com).



## IN THE COURTS

**City of Ontario, CA. v. Quon**, -- S. Ct. --, 2010 WL 2400087 (June 17, 2010).

The U.S. Supreme Court held that although a police officer may have had a Fourth Amendment privacy interest in his personal text messages sent on city-owned equipment and systems during working hours, the city did not violate the Fourth Amendment when it conducted a search of those text messages. In this narrowly-drawn opinion overturning a controversial Ninth Circuit decision two years ago, the Court assumed, without deciding, that the officer did have a limited reasonable expectation of pri-

vacuity in communications using employer-owned equipment, but determined that this particular search was constitutional because it was for “a legitimate work-related purpose” and because it was “not excessive in scope.” Moreover, the officer’s expectation of privacy was limited because the realities of working in a law enforcement workplace make officers subject to public scrutiny, and furthermore because he had been told his texts were subject to audit. Thus, in a balancing test the privacy interest was outweighed by the scope and reason for the search. The Court rejected the “least intrusive search” standard, and instead used the standard of “reasonableness” under the realities of the particular workplace.

Sgt. Quon was a member of the city’s SWAT team, and used a city-issued pager for the purpose of promptly responding to emergencies. The city’s contract with the wireless provider allowed for texting of 25,000 characters per month at a flat rate, after which overage charges kicked in. Despite signing off on a policy wherein Quon agreed that electronic transmissions should not be sexual in nature and were subject to search, and after being reminded that texts were treated the same as emails under the policy, he was told that as long as he paid the overage charges, the police department did not intend to delve into the content of the texts. However, after the text overages incurred by some officers became so frequent and excessive, the employee charged with monitoring the wireless contract told the Chief that he was “tired of being a bill collector” and felt that an audit was needed to determine if the 25,000 character limit was too low for work-related texts. The city requested two months of transcripts from the wireless provider of the texts of those officers with high overages, and, to protect Quon’s privacy, deleted any texts sent outside of Quon’s working hours. The review showed that a majority of Quon’s texts were personal and often sexually explicit. In one month, Quon sent 456 texts while on duty, and only 57 were work-related. The Court held that this investigation was reasonably narrow in scope to protect any privacy interests Quon may have had.

**General Electric Co. v. Jackson**, -- F.3d --, 2010 WL 2572955, (C.A.D.C., June 29, 2010).

The D.C. Circuit Court of Appeals rejected an appeal by General Electric (“GE”) from an EPA order requiring GE to clean up PCBs along a 40-mile stretch of the Hudson River. GE had appealed the CERCLA order because GE had not had an opportunity for a hearing on its liability. GE claimed that the issuance of the order inflicted immediate damage in that it depressed stock prices and increased the cost of financing for GE, and that as a result, GE was entitled to a hearing before the order was issued. The court rejected GE’s appeal, holding that damages that are not a result of the issuance of the order, but rather the result of market reactions to the order, “do not implicate the constitutionality of CERCLA or of the policies and practices by which EPA implements it.” The court noted that GE could obtain a hearing by refusing to comply with the order, which would force EPA to sue in federal court.

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**Coalition for Responsible Regulation, Inc., et al. v. U.S. Environmental Protection Agency**. No. 09-1322, (D.C. Cir., June 16, 2010).

In December 2009, the EPA released its scientific finding that greenhouse gases endanger human health and welfare. Numerous parties challenged this finding and asked the court to remand the finding to EPA in light of recent controversies involving the climate science upon which the agency's findings was based. After consolidating the appeals, the D.C. Circuit Court of Appeals abated the appeals until either EPA responds to petitions to reconsider the endangerment finding or August 16, 2010, whichever comes first. The EPA's response to the petitions is expected by the end of July. The endangerment finding is the linchpin in EPA's proposed regulation of greenhouse gases, scheduled to take effect January 2, 2011.

**United States v. Aerojet General Corp.** 606 F.3d 1142, (9th Cir., 2010).

The Ninth Circuit Court of Appeals held that under CERCLA, a non-settling potentially responsible party ("PRP") can intervene in settlement proceedings between another PRP and the EPA. CERCLA allows PRPs to sue each other for cost contribution, allowing the PRPs to fairly allocate the costs amongst themselves. However, CERCLA prevents a PRP that settles with the government from being sued by other PRPs for contribution. Under this decision, non-settling PRPs, concerned that settling PRPs are being offered "sweetheart deals" to induce them to settle, are allowed to intervene to protect their interests.

**State of Texas and the Texas Water Development Board v. Hearts Bluff Game Ranch, Inc.**, -- S.W.3d --, 2010 WL 1930216 (Tex. App.—Austin, May 13, 2010, no pet. h.).

Hearts Bluff Game Ranch ("Hearts Bluff") is the owner of 4,000 acres of bottomland, which was to be used for creating a mitigation bank. However, this acreage, located near the Sulfur River, is also in an area that had been considered by the State and Texas Water Development Board ("TWDB") as the location for the future Marvin Nichols Reservoir. Nevertheless, Hearts Bluff filed an application with the United States Army Corps of Engineers ("USACE") for a permit to create a mitigation bank on this land. USACE ultimately denied the permit request, citing the TWDB's opposition and the fact that Texas' long-term water needs appeared to conflict with maintaining a mitigation bank on that land. Consequently, Hearts Bluff filed an inverse condemnation petition. The Court of Appeals in Austin recently held that Hearts Bluff's pleading against the State and the TWDB was insufficient to sustain a takings claim and failed to plead a claim for which sovereign immunity was waived. The court reasoned that TWDB's opposition of Hearts Bluff's mitigation bank permit application did not amount to using its regulatory authority to stymie development of land to reduce future acquisition costs. In other words, while the TWDB lobbied for the denial of the application, USACE made the ultimate decision to deny the applica-

tion. This opinion demonstrates that in order for an entity to establish a takings claim against a governmental entity or agency, it must establish more than a "but-for" or cause-in-fact relationship between the action and the harm.

**City of Richardson v. Gordon**, -- S.W.3d --, 2010 WL 986808 (Tex. App.—Dallas, March 18, 2010, no pet.).

Gordon filed a declaratory judgment suit against the City of Richardson ("City"), asserting that the city council violated the town charter and the Texas Open Meetings Act by holding closed meetings from October 26, 2004, to November 13, 2007. Gordon also desired to obtain the city records from such meetings. The trial court denied the City's plea to the jurisdiction in part, and the City filed an interlocutory appeal on the grounds that: (1) Gordon's claim was moot because the City's charter was amended; (2) Gordon did not have standing to file the suit; and (3) the City has immunity from liability for attorneys' fees awarded under the Texas Declaratory Judgment Act. The appellate court rejected the City's appeal and affirmed the trial court's decision, holding that: (1) the amendment to the Charter did not render Gordon's claim moot; (2) Gordon had standing as a citizen of the City; and (3) governmental immunity does not bar a declaratory judgment action unless the plaintiff seeks a declaration of the government's liability for money damages. This holding demonstrates the limitations of the governmental immunity defense in declaratory judgment actions.

**Gatesco, Inc., v. City of Rosenberg**, -- S.W.3d --, 2010 WL 1438950 (Tex. App.—Houston [14th Dist.] April 13, 2010, no pet.).

The Texas Court of Appeals in the 14th District of Houston recently held that the TCEQ does not have exclusive jurisdiction over water and sewer service rate disputes for in-city customers. This important holding reverses the decision of the County Court at Law No. 1 in Fort Bend County, and is critical to the proper regulation of water and sewer utility service rates. Specifically, Texas Water Code § 13.042 provides that "...for the purpose of regulating [water and sewer] rates and services so that those rates may be fair, just, and reasonable and the services adequate and efficient, the governing body of each municipality has exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within its corporate limits." The conclusion by the Court of Appeals that the TCEQ does not have exclusive jurisdiction over water and sewer rates is consistent with § 13.042.

**The Cities of Allen, et. al. v. Railroad Commission of Texas**, No. 03-06-00691-CV, 2010 Tex. App. WL 39258 (Tex. App.—Austin, Feb. 05, 2010).

In February 2010, the Third Court of Appeals upheld the trial court's denial of Cities' request for declaratory relief that the Commission exceeded its authority in adopting the Gas Reliability Infrastructure Program ("GRIP") rule pursuant to § 104.301

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of the Texas Utilities Code. The Court held that the GRIP Statute provides for neither adjudicative hearings nor a substantive review of GRIP filings. Cities filed a Petition for Review at the Texas Supreme Court on June 28, 2010.

**Cities of Corpus Christi, et al. v. Public Utility Commission of Texas**, No. – 03-09-00116—CV, 2010 Tex. App. WL 2330366 (Tex. App. – Austin, June 11, 2010).

On June 11, 2010, the Third Court of Appeals affirmed the Commission’s decision in the appeal of PUC Docket No. 33309, the TCC Rate Case. The Court determined that TCC could recover funds spent to achieve its energy efficiency goal even though that goal was not actually achieved, and that the Commission correctly determined TCC’s consolidated tax savings allocation. If parties choose to appeal, the Petition for Review to the Supreme Court of Texas is due July 26, 2010.

**Gulf Coast Coalition of Cities v. Railroad Commission of Texas**, Cause No. D-1-GN-10-001813 (Appeal of Gas Utility Docket No. 9902- CenterPoint Gas- Houston Division Rate Case).

In June, the Gulf Coast Coalition of Cities appealed the Railroad Commission’s decision as to CenterPoint Gas Houston Division’s requested rate increase, filed July 2009. The Commission had disallowed much of CenterPoint’s rate request and awarded a rate increase of approximately \$5 million in its Final Order on February 23, 2010. An important issue in the case was whether to allocate franchise fee expenses to only City of Houston customers or also to customers in the environs (outside of the Houston city limits). The Commission allocated the franchise fee expenses only to City of Houston customers. CenterPoint, the City of Houston, and city coalitions also filed appeals of the Commission’s decision. The cases are currently awaiting assignment to a judge.

**Steering Committee of Cities Served by Oncor v. Public Utility Commission of Texas**, D-1-GV-10-000137 (consolidated). Appeal of Docket No. 35717 – Application of Oncor Electric Delivery Company LLC for Authority to Change Rates.

In 2008, Oncor requested a \$275 million rate increase, but the Steering Committee of Cities Served by Oncor argued that Oncor was over earning by nearly \$175 million annually. Multiple parties filed appeals in district court after the Commission awarded Oncor a rate increase of \$155 million. Those parties’ appeals were consolidated and initial briefs were filed on June 22, 2010. A hearing date has been set for October 19, 2010.

*In the Courts is prepared by attorneys from the Firm’s different practice areas. If you have any questions or need additional information, please contact our Editor at [editor@lglawfirm.com](mailto:editor@lglawfirm.com).*



## AGENCY HIGHLIGHTS

### Environmental Protection Agency

**EPA Disapproves Portions of Texas’ Air Permitting Program.** On March 31, 2010, EPA disapproved Texas’ Qualified Facilities exemption rule, which authorizes changes at facilities so long as emissions do not increase above the thresholds that require a federal new source review, and the plant uses best available control technology no more than 10 years old. On June 30, 2010, EPA disapproved Texas’ Flexible Air Permit Program, which allows facilities to increase the emissions at one part of the facility if those emissions are offset at another portion of the facility. This action follows several recent actions by EPA regarding Texas’ air permit program. EPA has issued comments on approximately 40 air permit applications in Texas, and as of the date of this writing, has announced that it is taking over the permitting process for three facilities, with more expected. The TCEQ has proposed regulations that it believes will address EPA’s concerns regarding flexible permits. Public comment on those rules opens on July 2, 2010, and ends on August 2, 2010. The TCEQ has also filed a petition for review of EPA’s actions with the Fifth Circuit Court of Appeals regarding the qualified facilities rule.

**EPA Expands GHG Reporting Rule.** EPA has expanded the Greenhouse Gas Reporting rule to four additional sectors originally excluded from the rule. Beginning January 1, 2011, industrial wastewater treatment facilities, underground coal mines, industrial landfills, and magnesium production facilities will have to report their greenhouse gas emissions if the facilities emit 25,000 metric tons of carbon dioxide-equivalent greenhouse gases (‘CO<sub>2</sub>e’) or more per year. The first reports from these facilities will be due March 31, 2012.

**EPA Finalizes GHG Tailoring Rule.** EPA released the final greenhouse gas (‘GHG’) tailoring rule, ‘tailoring’ the Clean Air Act to deal with GHG emissions. Under the final rule, regulation of GHGs will be taken in four stages. In Step 1 (January 2, 2011 – June 30, 2011), only those facilities that would be subject to

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prevention of significant deterioration (“PSD”) and Title V permitting for non-GHG pollutants will be required to address GHGs in those permits. In Step 2 (July 1, 2011 – April 30, 2016), new and modified sources that have the potential to emit CO<sub>2</sub>e at levels above certain thresholds (generally 100,000 or 75,000 tons per year) will be required to address GHGs in their PSD and Title V permits. In Steps 3 and 4, EPA will be conducting investigations and proposing rules to bring the regulation of GHGs in line with the statutory thresholds of 100 and 205 tons per year, although in the tailoring rule EPA states that in no case will it seek to lower the thresholds below 50,000 tons per year before January 2016.

**EPA Revises NAAQS Standard For Sulfur Oxides.** On June 22, 2010, EPA published a final rule establishing a new one-hour National Ambient Air Quality Standard for sulphur oxides of 75 parts per billion, and revoking the existing 24-hour and annual primary standards. The rule will be effective on August 23, 2010.

## **Texas Commission on Environmental Quality**

**Rules Adopted on CCN Notice and Submetering.** TCEQ proposed new rules on January 13, 2010, to implement HB 1295 and SB 2126 from the 81st Legislative Session. HB 1295 requires that notice for a Certificate of Convenience and Necessity (“CCN”) application be given to each county and groundwater conservation district that is within the proposed CCN area. SB 2126 allows owners/managers of apartments to add up to a nine percent (9%) service charge to the water bills for tenants in sub-metered apartment units. The public comment period closed on March 1, 2010. The rules were adopted on June 2, 2010, and became effective June 24, 2010.

**New Rules for Fire Hydrants Adopted.** On January 13, 2010, TCEQ proposed rules to implement changes to § 341.0358(b) Texas Health and Safety Code made by HB 3661 from the 81st Legislative Session. The proposed rulemaking will amend 30 TAC § 290.46 to require the regulatory authority for a public utility to adopt standards for installing fire hydrants adequate to protect public safety in residential areas in a municipality with a population of 1,000,000 or more. These standards must, at a minimum, follow current American Water Works Association standards pertaining to fire hydrants and the requirements of 30 TAC § 290.44(e)(6), pertaining to the location of fire hydrants. The public comment period ended March 1, 2010. The rules were adopted on May 19, 2010, and became effective June 10, 2010.

**Rules for Penalty Payments and Enforcement Authority Adopted.** TCEQ proposed rules on January 27, 2010, to implement SB 1693 from the 81st Legislative Session to allow for monetary civil or administrative penalties to be paid in periodic installments of up to 36 months. The proposed rules will also allow TCEQ to delegate to the Executive Director the authority

to issue an administrative order. The public comment period closed on March 15, 2010. The rules were adopted on June 30, 2010.

**Revisions to Water Quality Standards Adopted.** On January 13, 2010, TCEQ proposed revisions to the Texas Surface Water Quality Standards (Title 30, Chapter 307 of the Texas Administrative Code) and Procedures to Implement the Texas Surface Water Quality Standards (TCEQ RG-94). Please see the article by Lauren Kalisek in this edition of *The Lone Star Current* for detailed information about these revised standards.

**New Rules for Rates and Depreciation Proposed.** TCEQ proposed rules on March 10, 2010, to implement SB 2306 from the 81st Legislative Session that requires the book cost less net salvage of utility plant retired be charged to the accumulated depreciation account. The public comment period ended April 26, 2010. The rules are proposed to be adopted on August 11, 2010.

**Rules Proposed for Injection and Storage of Anthropogenic Carbon Dioxide.** On March 30, 2010, TCEQ proposed rules to implement SB 1387 from the 81st Legislative Session. This rulemaking relates to the Executive Director’s review and advisory responsibility for protection of fresh water in response to Railroad Commission permit applications for injection and geologic storage of anthropogenic carbon dioxide (“CO<sub>2</sub>”). The public comment period closed on May 17, 2010. The rules are anticipated to be adopted on August 25, 2010.

**Revisions to TCEQ and Railroad Commission MOU Proposed.** TCEQ proposed revisions to the December 1, 1987, Memorandum of Understanding (“MOU”) between TCEQ and the Railroad Commission (“RRC”) on March 30, 2010. The proposed rulemaking will bring the MOU between the RRC and TCEQ into a current status including the provision of SB 1387 from the 81st Legislative Session, requiring an MOU between the TCEQ and the RRC to identify the different agency jurisdictions over carbon dioxide sequestration. The MOU was last updated in May, 1998, and since that time statutory changes and several agency reorganizations have occurred requiring the MOU to be revised. The public comment period ended on May 17, 2010. The revisions are anticipated to be adopted on August 25, 2010.

**New Rules for eBusiness Proposed.** TCEQ proposed rules on April 28, 2010, to modify language concerning electronic means of transmission of information including notices, orders and decisions. The current TCEQ rules will need to be revised to include a request for a person’s email address. The public comment period closed on June 14, 2010. The new rules are expected to be adopted on October 15, 2010.

**New Rules Proposed on Boat Sewage Disposal.** On April 28, 2010, TCEQ proposed to repeal and introduce a new 30 TAC Chapter 321, Control of Certain Activities by Rule, Subpart A,

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Boat Sewage Disposal, to implement SB 2445 of the 81st Legislative Session by amending the fee structure. In addition, the rules will prohibit the discharge of treated waste from marine sanitation devices (“MSDs”) into all enclosed freshwater lakes or bodies of water (including rivers that do not support interstate vessel traffic) in Texas, in accordance with Title 40, Part 140 of the Code of Federal Regulations, including the expansion of the MSD certification requirement to certain boats when located on any of the inland waters. The public comment period ended on June 14, 2010. The new rules are anticipated to be adopted on October 15, 2010.

#### **Revisions to Construction Storm Water Rules Proposed.**

TCEQ proposed an amendment to 30 TAC § 305.541 to implement new federal construction storm water rules by reference on June 16, 2010. The rulemaking adopts 40 Code of Federal Regulations Part 450, a new chapter that sets new requirements for regulated construction sites. These rules require operators of any regulated construction activity (disturbing at least one acre or part of a larger plan of development or sale) to meet a series of non-numeric effluent limitations. Operators who conduct construction activities that disturb ten or more acres or are part of a plan of development or sale of at least ten acres will also be required to comply with a numeric effluent limitation for turbidity. The non-numeric effluent limitations and numeric effluent limitations will be incorporated into the construction general permit, TXR150000, upon its renewal in 2013. The public comment period is from July 2, 2009-August 2, 2010, with the public hearing set for July 29, 2010. The new rules are anticipated to be adopted on October 20, 2010.

#### **Proposed Revisions Regarding Financial Assurance for Class B Sewage Sludge.**

On June 2, 2010, TCEQ proposed a rulemaking that amends the Chapter 37 requirements of an environmental impairment insurance policy for Class B sewage sludge land application units. Texas Health and Safety Code § 361.121 requires Class B sewage sludge operators to provide evidence of environmental impairment insurance and commercial liability insurance along with their permit applications. As these permits are being renewed, small operators are reporting they are unable to obtain the required environmental impairment insurance. This proposed rulemaking would remove the requirement that the environmental impairment insurance policy must provide an automatic renewal option to the facility operator. Although not required by statute, the requirement is reported to be an impediment to obtaining coverage for some operators. The public comment period is from June 18, 2009-July 19, 2010, with the public hearing set for July 15, 2010. The new rules are expected to be adopted on November 17, 2010.

### **Public Utility Commission**

#### **Update on Competitive Renewable Energy Zone (“CREZ”)**

**CCN Dockets.** The Commission continued to approve final orders in a number of CREZ CCN dockets. The Commission has held a number of lengthy open meetings designed to address the

concerns of landowners participating in the cases. The Commission has worked with landowners on selected routes to minimize impacts on affected properties through use of certain transmission tower structures and by routing alongside property lines rather than through property. Controversially, in April the Commission denied LCRA’s application for a proposed CREZ transmission line to be routed through the Hill Country. The Commission cited a lack of options as the reason for its denial of the application. The Commission has directed the Electric Reliability Council of Texas to investigate the need for the proposed line and potential alternatives to it. Other CREZ projects were filed in May and June and approximately 15 additional projects will be filed throughout the remainder of the year.

#### **Project No. 37685 – Rule Proceeding to Amend Rules Relating to Change in Ownership or Control of a REP.**

The Commission published proposed revisions to its rules relating to the registration of Retail Electric Providers (“REP”) on May 5. The amendment would modify the current certification requirements for entities wishing to register as REPs. Notably, the amendment would limit trade names of REPs from the current five to just one. The amendment would also require Commission preapproval before a change in ownership of a REP or transfer of customers between REPs. Public comments on the proposed amendments have been submitted.

#### **Project No. 38338 – Rulemaking Regarding the Accountability and Performance of ERCOT.**

The Commission has opened a rulemaking project relating to the scope of the Commission’s authority over the Electric Reliability Council of Texas (“ERCOT”). ERCOT is the entity that acts as a clearinghouse for the de-regulated electric market. The Commissioners have expressed concern that the Commission rules clarify their oversight authority over ERCOT. The Commissioners also expressed interest in reviews that are shorter and less confining than the typical contested case hearing, which can last days or even weeks. Commission staff is currently working on a draft of proposed rules to be published at a later date.

#### **Project No. 37475 - Rulemaking for Utility Infrastructure Storm Hardening.**

At its June 11 Open Meeting, the Commission adopted a rule for utility infrastructure storm hardening. The rule will ensure that all electric utilities have a storm hardening plan that provides for the implementation of cost-effective strategies to increase the utilities’ transmission and distribution facilities’ capability of withstanding extreme weather conditions. The utilities will be required to submit prospective five-year plans to the Commission beginning January 1, 2011, including vegetation management plans, pole construction standards, plans and procedures to enhance post storm damage assessments, and enhanced data collection methods.

#### **Project No. 37623 – Rulemaking Proceeding to Amend Energy Efficiency Rules.**

The PUC Staff has proposed a rule that would increase energy efficiency goals for utilities from 20% of growth in demand to 30% of growth in demand of both residential and

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commercial customers by 2012, with further reductions of 40% by 2013 and 50% by 2014. Additionally, the proposal includes budget caps in each of the years as well as a revised calculation of the utilities' bonus earned when it achieves its goal. Many parties filed comments disagreeing with the utilities' assertion that the Commission should adopt a lost revenue adjustment mechanism ("LRAM") for the energy efficiency programs, arguing that it would create a windfall for utilities at the expense of ratepayers because any energy efficiency savings by the customers would be negated by the LRAM. Further, the review of energy efficiency cost recovery riders ("EECRF") already ensures that the utility is receiving the proper revenue recovery, making an LRAM unnecessary. The Commission Staff's filed Proposal for Adoption does not include a provision for recovery of lost revenues through an LRAM. The Commission will consider the proposed rules at a public hearing on June 30, 2010.

**Project No. 38298 - Rulemaking Related to Recovery by Electric Utilities of Distribution Costs.** On June 11, the Commission approved with little discussion the proposal for publication of new P.U.C. Subst. R. § 25.243 relating to recovery by electric utilities of distribution costs. The proposed rule closely parallels the transmission cost of service ("TCOS") rule (§ 25.192(g)), which allows utilities to file for an increase in transmission rates once per year. The proposed rule would allow electric utilities providing retail electric services using distribution facilities to apply for and update a distribution cost recovery factor ("DCRF") to reflect changes in invested capital for both their distribution facilities and the associated costs.

## **Railroad Commission of Texas**

**Railroad Commission Continues to Explore Issues Relating to Drilling Activities in the Barnett Shale Formation.** The Commission continues to hear concerns about natural gas drilling in the Barnett Shale area. Residents and local politicians from the North Texas area have been concerned that increased activity relating to natural gas drilling is causing air and water pollution in the area. Initial tests performed by the Texas Commission on Environmental Quality have been performed and the data is being analyzed. The Commission has committed to continue to monitor the issue.

*Agency Highlights is prepared by attorneys from the Firm's different practice areas. If you have any questions or need additional information, please contact our Editor at [edi-](mailto:edi-)*

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**Paul Gosselink** was highlighted along with the Firm in the *2010 Chambers USA Leading Lawyers for Business* in the Texas Environment section.

**Sara Thornton** will be discussing "Investigation/Enforcement Cases" at the 2010 EPA Region VI / RVI PA Pretreatment Workshop on August 4 in Irving.

**Mike Gershon** will be presenting the Introductory Remarks at the Texas Environmental Superconference on August 5 in Austin.

**Sheila Gladstone** will be speaking on the "Impact of FMLA and ADA on Workers' Compensation Law" at the State Bar of Texas Advanced Workers' Compensation Seminar on August 20 in Austin.

**Chris Brewster** will be on the panel for "The Coming Nodal Wholesale Electricity Market" at the Public Utility Law Section Conference on August 27 in Austin.

**David Klein** will be presenting "Adopting Orders Versus Resolutions" at the Texas Rural Water Association Districts Conference on September 2 at Horseshoe Bay.

**Jason Hill** will be discussing "Exempt Uses in Surface Water and Groundwater: Groundwater Exemptions" at the Texas Water Law Annual Conference on September 16 in Austin.

**Sheila Gladstone** will be presenting "Texas Payday Law" and "Independent Contractor Issues" at the American Payroll Association/Texas Payroll Conference on September 16 in The Woodlands.

**Chris Brewster** will be on the panel for "The Coming Nodal Wholesale Electricity Market" at the Gulf Coast Power Association Fall Conference on September 28 in Austin.

**Thomas Brocato** will be speaking on "Legal Hurdles in Energy Resource Planning" at the 2010 American Planning Association Texas Conference on October 7 in San Antonio.

**Sara Thornton** will be discussing "Legal Issues in Water Planning" at the 2010 American Planning Association Texas Conference on October 8 in San Antonio.

**Brad Castleberry** will be presenting "Legal and Regulatory Issues" at the Texas Innovative Water 2010 Seminar on October 12 in San Antonio.

Would you like to receive *The Lone Star Current* by e-mail? Please contact Jeanne Rials at (512) 322-5833 or [jrials@lglawfirm.com](mailto:jrials@lglawfirm.com). You can also access *The Lone Star Current* on the Firm's website at [www.lglawfirm.com](http://www.lglawfirm.com).





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