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82nd Legislative Wrap-Up

by Brian Sledge, Ty Embrey and Mindy Martinez

The regular session of 82nd Texas Legislature came to a close on Monday, May 30, but legislators did not go far from Austin. There is only one item that the Texas Constitution mandates that legislators must act on - the state budget. After a key fiscal matters bill failed to pass at the end of the regular session that was necessary to balance the budget, Governor Perry called a special session that began the next day.

The 1st Called Session was called pursuant to the Governor's Proclamation. It was open to the fiscal matters necessary for the implementation of the budget, as well as legislation relating to health care services and costs. As the 1st Called Session unfolded, the Governor added additional issues, including congressional redistricting, Texas Windstorm Insurance Association ("TWIA"), sanctuary cities, and security procedures at airports. The Legislature adopted legislation to address the various fiscal matters and congressional redistricting, but no legislation was ultimately passed that addressed TWIA, sanctuary cities, or airport security.

As you may recall, at the start of the regular session the State of Texas was faced with a significant budget deficit. After extensive debate, the House and Senate passed a budget for the 2012-2013 biennium totaling $172.3 billion, which includes $80.6 billion in General Revenue. Of the amount of funds appropriated in General Revenue, 45.8% of the funds were for public education, 14.7% was provided to higher education, and 27.8% was allocated for health care.

Another hot ticket legislative issue was redistricting. For the first time in twenty years, the Texas Legislature passed House and Senate maps during the regular session. To find out if you are in a new State House or State Senate district, you may view the maps at the Texas Legislative Council's website: www.tlc.state.tx.us/tlc.htm.

As a result of the budgetary and redistricting issues facing the State of Texas, fewer bills were filed and ultimately enacted by the Texas Legislature during the regular session. A total of 5,796 House and Senate bills were filed, and 1,379 ultimately passed. Of these, Governor Perry vetoed 23 bills.

The Sunset Advisory Commission ("SAC") had a substantial workload in the legislative interim leading up to the 82nd Legislature. The work of the SAC resulted in the filing of legislation that implemented changes and continued multiple state agencies, including the Texas Commission on Environmental Quality ("TCEQ"), the Texas Water Development Board ("TWDB"), the Public Utility Commission ("PUC"), and the Railroad Commission of Texas ("RCT"). Legislation continuing the TCEQ and TWDB for another 12 years was adopted, but the Sunset legislation for the PUC and RCT did not pass. These agencies will be subject to legislation during the next session that will either continue or abolish the agencies.

The new laws outlined below are but a sampling of the numerous measures impacting the environment and municipal concerns that survived the legislative process, and present an abbreviated highlight of each piece of legislation.

WATER ISSUES

SB 660 (Hinojosa and Hegar/Ritter). The TWDB Sunset legislation, SB 660 contin-

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The Lone Star Current

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Lloyd Gosselink Rochelle & Townsend, P.C. provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

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

Chambers USA has included the Firm in its listing of Leading Firms in Energy: State Regulatory & Litigation (Electricity) and (Oil& Gas), as well as Environment. Our lawyers receiving individual mention were Thomas Brocato, Geoffrey Gay, Lambeth Townsend, and Paul Gosselink.

Chris Pepper was elected Chairman of the Texas Aggregates & Concrete Association's Allied Board of Directors ("TACA") on June 28, 2011. TACA is Texas' lead trade association for the ready-mixed concrete and aggregates industries. Chris has been a TACA Member since 2005. He previously served as the Vice-Chairman for the Allied Board and has served on the Governmental Affairs, Environmental, and Membership Committees.

Ty Embrey will be giving an "Update on Environmental Legislation from the 82nd Texas Legislature" at the Annual Society of Environmental Professionals Meeting on July 21 in Grand Prairie.

Brad Castleberry will be presenting an "Enforcement Panel Discussion" at the 27th Annual EPA Region VI Pretreatment Association Workshop on August 3 in Dallas.

Lauren Kalisek will be presenting "Why Are the Fish Sad And Glad And Bad? The Role of WET Testing in Water Quality Protection" at the ENRLS Superconference on August 4 in Austin.

Brad Castleberry will be giving "Opening Remarks on Water Quality Issues" at the ENRLS Superconference on August 4 in Austin.

Sheila Gladstone will be discussing "Legal Issues Regarding Personnel in the Public Sector" at the City of Cedar Park Emerging Leaders Meeting on August 5 in Cedar Park.

Kristen O. Fancher will present an "Overview of Surface Water and Groundwater Rights and Supplies" at the Water Rights Sales and Transfers at the Texas Lorman Education Services Seminar on August 12 in Fort Worth.

Sheila Gladstone will be discussing "Personnel Issues" at the New Chiefs Conference on August 18 in Huntsville.

Chris Pepper will help facilitate and lead discussions on a variety of environmental topics at the Texas Aggregates & Concrete Association's Annual Environmental Seminar on September 26-27 in Fort Worth.

MUNICIPAL CORNER

The general manager of a water district may also serve as a city manager without violating the common law doctrine of incompatibility. The Attorney General was asked whether the general manager of a water district who simultaneously serves as city manager of a home rule city violates the common law doctrine of incompatibility. In this case, a city planned to consolidate with a water control and improvement district. These two public entities entered into an interlocal agreement providing for the general manager of the district to also serve as city manager for two years during this consolidation process. The A.G. opined that the positions are not offices because they are under the control of another authority (the water district board of directors and the city council), and neither position has the authority to appoint or supervise the other. Thus, the doctrine of incompatibility would not bar an individual from holding both the position of water district general manager and city manager. Tex. Att'y Gen. Op. No. GA-0849 (2011).

A school district is not prohibited from funding a project through impact fees imposed by city ordinance if certain conditions are met. The Attorney General was asked whether the Eagle Pass Independent School District was required to comply with a City of Eagle Pass ordinance requiring the school district to fund the extension of a water line along the property of a newly completed school through an impact fee. The A.G. opined that, although a factual determination could not be made, a school district is generally not required to pay an impact fee unless the board of trustees of the school district consents to do so through a contractual agreement. Further, the school district would not necessarily be prohibited from funding the water line, so long as its board of trustees determines in its discretion that the expenditure is "necessary in the conduct of public schools." Thus, although the A.G. did not speak to whether the school district must fund the water line through impact fees paid to the city in this particular case, he did determine that the school district would not be prohibited from doing so if certain conditions were met. Tex. Att'y Gen. Op. No. GA-0850 (2011).

Surplus funds from a hotel occupancy tax may not be expended for general city purposes. The Attorney General was asked whether the City of Galveston could use surplus hotel occupancy tax revenues received according to the City's convention center operating agreement for spending on general city purposes. The A.G. opined that all revenues derived from the hotel occupancy tax are strictly limited by Chapter 351 of the Texas Tax Code, which prevents hotel occupancy tax revenues, including surplus funds, from being expended for purposes other than the promotion of tourism and the convention and hotel industry. Thus, the city is prohibited by statute from using hotel occupancy tax surplus revenue for general city purposes. Tex. Att'y Gen. Op. No. GA-0851 (2011).

A city may not select as its official newspaper for the publication of legal notices a newspaper that does not comply with Chapter 2051 of the Texas Government Code. The Attorney General was asked whether the City of Eagle Pass could use a newspaper not fully in compliance with Chapter 2051 of the Texas Government Code for the publication of legal notices. Section 2051.044 of the Government Code requires that a newspaper used to convey official notices must, among other requirements, be entered as second-class postal matter in the county where published. The City believed it no longer had access to a newspaper that would fully satisfy those requirements of § 2051.044 and proposed to select as its official newspaper a local paper with no second-class postal permit, informing city residents of this selection through the city's water and wastewater bills. The A.G. opined that a newspaper would satisfy § 2051.044 so long as the newspaper holds its second-class postal permit in the *county* in which the newspaper is released to the public, irrespective of the county in which the notice is required to be published. The A.G. finally noted that even if no newspaper met the requirements of § 2051.044, Chapter 2051 directs a political subdivision to utilize alternative forms of notice, including alternative newspaper publication or posting notice at the door of the county courthouse. Tex. Att'y Gen. Op. No. GA-0856 (2011).

Municipal Corner is prepared by Stefanie Albright. Stefanie is an Associate in the Firm's Water and Districts Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Stefanie at (512) 322-5814 or salbright@lglawfirm.com.

(Legislative Wrap-Up continued from page 1)
ues the TWDB for another twelve years and makes significant changes to the Water Code, including the Groundwater Management Area ("GMA") process and Chapter 36 of the Water Code. SB 660 requires the state water plan to include an evaluation of the progress made in meeting the state's future water needs since adoption of the previous state water plan, and an analysis of the number of projects included in the prior state water plan that received financial assistance. The bill also requires the TWDB and TCEQ, in consultation with the Water Conservation Advisory Council, to develop a uniform methodology for water use and conservation to be used by a municipality or water utility in developing its reports to be submitted under the Water Code.

HB 2694 (Wayne Smith/Huffman). The TCEQ Sunset legislation, this bill continues the TCEQ until 2023 and abolishes the On-site Wastewater Treatment Research Council. HB 2694 made numerous changes to the operations of the TCEQ. Specifically, HB 2694 establishes a requirement that each person who holds a water right issued by the TCEQ or who impounds, diverts, or otherwise uses state water to maintain water use information on a monthly basis during those months the water rights holder uses permitted water. This bill further provides that the person shall make the information available to the TCEQ on request, but the TCEQ may only request the information during a drought or other emergency shortage of water. The bill authorizes the TCEQ Executive Director ("ED"), during a period of drought or other emergency shortage of water, to temporarily suspend the right to use water and adjust the allocation of water. The ED must evaluate water basins in which a watermaster is not appointed every five years to determine whether a watermaster should be appointed. The bill also requires the TCEQ to exempt certain dams from dam safety requirements, and to establish a timeline for compliance with the regulations.

HB 240 (Parker/Nelson). Amends §366.012 of the Health and Safety Code to require the TCEQ to adopt rules governing the installation of on-site sewage disposal systems to prevent accidental or unintentional access.

HB 451 (Lucio III/Hegar). Establishes a Don't Mess with Texas Water program to prevent illegal dumping that affects surface waters. Requires signs at major highway water crossings to notify drivers of a toll-free number to call to report illegal dumping. Local governments may participate in the program.

HB 2207 (Olivera/Lucio). Amends Chapter 552 of the Local Government Code to authorize municipalities with a population of less than two million to grant to boards of trustees of municipal water, wastewater, storm water, or drainage systems the authority to set rates and related terms for the system.

SB 181 (Shapiro/Laubenberg). Amends Chapter 16, Water Code, to require the TWDB to work with the TCEQ to develop a uniform methodology and guidance for calculating and reporting municipal water use. The bill also authorizes TWDB to develop a data collection and reporting program for utilities and municipalities with 3,300 or more connections, and requires the TWDB to submit a biennial report to the legislature on the data collected.

SB 332 (Fraser/Ritter). Addresses groundwater ownership issues and provides that a landowner owns the groundwater below the surface of his/her property as real property. The bill also provides that a landowner has a right to drill a groundwater well and attempt to produce groundwater from it, but is not entitled to a specific amount of groundwater. The new language on groundwater ownership does not prevent a groundwater conservation district ("GCD") from limiting or prohibiting the drilling of a well for failure to comply with the well spacing or tract size requirements in a GCD's rules nor does it affect a GCD's ability to regulate groundwater production. The bill also requires that, when adopting rules, GCDs must consider groundwater ownership and rights, the public interest in conservation and protection of the resource, the management goals in the GCD's management plan.

SB 360 (Frasier/Creighton). Makes substantial changes to Chapter 15 of the Water Code relating to the composition and use of money in the Rural Water Assistance Fund.

SB 430 (Nichols/Christian). Requires the Executive Director of the TCEQ to provide written notice of groundwater contamination to a groundwater conservation district whose jurisdiction extends into the contaminated area.

AIR ISSUES

SB 493 (Fraser/Wayne Smith). Amends Chapter 382 of the Health and Safety Code, by allowing "clean idle" engines to idle, as an exception to the rules relating to the idling of motor vehicles. SB 493 defines "idling" and prohibits the TCEQ from prohibiting or limiting the idling of any motor vehicle with a certain gross vehicle weight rating.

SB 1003 (Fraser/Wayne Smith). Addresses penalties and emergency orders that suspend the operation of a rock crusher or certain concrete plants without a current permit under the Texas Clean Air Act. SB 1003 applies to penalties for operating a rock crusher or concrete plant without a permit if the rock crusher or concrete plant had a permit and notifies TCEQ in advance that it will need to operate the facility beyond the expiration date of the permit.

WASTE ISSUES

HB 2826 (Murphy/Huffman). Amends provisions of the Solid Waste Disposal Act in the Health and Safety Code that impact the notice of an application for a municipal setting designation ("MSD"). HB 2826 requires a notice to include a statement that an affected municipality or public utility has 120 days from the date of receipt of the notice to pass a resolution opposing the application for a MSD if the property for which the MSD is sought is located in a city with a population of two million or more and the applicant intends to comply with the requirements for issuance of a municipal setting designation certificate. The bill also establishes that if the property for which a municipal setting designation is sought is located in a municipality that has a population of two million or more and the applicant has complied with applicable requirements, the appli-

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cant is considered to have complied with the requirements for a MSD certificate if the applicant provides specified documentation.

OTHER ISSUES

SB 18 (Estes/Geren). This is the omnibus eminent domain legislation that addresses numerous aspects of eminent domain procedures. SB 18 provides that a governmental entity may only use its eminent domain authority for a public use, and must authorize the use of eminent domain authority in a public meeting. The legislation requires all entities, including private entities, with eminent domain authority to establish their authority with the State Comptroller or the entity will lose such authority. SB 18 also requires the disclosure of certain appraisal information to a landowner, and requires an offer of at least the appraised value. Landowners will have the ability to repurchase property if the condemned land is not used for its intended purpose within 10 years.

HB 3272 (Burnam/Deuell). Revises Chapter 382 of the Health and Safety Code to add electric and natural gas vehicles to the list of replacement vehicles eligible for the low-income vehicle repair, assistance, retrofit, and retirement program. The bill also establishes that vehicles that have been certified to meet certain federal certifications are eligible as replacement vehicles. The TCEQ shall establish a partnership with representatives of the steel industry, automobile dismantlers, and scrap metal recyclers to ensure that vehicles are scrapped or recycled.

HB 3395 (Callegari/Lucio). Revises Chapter 2155 of the Government Code regarding state preferences for recycled products.

SB 329 (Watson/Chisum). Amends Chapter 361 of the Health and Safety Code to establish a comprehensive program for the recycling of television equipment. SB 329 requires the TCEQ to develop an informational website and hotline to inform and educate the public about the program, and to establish an annual statewide recycling rate for television equipment. The bill authorizes TCEQ to audit, inspect, and enforce against retailers and recycling facilities implementing the program, and requires TCEQ to provide an annual report to the Legislature regarding the program.

SB 694 (West/Wayne Smith). Creates increased requirements that must be met by metal recycling entities. SB 694 requires the Department of Public Safety ("DPS") to establish an advisory committee relating to the DPS's regulation of metal recycling entities and include on that committee representatives of local law enforcement agencies. It also prohibits a metal recycling entity from paying cash for a purchase of regulated material if the entity does not hold a certificate of registration and does not hold (if applicable) a license or permit required by a county, city, or other political subdivision, or has been prohibited by the DPS from paying cash. SB 694 prohibits a county, city, or other political subdivision from adopting or enforcing a rule, charter, or ordinance, or issuing an order or imposing standards that limit the use of cash by a metal recycling entity in a manner more restrictive than provided in the bill, unless the rule, charter, ordinance, or order was in effect on January 1, 2011. Further, the bill authorizes a county, city, or other political subdivision to enjoin the business operations of a recycling entity if the owner or operator has not submitted an application for a certificate of registration or, if applicable, a license or permit. The bill also authorizes cities and counties to retain 10% of fines collected due to metal recycling violations.

SB 1258 (Duncan/Hardcastle). Grants the TCEQ the authority to adopt rules to create a process by which to issue a permit to authorize a city or county with a population of 10,000 or less to dispose of demolition waste from an abandoned building or building found to be a nuisance.

This article was prepared by Brian Sledge, Ty Embrey, and Mindy Martinez of the Firm's Government Relations Practice Group who are registered lobbyists with the Texas Ethics Commission. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Brian at (512) 322-5839 or bsledge@lglawfirm.com, Ty at (512) 322-5829 or tembrey@lglawfirm.com, or Mindy at (512) 322-5824 or mmartinez@lglawfirm.com.

Legislation from the 82nd Regular Session Affecting Water Districts

by Stefanie Albright

Municipal utility districts, water control and improvement districts, and other districts governed by the Texas Water Code may be affected by certain legislation passed during the 82nd Legislative Session. Below is a brief overview of these new laws.

HB 628 (Callegari/Jackson). Consolidates alternative contracting and delivery procedures for construction projects into Chapter 2267 of the Texas Government Code. Additionally authorizes construction manager-at-risk and competitive sealed proposals for construction services to be used for all types of projects, including water, wastewater, transportation, utilities, and other improvements to real property. Prohibits the use of reverse auctions for certain contracts where bonds are required, and authorizes job order contracting to be used for the maintenance, repair, alteration, renovation, or minor construction of an existing facility. Effective September 1, 2011.

HB 679 (Button/Carona). Allows the governing body of a water district to grant the authority to an official or employee responsible for purchasing or for administering a contract, to approve change orders that involve an increase or decrease of $50,000 or less. Effective immediately.

HB 1901 (Keffer/Birdwell). Exempts a public utility agency created under Chapter 572 of the Texas Local Government Code from the requirement that the agency must receive approval from the TCEQ for a bond issuance if: (1) at least one of the participating public entities is a municipal utility district that includes territory in only two counties; (2) the district has outstanding long-term indebtedness that is rated BBB or better; and (3) the district has at least 5,000 active water connections. Effective immediately.

(Legislation continued on page 6)

(Legislation continued from page 5)
HB 2226 (Truitt/Carona). Updates the Public Funds Investment Act to require that an investment officer must attend a training session not less than once during a two-year period beginning on the first date of the applicable local government's fiscal year, and consisting of the two consecutive fiscal years after that date. HB 2226 does not require a treasurer or chief financial officer of an investing entity that has fewer than five full-time employees to attend training unless the person is also the investment officer of the entity. Effective immediately.

HB 3002 (Hughes/Eltife). Raises from $100,000 to $250,000 the minimum level of gross receipts from operations, loans, taxes, or contributions, or cash and temporary investments in order for a district to elect to file annual financial reports with the TCEQ Executive Director in lieu of filing a full audit under Texas Water Code § 49.191. Effective immediately.

SB 100 (Van de Putte/Taylor, Van). Implements the federal Military and Overseas Voter Empowerment ("MOVE") Act that requires all states to mail absentee ballots to military personnel and citizens living overseas at least 45 days before election day. Changes several of the deadlines in the Election Code to comply with the MOVE Act, including the uniform election dates, which are now: (1) the second Saturday in May in odd-numbered years; (2) the second Saturday in May in even-numbered years for non-county elections; or (3) the first Tuesday after the first Monday in November. SB 100 allows the governing body of a political subdivision, other than a county, that holds its elections in May of even-numbered years to change its election date to the uniform election date in November or to May of odd-numbered years. This change is required to be made no later than December 31, 2012. Effective September 1, 2011.

SB 569 (Jackson/Taylor, Larry). Allows a district that provides nonsubmetered master metered utility service to a recreational vehicle park to determine the rates for that service on the same basis the district uses to determine the rates for other commercial businesses that serve transient customers and receive nonsubmetered master metered utility service from the district. Effective September 1, 2011.

SB 1140 (Watson/Hartnett). Allows a water control and improvement district to pay actual property damages caused by the backup of the district's sanitary sewer system without waiving governmental immunity from suit or liability. Effective immediately.

Stefanie Albright is an Associate in the Firm's Water and Districts Practice Groups. If you would like additional information or have questions related to this article or other matters, please contact Stefanie at (512) 322-5814 or salbright@lglawfirm.com.

Water and Wastewater Legislative Update

by Ty Embrey

The Texas Legislature enacted numerous bills during the regular session of the 82nd Legislature that covered a wide array of water and wastewater related issues. While the overall number of bills passed during the regular session was down in comparison to other recent regular sessions, the number of water and wastewater related bills was substantial as Texas continues to address the water and wastewater issues created by a rapidly expanding population.

Many water and wastewater related issues were addressed in the TCEQ and TWDB bills mentioned elsewhere in this issue of *The Lone Star Current*. The TCEQ and TWDB Sunset bills were the result of several years of work by the Sunset Advisory Commission, legislators, state agency staff, and stakeholders. Legislation passed during the regular session (SB 573) made significant revisions to the TCEQ's regulation of water and wastewater certificates of convenience and necessity (CCN). Other legislation (HB 1732/SJR 4) will enable Texas voters to address Texas' growing water and wastewater infrastructure needs with the adoption of an amendment to the Texas Constitution that would authorize the TWDB to issue bonds as part of a revolving $6 billion bond program.

Stakeholders also worked throughout the legislative interim to make revisions to Chapter 36 of the Water Code to address some of the current groundwater issues and provide necessary clarifications. Many of the groundwater bills that were passed by the Legislature were a result of the work of these stakeholders. The following list highlights the water and wastewater legislation enacted during the 82nd Texas Legislature:

HB 444 (Creighton/Nichols). Adds increased notification requirements in Chapter 27 of the Water Code for applications for injection wells to dispose of industrial and municipal waste; groundwater conservation districts will now receive notice of applications, draft permits, and contested case hearings.

HB 965 (Callegari/Hegar). Enables the TCEQ to recognize Internet-based continuing education programs.

HB 1732 (Ritter/Hinojosa). The bill, along with SJR 4, makes the necessary revisions to Chapters 15, 16, and 17 of the Water Code to enable the TWDB to implement a revolving $6 billion program to fund water and wastewater infrastructure projects.

HB 3090 (Creighton/Nichols). Establishes that a water utility that receives financial assistance from the TWDB is required to perform an annual water audit that calculates the utility's system water loss during the preceeding year, and must file the audit with the TWDB.

HB 3372 (Tracy King/Jackson). Requires the TCEQ and Texas Department of Health to develop rules for rainwater harvesting systems that can be used for indoor potable purposes and can be connected to a public water system.

HB 3391 (Doug Miller/Seliger). Amends numerous statutory provisions to encourage the use of rainwater harvesting systems.

(Water and Wastewater continued on page 7)

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SB 313 (Author: Seliger; Sponsor: Price). Revises the provisions in Chapter 36 of the Water Code related to the process for creating a groundwater conservation district ("GCD") for areas located in a Priority Groundwater Management Area ("PGMA"). The bill allows the TCEQ to amend the territory in a TCEQ order recommending creation of one or more GCDs in a PGMA to account for areas that have already been added to an existing GCD or created as a separate GCD.

SB 573 (Nichols/Creighton). Makes numerous significant revisions to Chapter 13 of the Water Code addressing water and wastewater certificates of convenience and necessity (CCN). Sections amended are §§ 13.245, 13.2451, 13.24b, and 13.254. The amendments address the granting of CCNs within the extraterritorial jurisdiction ("ETJ") of cities, the ability of landowners to opt out of existing and new CCNs, and provides for a new 60-day decertification process. Most of the provisions are applicable to only the following counties: Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Medina (see discussion above), Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, Wise.

SB 691 (Estes/King). Provides that a GCD may not require a permit for a well used for domestic, livestock, or poultry purposes if the well is located on 10 or more acres and is drilled, completed, or equipped to produce 25,000 gallons per day or less.

SB 692 (Estes/Doug Miller). Clarifies the exemption in § 36.117 of the Texas Water Code. A district may exempt certain wells by rule, and may require exempt domestic, livestock, and poultry wells and oil and gas rig supply wells to comply with the district's spacing requirements. The bill also requires well drillers to file well logs with the district and to file geophysical logs, if available.

SB 693 (Estes/Price). Allows a GCD to conduct permit hearings by a quorum of the board, a hearings examiner, or by contracting with the State Office of Administrative Hearings ("SOAH"). The bill requires a district to contract with SOAH if requested by the applicant or another party to a contested case and requires the party that requests the hearing to pay all costs associated with the SOAH contract. The bill also allows a district to adopt rules and establish procedures for preliminary and evidentiary hearings. The changes apply only to permit or permit amendment applications determined to be administratively complete on or after the effective date of the bill.

SB 727 (Seliger/Beck). Clarifies Chapter 36 related to GCD management plans, generally making all the provisions related to management plan preparation and adoption consistent with one another.

SB 737 (Hegar/Price). Amends the Managed Available Groundwater language in Chapter 36 of the Water Code to establish the new term "Modeled Available Groundwater" as the amount of water that the TWDB determines may be produced on an average annual basis to achieve the Desired Future Conditions ("DFC") established for the aquifers. The bill requires a GCD to issue permits up to the point that the total amount of exempt and permitted production will achieve the DFC. The bill also requires TWDB to work with GCDs to develop estimates of exempt use within the district's boundaries.

SJR 4 (Hinojosa/Ritter). This Joint Resolution provides that a constitutional amendment will be presented to Texas voters to authorize the TWDB to issue fund bonds as part of a $6 billion revolving bond program to fund water and wastewater infrastructure projects.

Ty Embrey is a Principal in the Firm's Government Relations Practice Group. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Ty at (512) 322-5829 or tembrey@lglawfirm.com.

Electric and Gas Utilities Legislation

by R.A. Dyer

Although the budget and redistricting efforts captured many of the headlines, energy policy also played an important role during the 82nd Legislative Session that ended on May 30. Texas lawmakers considered "Sunset" bills to reauthorize key agencies like the Railroad Commission and the Public Utility Commission, rate "streamlining" bills that could potentially lead to higher gas and electric rates, and legislation to discourage malfeasance in the state's wholesale energy market.

Some of these important bills passed; others did not. Some would have tended to increase rates while others would help lower or stabilize rates and help consumers.

In all, lawmakers considered more than 120 bills relating in some fashion to electric utility rates and another 45 relating to rates charged by gas utilities. The following is a listing of some of the most noteworthy bills and their legislative fate.

Electric Utilities Legislation

- **Solar Technology for Homes – HB 362** (Sen. West/Rep. Solomons). Outcome: Signed by Governor

HB 362 will prevent a property owners' association from prohibiting a homeowner from installing a solar energy device. It will also invalidate any existing deed restriction against solar energy devices. However, the property owners' association can continue prohibiting solar devices that violate certain standards.

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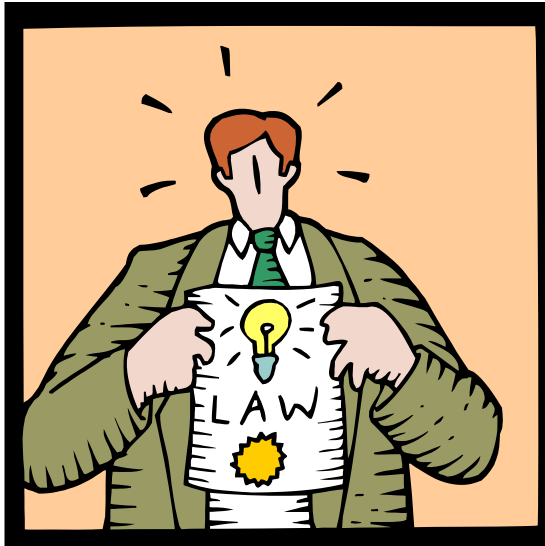
- **PUC Sunset - SB 661** (Sen. Nichols/Rep. Solomons). Outcome: Dead

This bill emerged from the Sunset Advisory Commission process pertaining to the PUC and the Electric Reliability Council of Texas ("ERCOT"). It included provisions to create more fiscal oversight for ERCOT, as recommended by city coalitions and consumer groups. SB 661 included new authority for the PUC to issue cease and desist orders against bad actors in the electricity market and would have allowed the PUC to assess greater fines for violations that could jeopardize grid reliability.

Note: Although this bill failed, lawmakers adopted an alternative "safety net" bill (SB 652) that reauthorizes the PUC until 2013 and instructs the legislature to repeat the Sunset process during the legislative interim. ERCOT will not come up for Sunset review for another 10-12 years. SB 652 also continues the Office of Public Utility Counsel until 2023.



- **Political Subdivision Energy Reporting - SB 898** (Sen. Carona/Rep. Cook). Outcome: Signed by Governor

SB 898 requires political subdivisions in areas with air pollution concerns to report on efforts to reduce energy use, and requires the Energy Systems Laboratory at Texas A&M to report on energy use and pollution.

- **MOU and Coop. Energy Reporting - SB 924** (Sen. Carona/Rep. Keffer). Outcome: Signed by Governor

The bill requires municipally owned utilities and electric cooperatives to submit annual reports to the State Energy Conservation Office on the office's standardized form starting April 1, 2012. These reports must contain information from the previous calendar year regarding energy efficiency activities, as well as the entity's annual goals, programs enacted to accomplish those goals, and any achieved energy demand or savings goals.

- **Standard Offer - SB 948** (Sen. Davis, Wendy/Rep. Turner). Outcome: Dead

This bill would have required retail electric providers to offer a single standard offer along with their other offers. This bill was intended to reduce confusion in the deregulated electricity market and was filed in response to concerns raised by city coalitions.

- **Third-Party Ownership of Solar Technology – SB 981** (Sen. Carona/Rep. Anchia). Outcome: Signed by Governor

SB 981 clarifies that persons installing onsite renewable energy generating equipment at a home or business do not have to register with the PUC as power generators or retail electric providers. SB 981 also allows third-party ownership of such equipment. This provision allows both residential and commercial building owners to lease their roof space and then buy back energy from solar power production companies that install panels on their roof.

- **Demand Ratchets - HB 1064** (Sen. Pitts/Rep. Eltife). Outcome: Signed by Governor

This bill waives certain "demand ratchet" provisions in wires rates that otherwise would result in dramatically higher charges for certain commercial customers. Cities and other political subdivisions will benefit from this legislation because it could potentially lower rates for facilities with extremely high peaks in electric consumption, but with relatively low average consumption. Examples are football stadiums and emergency water pumps.

- **Energy Efficiency - SB 1125** (Sen. Carona/Rep. Anchia). Outcome: Signed by Governor

SB 1125 raises the investor owned utility energy efficiency goals to 30% of load growth by 2013. Senate Bill 1125 also enforces by statute increased energy efficiency goals previously adopted by the PUC. The bill transitions to a new method of measuring energy efficiency - 0.4% of peak demand - in the years after 2013.

- **Non-ERCOT Energy Efficiency Goals - SB 1150** (Sen. Seliger/Rep. Frullo). Outcome: Signed by Governor

This legislation closes a loophole that exempted a single investor owned utility outside of ERCOT from energy efficiency goals and cost recovery that are applicable to nearly every other electric utility in the state.

- **Electricity as Personal Property - SB 1393** (Sen. Seliger/Rep. Keffer). Outcome: Signed by Governor

This bill specifies that electricity purchased by a governmental body for its own needs meets the legal definition of personal property. The bill was filed in response to concerns raised by a city coalition that legal uncertainty has complicated the use of municipal debt to finance long-term energy acquisition for municipal needs.

- **Low-Income Weatherization - SB 1434** (Sen. Carona/Rep. Frullo). Outcome: Signed by Governor

SB 1434 requires unbundled transmission and distribution utilities to include in their energy efficiency plans a targeted low-income energy efficiency program to be administered by the Texas Department of Housing and Community Affairs. Expenditures for the

(Electric and Gas continued on page 9)

(Electric and Gas continued from page 8)
programs cannot be less than 10% of the transmission and distribution utility's energy efficiency annual budget. The bill requires the PUC, in an energy efficiency cost recovery factor proceeding, to make findings of fact regarding whether the utility meets the requirements.

- **Transparency at MOUs – SB 1613** (Sen. Ogden/Rep. Brown). Outcome: Signed by Governor

SB 1613 increases transparency at municipal utilities by clearly defining "competitive" information that utilities do not need to disclose to the public, and presuming that all other information is public. This bill codifies practices that the City of Austin adopted as a result of collaborative efforts between the Austin municipal utility and community activists during 2009 and 2010.

- **Electric Streamlining – SB 1693** (Sen. Carona/Rep. Thompson). Outcome: Signed by Governor

Pertaining to "streamlined" ratemaking, this bill will make it easier for monopoly electric utilities to raise rates to correspond with certain investments. City coalitions negotiated with the legislative authors and stakeholders to insert important consumer protections in this bill. The legislation expires on Jan. 1, 2017, which gives the Legislature an opportunity to reconsider it during the 85th Legislative Session that year.

- **Market Restitution - HB 2133** (Rep. Solomons/Sen. Fraser). Outcome: Signed by Governor.

Filed in response to suggestions by city coalitions, HB 2133 grants the PUC authority to order any company found to have violated rules in the wholesale energy market to disgorge profits from that activity. HB 2133 directs that disgorged revenue to market participants, with the intent that the participants refund the money to consumers harmed by the violations.

Note: HB 2133 was successfully amended midway through the legislative process to restrict participation in enforcement cases pertaining to wholesale market violations to the company, the independent market monitor and the PUC staff. Another amendment allows the company to avoid future prosecution by creating and adhering to a corrective plan approved by the PUC.

Gas Utilities

- **Railroad Commission Sunset - SB 655** (Sen. Hegar/Rep. Keffer). Outcome: Dead

This bill emerged from the Sunset Advisory process. The legislation would have reauthorized operations at the agency until 2023. As originally filed, SB 655 included a recommendation favored by the Atmos Cities Steering Committee (a city coalition) that the independent State Office of Administrative Hearings ("SOAH") adjudicate utility cases for the agency. The bill also included a recommendation from cities that the agency change its name.

Note: House and Senate conferees failed to reach an agreement on separate versions of this bill that had emerged from each chamber. Although SB 655 died, the separate agency "safety net" bill (SB 652) authorizes the continued operations of the Railroad Commission for an additional two years. In 2013 the Railroad Commission will again come up for Sunset review by lawmakers during the 83rd Regular Session.

- **Pipeline Utility Regulation - SB 1135** (Sen. Hegar/Rep. Chisum). Outcome: Dead

This proposal was brought by the gas pipeline companies, and, according to the representations of company officials, was intended to ensure that gas pipeline statutes would be protected from any sort of reorganization that came as a result of the Railroad Commission Sunset bill. Industry officials said the re-codification would make it easier to draft bills in the future that distinguish pipelines from local distribution companies.

Note: Rep. Warren Chisum, author of the House version, allowed his bill to die on May 12 in response to concerns raised by city officials. Sen. Glenn Hegar, the Senate sponsor, also agreed not to pursue SB 1135.

- **Gas Streamlining - SB 1309** (Sen. Hinojosa/Rep. Deshotel). Outcome: Dead

This legislation would have allowed gas utilities to obtain approval from the Texas Railroad Commission for the creation of an expedited ratemaking procedure, even if municipalities had deemed the procedure in violation of the public interest. The legislation represented an expansion of the Gas Reliability Infrastructure Program, which has led to successive rate increases without substantive review by the Railroad Commission.

Note: Responding to objections from city consumer groups, the sponsor of the House version of this bill, Rep. Joe Deshotel, killed his own bill through a procedural maneuver on May 12. The Senate version died after it failed to pass that chamber before a procedural deadline.

- **Rate Case Expenses - HB 3407** (Rep. Taylor). Outcome: Dead

The intent of this legislation was to deny both cities and utilities the ability to recover their rate case expenses in gas utility cases. However, it was not drafted in such a way as to accomplish that purpose.

Note: The author allowed the bill to die in response to concerns raised by city representatives.

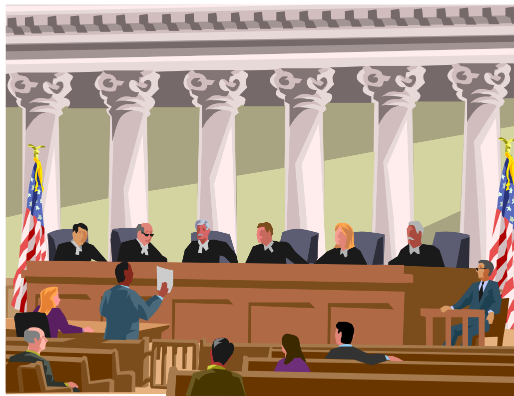
R.A. ("Jake") Dyer is a policy analyst for the Utility Practice Group and the author of several reports on the state's electric and gas markets. If you have any questions or would like additional information, you may contact Jake at (512) 322-5898 or rdyer@lglawfirm.com.

Texas Supreme Court Makes Arbitration More User Friendly

by Chris Phillips

In October 2007 we published an article on the arbitration process that incorporated a number of recommendations for countering one of the most oft-cited reasons given by parties objecting to the submission of their commercial disputes to arbitration: the lack of a mechanism for appealing the erroneous award of a rogue – or merely grievously wrong – arbitrator. The suggestion was made in that article that a provision allowing for an appeal where the arbitrator commits a substantive error of law be incorporated into the arbitration clause. As we agreed in that earlier article, because arbitration is largely a creature of contract, there should be no reason why parties to a contract could not incorporate an appellate process. Indeed, this was an approach that others had also advocated.

Three years ago, the United States Supreme Court, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, held the Federal Arbitration Act ("FAA") does *not* allow parties to expand judicial review of an arbitrator's award by agreement, and prohibited such a contractual arrangement. However, in a unanimous decision reached in May 2011, the Texas Supreme Court held the Texas Arbitration Act ("TAA") ***permits*** agreements that limit an arbitrator's decision-making authority, thereby allowing for an expanded judicial review of arbitration awards for reversible error.



Background

Parties often prefer arbitration to litigation because of its obvious advantages, including increased privacy and the ability to select arbitrators with knowledge in the area of the dispute. In addition, arbitration is thought of as an efficient and less costly alternative to traditional litigation. As part of an effort to promote efficiency and affordability, most arbitration statutes limit the parties' right of appeal and, apart from several codified exceptions, require courts to uphold and enforce arbitration awards. For example, both the FAA and the TAA state that a court must confirm an arbitration award unless it was the result of fraud and corruption on the part of the arbitrator. While arguably making the arbitration process less costly, in some instances the limited scope of judicial review can weigh against the benefits of arbitration.

Parties have historically tried to expand their right to appeal arbitral awards by contractually agreeing to do so in advance. In *Hall Street*, the parties agreed to an arbitration clause that included the following:

> The court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

In *Hall Street*, the U.S. Supreme Court analyzed the FAA's plain language. Relying on a national policy favoring arbitration, the Court found this arbitration clause invalid, holding that the FAA provides an exhaustive list of reasons for vacating or modifying arbitration awards and parties may not contractually *expand* that list. Nonetheless, the Supreme Court limited its opinion to the FAA, acknowledging there are other ways "into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."

Thus, *Hall Street* left the states an open door, and the Texas Supreme Court stepped right through it in *Nafta Traders v. Quinn*. Although the TAA and FAA are very similar statutes, the Texas Supreme Court distinguished its decision from *Hall Street* on the basis of facts. Unlike the agreement in *Hall Street*, which the U.S. Supreme Court interpreted to *expand* the scope of judicial review, the agreement at issue *Nafta Traders* focused on contractually *limiting* the authority of the arbitrator, stating, "[t]he arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." The Court reasoned that because an arbitrator derives his power from the parties' arbitration agreement, and because an arbitrator exceeding his or her powers is one of the grounds for vacating or modifying an arbitrator's award, the parties may limit an arbitrator's power to be no more than that of a trial judge, thereby subjecting his decision to independent review.

However, the Texas Supreme Court did not base its decision on this distinction alone; it also voiced its disagreement with the U.S. Supreme Court's policy analysis. While the U.S. Supreme Court stressed that a limited judicial review of arbitration awards is necessary to maintain arbitration's "essential virtue of resolving disputes straightaway," the Texas Supreme Court found the essential virtue of arbitration to be that it is a "creature of agreement," closely related to the fundamental and broad freedom to contract.

Implications for Texas

The Texas Supreme Court held in *Nafta Traders* that the FAA did not preempt the TAA. As a result, the Court's holding will likely have a significant impact on parties wanting to carefully craft sophisticated arbitration agreements. To do so, however, parties should expressly consider including clauses like the one in *Nafta Traders*, specifying limits on the arbitrator's power to make errors of fact or law. Additionally, in order to properly preserve any error, the arbitration agreement should clearly specify that it is to be construed under the TAA and that the parties agree to apply appropriate procedures during the arbitration itself, such as agreeing to allow a court reporter to make an official transcript of the hearing, and properly objecting where necessary to preserve error, just like in traditional court proceedings.

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(Texas Supreme Court continued from page 10)

Expanded review of arbitral awards is not always a good idea; there are times when the need for closure in a dispute can outweigh the desire for ultimate vindication. But in appropriate cases, especially in complicated contractual relationships involving substantial sums of money, contracting parties now have the Texas Supreme Court's imprimatur on a way of protecting against the rogue arbitrator while enjoying the other benefits of arbitration. The "standard" off-the-shelf arbitration clause rarely was a good idea for use in complex contracts, but *Nafta Traders* underscores the need to carefully consider what terms should be included when parties are contemplating choosing arbitration as their dispute resolution mechanism.

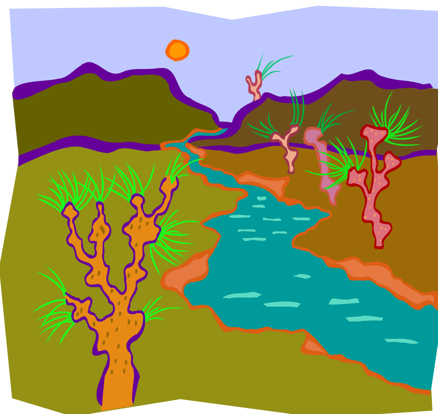
Chris Phillips is the head of the Firm's Litigation Practice Group. Chris is an experienced arbitrator and mediator and maintains an active litigation practice. If you would like further information or have any questions, you may contact Chris at (512) 322-5890 or cphillips@lglawfirm.com.

TCEQ Adopts Environmental Flow Standards

by Martin C. Rochelle and Cristina D. Ramage

On April 20, 2011, the Texas Commission on Environmental Quality ("TCEQ") adopted the first in a line of environmental flow ("E-Flows") standards for the state's surface waters. These new standards apply to two Texas river and bay systems—the Sabine and Neches Rivers along with Sabine Lake Bay, and the Trinity and San Jacinto Rivers along with Galveston Bay—and will likely influence future rulemakings for the remaining river and bay systems in the state.

Background



The TCEQ's adoption of E-Flows standards follows years of work by various committees charged by the Legislature to oversee and implement Senate Bill 3's environmental flows provisions. Through SB 3, the Legislature directed the TCEQ to adopt appropriate environmental flow standards for each river basin and bay system in the state that are adequate to support a sound ecological environment, to the maximum extent reasonable considering public interests, including the state's need for additional water supplies, and other relevant factors.

With the passage of SB 3, the Legislature established a statewide Environmental Flows Advisory Group ("Advisory Group") to oversee the process, and two types of committees, the local Bay and Basin Expert Science Teams ("BBEST") and the Bay and Basin Area Stakeholders Committee ("BBASC"), charging them to make E-Flow recommendations with respect to their respective river and bay systems. The BBESTs were charged with developing environmental flow analyses and recommending environmental flow regimes based solely on the "best science available" in order to ensure a "sound ecological environment" for their bay and basin areas. The BBASCs were then charged with developing recommendations regarding appropriate environmental flow standards and strategies, considering the "needs of humans," and submitting those recommendations to the Advisory Group and to the TCEQ for rulemaking. Following this process for the first two bay and basin areas assessed (the Trinity-San Jacinto and Sabine-Neches bay and basin areas), on October 15, 2010, TCEQ's Executive Director proposed rules establishing E-Flow standards for these areas.

Newly-Adopted Standards

Last November, the TCEQ published its proposed E-Flows rules in the Texas Register, and these rules were available for public comment until December 20, 2010. TCEQ staff received over 2,000 comment letters, including comments filed by attorneys in the Firm's Water Practice Group who worked with their clients and consultants to develop comments for the TCEQ Commissioners' consideration. On April 20, 2011, after reviewing the proposed rules and considering the public's comments, the TCEQ adopted the new E-Flows standards, which were published in the May 6, 2011 edition of the Texas Register.

The newly-adopted standards are contained within 30 T.A.C. Chapter 298, and include procedures for the establishment and adjustment of conditions in water use permits issued in the affected river and bay systems. Among other departures from the rules as originally proposed, the adopted standards require the passage of two pulse flows per season, but clarify that a water rights holder is not required to produce pulse flows or to pass more than two high flow pulses in a season if only one high flow pulse is generated in the preceding season. Other notable changes made in the adopted version of the new rules include:

- For water rights voluntarily contributed to the Texas Water Trust that authorize storage and diversions from storage, and that are reliable in at least 75% of the years, the Commission may allow credit for the contribution without spreading the amount of contribution evenly across the year if the Commission determines that doing so would better ensure protection of the standards and any applicable environmental set-aside.
- Creation of a more simplified flow regime that clarifies that subsistence flow standards can be variable depending on the season, and that only the subsistence flow for a particular season limits diversions by a water right subject to the standards of that season.
- Changes in specific values for base and subsistence flow standards for all of the measurement points in the Trinity River Basin and San Jacinto River Basin, based upon specific values

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recommended by commenters.

- Deletion of the phrase "to the maximum extent reasonable, considering other public interests and other reasonable factors" from language to be included as special conditions in water rights permits, based upon the reasoning that Texas Water Code §11.147(e-3) does not allow this type of balancing.

The standards adopted by the TCEQ also contain specific values for the base flow standards for all of the measurement points in the Sabine-Neches bay and basin area that were increased by 10% over the standards as originally proposed. The Commissioners also adopted amendments to 30 T.A.C. Chapter 35, providing that the TCEQ may make any waters that had been previously set aside from permitting by the E-Flows rules available in cases of emergency (e.g., drought), thereby suspending permit conditions in such situations. The Commissioners adopted these amendments with no changes to the rules as originally proposed.

As adopted, the E-Flows standards allow for the development of implementation procedures by TCEQ staff through promulgation of guidance documents. TCEQ staff is now in the process of developing implementation guidance for the E-Flows standards, and has solicited public comment relating to implementation of the rules. Written comments relating to the proposed implementation procedures were recently submitted to TCEQ. Comments will also be received by TCEQ staff at the next called meeting of the TCEQ's Water Rights Advisory Work Group, yet to be scheduled.

Future of E-Flows Rulemaking

Pursuant to its rules adoption schedule, TCEQ Commissioners are next expected to adopt E-Flows standards for two additional Texas river and bay systems by September 2, 2012. These river and bay systems include the Guadalupe, San Antonio, Mission, and Aransas Rivers, along with the Mission, Copano, Aransas, and San Antonio Bays, and the Colorado and Lavaca Rivers along with Matagorda and Lavaca Bays.

Martin C. Rochelle is a Principal with the Firm, where he chairs its Water Practice Group. Martin represents a broad array of clients across the state in the areas of water rights and supply, water quality, and water reuse, and he is actively engaged in the development of sound water policy at the Texas Capitol. Cristina D. Ramage is an Associate in the Firm's Water Practice Group. Cristina assists clients with water supply planning, permitting and regulation in the areas of surface water and groundwater. If you would like additional information or have questions related to this article or other water-related matters, please contact Martin at (512) 322-5810 or mrochelle@lglawfirm.com, or Cristina at (512) 322-5887 or cramage@lglawfirm.com.

Finally, the Final ADA Employment Regulations

by Sheila Gladstone and Ashley Dalton

If an employee wanted to bring his miniature horse to work or ride his Segway® around the office, would you, as the employer, let him? According to the new ADA regulations, you may have to. Two years ago, we told you about the ADA Amendments Act of 2008 ("ADA-AA"), which was enacted to broaden the scope of protection under the Americans with Disabilities Act ("ADA"). *[LINK TO PRIOR ARTICLE – in Vol 14, issue 3 July 2009]* The ADA-AA greatly expanded the definition of "disability" (which Congress felt had been inappropriately narrowed by the Supreme Court) and directed the Equal Employment Opportunity Commission ("EEOC") to amend its regulations to reflect these changes. We have been waiting for the final regulations for several years, and EEOC finally published them on March 25, 2011.

The changes are intended to make it easier for individuals to establish their right to protection and their standing to bring an ADA claim. Under the old regulations, the focus of ADA claims was on whether the person bringing the claim was "disabled" and, therefore, entitled to protection. Now, under the ADA-AA and the final regulations, the focus is intended to be on the employer's treatment of the person, and whether the employer acted reasonably.

The EEOC's final regulations (found in 29 C.F.R. § 1630) use a three-pronged approach for the definition of "disability": (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

A "physical or mental impairment" under the new regulations includes those disorders and illnesses that were conventionally considered disabilities, but also includes cosmetic disfigurement, as well as any condition (or "anatomical loss") that affects the immune or circulatory systems. Thus, an "impairment" no longer has to restrict a person's daily activities in order to be a disability. A disability can now be a disease that affects a person's internal organs or systems, even when there is no effect on the ability to go about one's normal life activities. The regulations identify specific impairments that would easily be considered disabilities affording ADA protection. Those impairments include, among other things, cancer, diabetes, high blood pressure, infertility, epilepsy, HIV infection, multiple sclerosis, depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

A "record of such an impairment," the second prong of the definition of disability, means that episodic impairments are now included as disabilities if the person would have met the definition of disability at the time the condition was active. For example, a person with major depressive episodes qualifies as disabled even between episodes.

Whether a person is "disabled" is determined without looking at the effects of mitigating measures such as medication, hearing aids, or prosthetics. For example, a person whose obsessive-compulsive

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(Final ADA continued from page 12)
disorder is under control because of medication might now be covered by the ADA, if the condition would be a disability if untreated. A person who hears without limitation while wearing a hearing aid would now be considered disabled if, without the device, the condition would limit the ability to hear. Furthermore, an employer cannot require an employee to use a mitigating measure available to the employee that could eliminate or reduce the symptoms or impact of an impairment.

An employee is also entitled to protection under the ADA if he is regarded as having a disability regardless of whether he is actually disabled. For example, a person with burn scars could have a claim for discrimination under the ADA if the employer regards him as disabled, regardless of whether he actually has an impairment. However, a person who claims he was "regarded as" disabled but not actually disabled can only claim discrimination under the ADA, and cannot claim they were not reasonably accommodated. This is because they are not actually disabled and therefore don't need reasonable accommodation.

While the regulations don't change employers' duty to reasonably accommodate, employers should familiarize themselves with what this duty entails. For example, reasonable accommodation could, in certain circumstances, mean allowing service animals (e.g. dogs and miniature horses) or the use of Segways® in the workplace. With the final regulations' shift in focus, employers must be much more attentive to their treatment and accommodation of potentially disabled individuals, rather than being concerned with whether such individuals qualify as disabled under the ADA. Bottom line -- always try to do whatever is reasonable to allow employees with health problems to do their job. If they still can't do what is necessary to get the job done even after the employer has tried all reasonable accommodation, then the employee will not be qualified and may be transferred or let go.

Sheila Gladstone heads the Firm's Employment Law Practice Group. Sheila is available to help with employee training sessions and any other employment-related matter. Ashley is an Associate in the Firm's Employment Law Practice Group. For additional information, you may contact Sheila at (512) 322-5863 or sgladstone@lglawfirm.com, or Ashley at (512) 322-5808 or adalton@lglawfirm.com.

Effective Dates of TCEQ Actions

by Duncan C. Norton

Clients often ask when their TCEQ permit is "effective." The answer to that question is dependent on what procedure it went through at the agency which led to its issuance. Was it issued by the Commission pursuant to the contested case process, or by the Executive Director ("E.D.") as an uncontested item?

The effective date of Commission actions, unlike E.D. actions, is not defined by any TCEQ regulation. Pursuant to the Texas Open Meetings Act, Commission actions are typically required to be taken in an open meeting. A decision or order that may become final in a contested case "must be in writing or stated in the record." The Commission, as a matter of regular practice, will vote on a contested case matter in an open meeting and then several days later one Commissioner will sign the order implementing that decision. Such orders typically include an "issued date" or "effective date" on the signature page of the order. This includes both interim orders and orders that may become final Commission actions on a contested matter.

Often, practitioners before the TCEQ refer to "effective date," "issued date," and "final and appealable" either interchangeably or in ways that confuse the differences between those three phrases. The "issue date" of an agency order is the date on the signature page of a typical Commission order. The date an order arising from a contested matter is "final and appealable" is also clear because it is controlled by the Texas Administrative Procedures Act, and is tied to the denial of a motion for rehearing either by Commission action or operation of law.

The "effective date," or date on which a Commission action can be relied on for action by the permittee, is the date on which the Commission order approving the application is signed. It is typically the same as the issue date. On the issue or effective date, a permittee can move forward with the activity that required the permit, with the caveat that the action could be reversed by the Motion for Rehearing ("MFR") process or action on appeal by a Texas court. The order is "final and unappealable" only when the deadlines for filing a MFR have passed or the MFR has been denied, either by operation of law pursuant to the administrative appeal statutes or by action of the Commission, and no timely court appeal is filed or the appeal process is finished. Once it is "final and unappealable" the permit can only be taken away by some new act of the agency, such as a revocation proceeding.

Most of the permitting actions taken by the TCEQ on a daily basis occur outside the scope of a contested case hearing, and most of those actions have been delegated to the E.D. The TCEQ rules at 30 TAC § 50.131 contain a laundry list of the types of actions the E.D. may take on behalf of the agency. The "effective date" of these actions is governed by § 50.131, which clearly states that a "permit or other approval is effective when signed by the executive director, unless otherwise specified in the permit." Logically, this requires that E.D. actions must be written. Thus, similar to an order or decision arising from a contested case, an interested party may act in reliance upon and in accordance with a permit or other action once it is signed and issued by the E.D. However, for a period of time after

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(Effective Dates continued from page 13)
being signed and becoming effective, the permit or approval may possibly be overturned by administrative or judicial process.

Pursuant to 30 TAC §50.139(a), a person may file with the chief clerk a motion to overturn ("MTO") the E.D.'s action on the various different types of matters listed in 30 TAC §50.131(b). Such MTO must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the E.D. to the applicant and persons on any required mailing list for the action. These motions are not subject to the APA procedures for contested case hearings and do not affect the "effectiveness" of the action.

According to subpart (d) of this same section, "[a]n action by the executive director is not affected by a motion to overturn... unless expressly ordered by the commission." Thus, the E.D.'s action remains effective during the filing and review stages of the MTO process. If the MTO is not acted on by the Commission within 45 days after the date the agency mails notice of the signed permit, approval, or other action of the E.D., the motion is denied (unless an extension of time is granted).

The Water Code and the Health and Safety Code both include provisions that provide a method for challenging TCEQ actions. Pursuant to Texas Water Code §5.351(a), persons affected by actions of "the commission may file a petition to review, set aside, modify, or suspend the act of the commission." This section of the Water Code applies to the issuance of uncontested permits and other actions taken by the E.D., and to Commission actions where there is no contested case hearing. Only when action by the Commission invokes the contested case process do the provisions of Tex. Government Code § 2001.171 apply.

To be timely, a person affected by a ruling, order, or decision of the Commission must file a petition within 30 days after the effective date of the ruling, order, or decision. That means, unless otherwise specified, a petition for judicial review of an action of the E.D. must be filed within 30 days after the E.D. signs the permit or approval. This is true regardless of whether the MTO process is utilized.

Applicants and others participating in the TCEQ permit process should not presume that action taken by the Commission is subject to the contested case process or that the Commission's MTO and rehearing procedures delay the effective date of Commission or E.D. actions. If the regulated community recognizes that the motion for rehearing and finality considerations of the Texas Government Code only apply in contested case situations and not E.D. actions, much of the confusion over the effectiveness of TCEQ actions will be avoided.

Duncan Norton is a Principal in the Firm's Air & Waste and Water Practice Groups. Duncan has over 20 years of experience in environmental regulatory law in Texas and his practice focuses on representing businesses and governmental subdivisions in permitting, enforcement, and rulemaking issues before the Texas Commission on Environmental Quality and the Environmental Protection Agency. If you would like additional information or have questions related to this article or other matters, please contact Duncan at (512) 322-5884 or dnorton@lglawfirm.com.

Ask Sheila:

Dear Sheila,
Are we required to grant paternity leave to a male employee?
Signed,
Lone Star Employer

Dear Lone Star Employer:
Probably yes. Fathers and mothers have equal rights to parent and bond with a new child. There are two laws that affect whether male employees have the right to take time off for a new child: The Family and Medical Leave Act (FMLA) and Title VII of the Civil Rights Act – sex discrimination provisions (Title VII).

FMLA
The FMLA applies only to employers with 50 or more employees in a 75-mile radius, and provides benefits only to employees who have worked for the employer for at least a year (total time). If the FMLA applies, then new parents can take up to twelve weeks of unpaid, protected leave to care for the child. This provision applies equally to men as well as women, and to adoptive parents, foster parents, and even employees who take in a child because of the death or incapacity of a relative. It is irrelevant whether there is another parent who can be with the new child – men have equal rights with women under the FMLA to be at home and "bond" with a new baby. The paternity leave must be taken within one year of the birth or placement of the child, so some couples have the mother take time off her job first, and then the father takes the second twelve weeks. Or, both parents can take time off together.

FMLA leave is unpaid leave, but if the employee has paid leave available that would cover all or part of the time off, then the employee should use it. Vacation, comp time and sick leave should be considered. Be sure to send out the appropriate legal letters, information, and notices whenever an employee is beginning FMLA leave.

Title VII
But suppose FMLA doesn't apply? Either the employer isn't big enough, or the employee hasn't worked there long enough. Now we switch over to a Title VII gender discrimination analysis. If you have 15 or more employees, you must provide men and women with equal benefits under equal circumstances. So if you allow non-FMLA-covered women only to take disability time off, such as the first six weeks after the birth, then you don't need to offer the same benefit to men, who have not had a physical disability related to giving birth. If, however, the employer offers benefits to all new mothers, including those who adopt, then equal benefits must be offered to men, since the benefit is not related to the disability of giving birth. Moreover, if you offer time off to woman beyond the

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period of disability, whether paid or unpaid, then you must also offer that additional time to men. For example, if your policies allow three months or six months of paid maternity leave to women who give birth, then any paid time off beyond the period of disability (usually six weeks) must also be offered to men.

To summarize, the only time an employer would ***not*** be legally required to give time off to men for paternity leave is when (1) the FMLA does not apply, *and* (2) the only benefits given to women are directly related to the actual short-term disability surrounding physically giving birth.

"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.

IN THE COURTS

American Electric Company, Inc. v Connecticut, -- S.Ct. --, 2011 WL 2437011 (U.S. June 20, 2011).

On June 20 the United States Supreme Court, in the first global warming nuisance case brought before the high court, reversed and remanded the Second Circuit Court of Appeals in an 8-0 decision. Eight states, three nonprofit land trusts, and the City of New York alleged that the defendants (five large power producers) emit greenhouse gases ("GHG") and therefore contribute to global warming, causing damages, such as loss of property due to rising sea levels, to the states. The Supreme Court held that the "Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions," effectively preventing these types of GHG gas nuisance cases from continuing. However, the holding may not prevent GHG nuisance cases seeking monetary damages rather than injunctions from going forward.

Huber v. New Jersey Dept. of Environmental Protection, 131 S.Ct.1308, 179 L.Ed. 2d 643 (March 21, 2011).

The U.S. Supreme Court denied a request to overturn a $4,500 state fine and a restoration order for filling wetlands within the Hubers' backyard. The Hubers' Supreme Court petition contended that a state inspector's warrantless search of their property was illegal, violating their Fourth Amendment right of protection against unreasonable searches and seizures. The Supreme Court's decision was based primarily on the fact that the case was appealed from a New Jersey state intermediate appellate court, and not the state's highest court. The intermediate appellate court held that the 2002 inspection of the Hubers' backyard was authorized by state statute protecting wetlands and did not require a warrant. The Court stated that it would be willing to hear and analyze the rare situation of unwarranted searches involving wetland violations if appealed from a proper court.

Montana v. Wyoming, 131 S.Ct. 1765 (May 2, 2011).

The U.S. Supreme Court recently held that Wyoming did not violate a water-sharing compact with Montana and North Dakota by reducing the runoff and seepage of water from farm fields into the Yellowstone River and its tributaries. The case arose out of a dispute between Montana and Wyoming over the interpretation of the Yellowstone River Compact. Montana alleged that Wyoming breached the Compact by allowing its upstream, pre-1950 water users to switch from flood to sprinkler irrigation, which improved efficiency through increased crop consumption of water and decreased volume of runoff and seepage into the river system. The Court held that upstream water users can improve the efficiency of their irrigation systems even though such may impair downstream flows. The Court reasoned that the plain terms of the Compact protect ordinary appropriative rights to the beneficial use of the water in those states that are parties to the Compact. In addition, the Court stated that the evidence shows that the doctrines of appropriation in Wyoming and Montana allow users to improve the efficiency of their irrigation systems, even if it is to the detriment of downstream users.

Ocean County Landfill Corp. v. U.S. E.P.A. Region II, 631 F.3d 652 (3d Cir. Feb. 2, 2011).

The Court of Appeals for the Third Circuit dismissed a landfill's petition to overturn an EPA determination that the landfill and an adjacent gas-to-energy facility were under common control for purposes of air emissions permitting. Under EPA's determination, the facilities must file for a single air permit covering both operations. The court held that EPA's determination does not constitute a "final agency action" as required for judicial review. The common control analysis, according to the court, was only one step in the permitting process. According to the court, an action is not "final action" until a new permit is issued or denied. If EPA's determination is ultimately allowed to stand, many in the solid waste industry are concerned that the costs associated with additional pollution control requirements may destroy the economic viability of some landfill gas-to-energy projects.

Pluck v. BP Oil Pipeline Co., 640 F.3d 671 (6th Cir. May 12, 2011).

The U.S. Court of Appeals for the Sixth Circuit upheld the dismissal of a residential exposure suit alleging the plaintiff's non-Hodgkin's lymphoma was caused by benzene in her drinking water that the plaintiff claimed originated from a BP-owned pipeline in Franklin Township, Ohio. The dismissal was upheld by the court because the plaintiff's benzene levels were not previously recorded

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and there was insufficient evidence to prove causation. The court held that the mere existence of a toxin in the environment is insufficient to establish causation. The court also upheld the lower court's decision to exclude the causation expert's opinion on the plaintiff's diagnosis because the expert failed to rule out alternative causes of the plaintiff's illness and failed to demonstrate benzene as the cause of plaintiff's cancer.

Pakootas v. Teck Cominco Metals Ltd., No. 8-35951, 2011 WL 2138157 (9th Cir. June 1, 2011).

The U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's dismissal of a civil suit by two members of the Confederated Tribes of the Colville Reservation, located in Washington State, against Teck Cominco Metals ("Teck"). From 1905 to 1995 Teck dumped slag from a metal smelting operation into the Upper Columbia River. The pollution, which traveled downstream and contaminated waters bordering Colville Reservation lands, resulted in the EPA designating the affected area as a "Superfund" site. After failed negotiations, EPA issued an administrative order demanding that Teck conduct a remedial investigation and feasibility study to assess the site conditions and to implement a cleanup. Teck failed to comply with the order. Eventually, Teck and EPA entered into a contractual arrangement wherein Teck would conduct the remediation and EPA would withhold enforcement of the penalties for the 892 days of non-compliance with the original administrative order. Teck's failure to perform under the terms of the contract triggers the EPA's right to enforce the penalties; the penalties thus operate both as leverage to compel remediation and as a means of funding the clean up in the event of Teck's nonperformance. The plaintiffs asked the court to enforce the penalties for the 892 days of past noncompliance with the original administrative order. The Court of Appeals stated that to force EPA to enforce the penalties would effectively strip the EPA of the contractual hammer the EPA holds to ensure that Teck completes the cleanup.

Loorz v. Jackson, No. 11-2203CV (N.D. Cal. May 4, 2011).

Environmental groups have filed suit in the U.S. District Court for the Northern District of California seeking an injunction to compel federal agencies to take all necessary actions to reduce greenhouse gas ("GHG") emissions in the United States. The groups are basing their claims on the "Public Trust Doctrine," never before applied in GHG litigation. The plaintiffs are asking the court to declare: (i) that the atmosphere is a Public Trust; (ii) that the government has a fiduciary duty, as trustee, to preserve and protect the atmosphere as a commonly shared Public Trust asset; (iii) that certain governmental agencies have breached their fiduciary duties as trustees of the atmosphere by allowing unsafe amounts of GHG emissions into the atmosphere; and (iv) that the agencies bear the responsibility of taking whatever action is necessary to reduce GHG emissions into the atmosphere. The Supreme Court's holding in *American Electric Company* (discussed above) may set a precedent precluding this legal theory.

Portland Cement Ass'n v. EPA, No. 10-1358, No. 10-359 (D.C. Cir. May, 16 2011)

The Portland Cement Association ("PCA") filed suit against EPA, claiming that EPA's recently revised emissions limits for cement kilns violate the Clean Air Act ("CAA") because EPA failed to demonstrate that the limits are achievable by the industry. In a separate but related lawsuit, PCA is seeking to overturn the same rules, claiming that they overlap with another rule revising New Source Performance Standards ("NSPS") for commercial and industrial solid waste incinerators. PCA argues that including kilns in two mutually exclusive categories violates the CAA. Moreover, PCA argues, the EPA failed to consider outside factors affecting the ability of the kilns to achieve the numeric emissions limits. Finally, the PCA insists that the EPA violated § 112(d) of the CAA because the EPA failed to select a large enough sample of sources when setting emissions limits for hydrogen chloride and total hydrocarbons.

State of Texas vs. EPA, No. 11-1128 (D.C. Cir. May 4, 2011).

The State of Texas has filed suit against the EPA, alleging that the EPA's final rule extending EPA's takeover of greenhouse gas ("GHG") permitting in Texas is arbitrary and capricious, and a violation of the Clean Air Act. EPA insists that, due to Texas' refusal to implement a GHG permitting program in its state implementation plan ("SIP"), the EPA has no option but to continue its role as the GHG permitting authority in Texas. The contested final rule grants partial approval to the Texas SIP, and allows the state to retain PSD permitting authority for pollutants other than GHGs.

United States v. Mahard Egg Farm Inc., N.D. Tex., No. 11-01031 (May 18, 2011).

A Texas-based egg producer agreed on May 18, 2011, to pay $1.9 million in fines and spend $3.5 million in remedial measures to settle Clean Water Act ("CWA") violations at three Texas plants and four Oklahoma plants. The Environmental Protection Agency ("EPA") alleged that the company violated §§ 402 and 301 of the CWA and both states' laws through application of manure at levels in excess of nutrient management plans, resulting in accumulation of large amounts of nutrients that washed into area waterways. The company was also charged with abandoning inactive and improperly designed manure lagoons, operating facilities without discharge permits, and failing to comply with the terms of its discharge permits at seven facilities. Both EPA and the Texas Commission on Environmental Quality were involved in the case, claiming the illegal discharges threaten human health, inhibit functioning of aquatic plants and animals, and transmit diseases to humans via bacteria and parasites due to adversely affecting fish and other aquatic life. EPA officials indicate that the civil penalty resulting from the company's violation is the largest fine imposed in a federal enforcement action involving a concentrated animal feeding operation.

State v. Public Utility Commission of Texas, Cause No. 08-0421, ---S.W.3d---, 54 Tex. Sup. Ct. J. 690 (2011).

On March 18, 2011, the Texas Supreme Court rendered its decision in the CenterPoint true-up appeal (PUC Docket No. 29526). The Court reversed the Commission's decision with respect to several issues, including the capacity auction true-up, depreciation, excess

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mitigation credits, and taxes. On May 4, 2011, intervenors filed motions for rehearing requesting that the Court reconsider certain issues; however, the Court denied the motions for rehearing on June 10, 2011. As a result of the Court's decision, CenterPoint will collect an additional $2 billion from ratepayers. CenterPoint is seeking to securitize the additional stranded cost amounts. Stakeholders are continuing to meet to discuss remaining issues as well as a path forward.

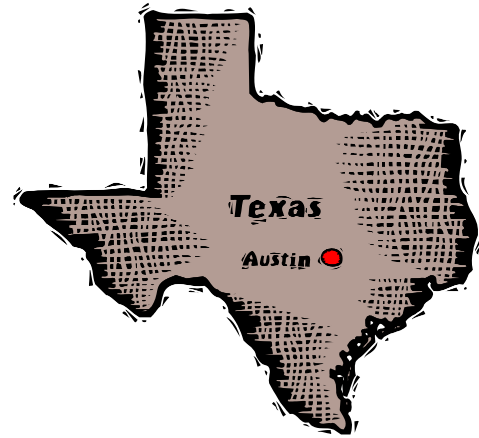
Hendricks v. Tex. Comm'n on Environmental Quality, NO. 03-10-00758-CV (Tex. App.—Austin, June 15, 2011).

The Third Court of Appeals in Austin recently affirmed the lower court's dismissal of Hendricks' suit because Hendricks failed to file his petition for judicial review within the 30-day statutory period in § 5.351 of the Texas Water Code. Hendricks appealed a Texas Commission on Environmental Quality ("TCEQ") order approving the issuance of over $8 million in bonds by the Harris County Fresh Water Supply District No. 61. The TCEQ bond approval order was issued on February 9, 2010, and Hendricks filed a motion to overturn the TCEQ Executive Director's decision on March 5, 2010. After Hendricks' motion to overturn was overruled, he filed suit for judicial review of the bond approval order on April 27, 2010. The district court dismissed the suit because Hendricks did not timely file his suit within 30 days of the effective date of TCEQ's decision. Despite Hendricks' efforts to argue that the effective date was March 5 and not the issuance date of February 9, the court affirmed the dismissal stating that Hendricks failed to comply with the statutory filing prerequisite. For a full discussion of the "effective date" of TCEQ orders, see the article by Duncan Norton on page 13 of this newsletter.

City of Waco v. Tex. Comm'n on Environmental Quality, -- S.W.3d --, 2011 WL 2437669 (Tex. App. – Austin, June 17, 2011).

The Third Court of Appeals withdrew its panel opinion dated September 17, 2010, and issued a new opinion in *City of Waco v. Tex. Comm'n on Environmental Quality*. The new opinion reverses the Court's previous decision and the decision of the lower court upholding TCEQ's denial of the City of Waco's request for a contested case hearing on the O-kee Dairy's ("O-kee") application to enlarge its concentrated animal feeding operation. The City argued that O-kee's request, if granted, would further threaten water quality in Lake Waco, which is the City's primary source of water supply. In its new opinion, the Court held that the TCEQ's decision to deny the City's request for a contested case hearing was arbitrary and an abuse of discretion because the TCEQ did not take a "hard look" as to whether the City would be affected if the permit were granted. The Court further held that the substantial evidence standard of review, which provides significant deference to an agency's decision, does not apply when a party has not been given the opportunity to develop an evidentiary record.

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.



AGENCY HIGHLIGHTS

Environmental Protection Agency

EPA Proposes Cooling Water Intake Rule to Protect Fish. EPA has announced a proposed rule to prevent cooling water intake systems at power plants from killing fish. The rule addresses situations where fish can either be trapped against intake screens (impingement) or actually pulled into the intake systems (entrainment). Impingement control requirements will apply to facilities that withdraw 25% of their water for cooling and have the capability to intake at least 2 million gallons of water per day. Entrainment controls will be determined on a site-specific basis and be subject to public comment. The new rule was proposed on March 28, 2011, and EPA is required by a settlement agreement to have a final rule in place by July 27, 2012.

EPA Expects to Propose a Rule in September for Stormwater Discharges at Construction Sites. On May 9, 2011, EPA officials announced that the agency is on track to propose a rule this September to regulate construction stormwater discharges from development and redevelopment projects. EPA is considering proposing different standards for new developments than for redevelopments, and is also accepting public input on possible phase-in methods for any new standards. The agency is studying local standards that have already been put in place as part of the rule proposal process. EPA is considering whether to mandate certain retrofit practices for all municipal sewer systems or to allow local systems to adopt their own retrofit plans and cycles. EPA expects the proposed rule to be published in September as planned with a final rule to be published in 2012.

EPA and Army Corps Publish Guidance on Clean Water Act Jurisdiction. On May 2, 2011, the EPA and U.S. Army Corps of Engineers ("USACE") jointly published in the Federal Register their proposal to issue clarifying guidance for determining which waters and wetlands are protected under the Clean Water Act ("CWA") programs. The guidance provides revised definitions of waterways covered under the CWA, offering a wide range of criteria to determine whether a particular "waterway, water body, or wetland" constitutes a "water of the United States." Specifically, the guidance removes some types of waters that were categorically excluded by a previously issued guidance. EPA claims that about 17% of isolated waters (*i.e.*, intrastate non-navigable waters that have no direct surface connection to other waterways) that were not previously

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covered by the CWA will now be subject to federal jurisdiction and permitting requirements. This guidance is yet another step in an ongoing battle over CWA jurisdiction, as bills currently moving through the U.S. House are attempting to strip EPA's veto authority for state-issued dredge-and-fill and discharge permits. The guidance is also part of an overarching strategy aimed at an across-the-board overhaul of water pollution regulation. While the original comment period was set to expire on July 1, 2011, EPA announced via press release on June 27, 2011, that the EPA and USACE have extended the public comment period by 30 days.

Phase 2 of EPA's Greenhouse Gas Regulations to Become Effective July 1, 2011. On January 2, 2011, Phase 1 of the EPA's new greenhouse gas ("GHG") regulations took effect. Pursuant to the "Tailoring Rule," Phase 2 became effective on July 1, 2011. With some exceptions, Phase 2 requires "new industrial facilities that emit the carbon dioxide equivalent ('$CO2_e$') of 100,000 tons per year" and "modified sources that increase emissions by 75,000 tons annually" to obtain a Prevention of Significant Deterioration ("PSD") permit even if they would not otherwise be required to obtain a PSD permit. Facilities that emit 100,000 tons of $CO2_e$ annually will be required to obtain Title V permits. Phase 2 mandates PSD permits for six GHG pollutants, regardless of whether the facilities trigger permitting thresholds for other air pollutants; only facilities already required to obtain PSD permits for other pollutants were affected in Phase 1.

EPA Repeals the "1997 PM10 Surrogate Policy" under the Federal Prevention of Significant Deterioration Permit Program. Effective May 16, 2011, the EPA issued a final rule repealing the grandfather provision for particle matter less than 2.5 micrometers ("PM2.5") under the federal Prevention of Significant Deterioration ("PSD") permit program. Additionally, the EPA has declined to change the effective date of May 16, 2011 for repeal of the "1997 PM10 Surrogate Policy" for use by states in their State Implementation Plans ("SIP"). The grandfather provision, known as the 1997 PM10 Surrogate Policy, allowed facilities that had applied for permits prior to the July 15, 2008 effective date of the new PM2.5 regulations to continue to be reviewed for PM10 in lieu of the new PM2.5 requirements. Under the new rule, permit applications completed before July 15, 2008 and for which a permit has yet to be issued must be amended. The amended applications must include: (i) further analysis to demonstrate compliance with PSD requirements for PM2.5; or (ii) a demonstration that PM10 is an adequate surrogate for PM2.5 for the specific project.

EPA Considers Delays to Air Toxics Rules Affecting Coal- and Oil-Fired and Fossil Fuel-Fired Electricity Utility Steam Generating Units. On May 3, 2011, the EPA announced that it was proposing National Emission Standards for Hazardous Air Pollutants ("NESHAP") for coal- and oil-fired Electrical Utility Steam Generating units ("EUGs") under § 112(d) of the Clean Air Act ("CAA"). The EPA also proposed revised New Source Performance Standards ("NSPS") for fossil fuel-fired EUGs under § 111(b) of the CAA. The EPA extended the initial July 5 deadline for public comment by 30 days in order to accommodate requests by members of Congress and industry groups.

EPA Reaches Settlement with Environmental Groups to Extend Deadline for Power Plant Rule. The EPA reached a settlement on June 13 with several states and environmental groups that will allow the EPA to postpone a proposed rule for greenhouse gas ("GHG") limits on new and modified power plants. The new deadline for proposed new source performance standards for GHG's for power plants shifts the date for issuance of the proposed rule from July 26, 2011 to September 30, 2011. However, the extension does not change the deadline for publication of the final rule on May 26, 2012. The original July 26 date for publication of the proposed rules resulted from a December 2010 settlement with the same groups. The EPA sought the extension because the deadline set in the December settlement did not allow sufficient time to collect and analyze all of the information the EPA requested from the industry. A spokesman for one of the environmental groups stated that the extension would allow the EPA to put together a more thorough and well thought-out proposal.

EPA Delays Effective Date of Recently Published Boiler and Incinerator Rules. The EPA published final rules on March 21, 2011, establishing National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for mercury, particulate matter, and nitrogen oxides from boilers and incinerators. The final rules also revised New Source Performance Standards ("NSPS") for sewage sludge and solid waste incinerators. Concurrently, in response to numerous lawsuits and petitions for review of the new rules, EPA published notice of its intent to reconsider certain provisions of the final rules being published. On June 2, the EPA established a schedule for issuing updated standards by the end of April 2012. This schedule is consistent with a schedule proposed by the EPA last year before a federal judge forced the EPA to publish the controversial final rules.

Texas Commission on Environmental Quality

TCEQ Adopts Rule to Allow District Cost Sharing Participation. On June 22, 2011, the TCEQ adopted a rule that will permit a water district to obtain capacity or fund construction in regional facilities through bonds or reimbursement as long as the alternative funding would be cost-effective compared to the district having to construct facilities to provide the same service on its own. The adopted amendment was put in place to facilitate regionalization and cooperative planning among water districts and other local government entities. The rule became effective on July 14, 2011.

TCEQ proposes revised VOC requirements for crude oil and condensate storage tanks. On May 20, 2011, the TCEQ proposed a Volatile Organic Compound ("VOC") storage rulemaking for the Dallas / Fort Worth area. The rulemaking, if adopted, would increase the level of VOC controls required for floating roof tanks. The proposed rulemaking would also require 95% control of VOC emissions from crude oil and condensate storage tanks emitting 25 tons or more of VOCs annually. The TCEQ suggests that the proposed rules may require upstream oil and gas storage tank owners to install control technologies, implement new work practices, and comply with additional monitoring and recordkeeping requirements. Public hearings on the proposed rules are scheduled for the month of July. The public comment period runs from June 24 through July 25. The TCEQ anticipates adoption of the rules in November 2011.

Public Utility Commission of Texas

Project No. 39465 - *Rulemaking Relating to Periodic Rate Adjustments*. SB 1693, adopted during the 82nd Regular Session of the Legislature, adopted a periodic rate adjustment ("PRA") for electric utilities. Under this amendment to the Utilities Code, electric utilities

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are allowed to annually file abbreviated rate cases to recover the costs of distribution plant investment. The bill left undefined many of the details as to how the adjustment will work, and directed the PUC to adopt rules to fill in these details. In response, on June 2, 2011, the Commission opened Project No. 39465 for the purpose of creating a rule to guide the implementation of a PRA. Under the law, the Commission has only 120 days from the effective date of the law (May 28, 2011) to adopt a rule, thus a final rule is expected to be adopted at the Commission's Open Meeting currently scheduled for September 15, 2011. On June 9, utilities provided a draft of the rule for other interested parties to review. Interested parties are currently in the process of reviewing the rule to ensure that customers are adequately protected as intended by the Legislature. The rule was approved for publication in July, and comments are due in early August.

Docket No. 38929 – *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*. On January 7, 2011, Oncor Electric Delivery Company, LLC ("Oncor") filed an application to increase rates by $353 million. However, before intervenors filed testimony in the proceeding, the parties were able to reach a settlement agreement on April 8. The settlement reduces Oncor's rate increase to $136 million and provides for a 10.25% return on equity. The increase amounts to a 6.2% increase for residential customers and a 13.8% increase for street lighting, both lower than the Company's proposed increases of 14.6% for residential and 25.9% for street lighting. Under the settlement, the Company agreed to phase-in the increase with a $93 million increase in July 2011, and a $43 million increase in January 2012. Additionally, Oncor agreed to pay franchise fees in the amounts the parties contractually agreed to, consistent with the District Court's decision in the appeal of Oncor's previous rate case. The Commission initially considered the settlement at its June 17 Open Meeting. During the meeting, the Commissioners expressed reluctance to approve the portion of the settlement dealing with franchise fees. On July 8, the Commission again took up the matter after receiving comments from several city representatives. The Commission plans to take additional evidence on these issues at a hearing scheduled for July 29. A final decision in the case is expected in August.

Docket No. 38339 – *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*. On June 30, 2010, CenterPoint filed its request for an increase in rates annually by $111 million. On May 12, 2011, the Commission adopted an order reducing the requested revenue increase to $14.65 million. Parties filed motions for rehearing and the Commission issued its Order on Rehearing on June 23, 2011. The Commission reversed its position previously taken in Oncor's last rate case, determining that cities and utilities are permitted to agree to franchise fee payments in excess of the statutory formula.

Docket No. 38306 – *Texas-New Mexico Power Company's Request for Approval of Advance Metering System Deployment and AMS Surcharge*. In May 2010, TNMP filed an application for approval of a deployment plan for its proposed Advanced Metering System ("AMS") and a request for a surcharge to fund it. After the case was delayed several months due to critical problems identified in TNMP's filing, the hearing convened on June 1, 2011. On that date, parties announced that they had reached a settlement agreement and on June 9 filed a Stipulation signed by all parties. Ultimately, the parties agreed that TNMP's total revenue requirement of $113.4 million was reasonable and should be recovered through the AMS surcharge. The Stipulation provides for an AMS residential surcharge of $3.40 per month beginning July 18, 2011, through July 17, 2023. From July 2011 to January 2016, secondary service less than 5 kW will have a monthly surcharge of $8.20, and secondary service greater than 5 kW will have a monthly surcharge of $13.63. Lighting service will have a surcharge of $7.22 per month through January 2016. The approved the settlement on July 8, 2011.

Docket No. 39375 – *Oncor Energy Efficiency Cost Recovery Factor ("EECRF") Application*. On May 2, Oncor filed its 2012 EECRF application. Pursuant to Commission rules, Oncor is required to apply no later than May 1 of every year to adjust the EECRF in order to reflect changes in program costs and bonuses and to minimize any over- or under-collection of energy efficiency costs resulting from the use of the EECRF. Last year, the Commission approved Oncor's 2011 EECRF in the amount of $51,132,744. In Oncor's 2012 filing, the Company requests approval of its EECRF in the amount of $53,898,501. This amount is made up of energy efficiency expenses forecasted for the 2012 program year of $48.9 million, inclusion of a $8.2 million Energy Efficiency Performance Bonus, and a return, or refund, of $3.3 million for the over-recovery of energy efficiency costs in 2010. If approved, the monthly impact on residential customers will be $0.98 per month.

Railroad Commission of Texas

GUD No. 10000 – *Statement of Intent to Change the Rate CGS and Rate PT Rates of Atmos Pipeline – Texas*. On September 17, 2010, Atmos Pipeline – Texas ("APT") filed a rate application seeking to increase rates by $38.9 million annually. On April 18, 2011, the Commission decided the case with little discussion, adopting recommendations in the proposal for decision that reduced APT's requested increase to $26 million.

CenterPoint Texas Gas - Texas Coast Division COSA. On April 29, 2011, CenterPoint Gas Texas Coast Division filed its third Cost of Service Adjustment ("COSA") pursuant to the July 3, 2008 Settlement Agreement with cities served by CenterPoint. Based on CenterPoint's 2010 operating results, the Company claimed the need for an increase in annual revenues of $914,910. The COSA rate formula produces an increase of $0.28 per residential customer per month, $0.44 per small commercial customer per month, and $6.31 for large -volume commercial customers per month. In addition, the Company is proposing to recover $91,294 in rate case expenses associated with last year's COSA proceeding, which was contested. Cities have 90 days, or until July 30, to review the filing.

Texas Gas Service - Rio Grande Valley COSA. On April 28, 2011, Texas Gas Service Company ("TGS") filed a COSA tariff supporting a revenue deficiency of $2.5 million. However, due to the 5% cap contained in the COSA, TGS is only seeking recovery of $2.2 million. This increase would amount to an average monthly increase of $1.09 for residential customers and $22.27 for commercial customers. Cities have 90 days, or until July 27, to review the filing.

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 editor@lglawfirm.com.

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