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MUSSEL LISTINGS UNDER THE ENDANGERED SPECIES ACT AND PREPARING FOR THE BATTLES AHEAD

by Sara Thornton

The potential for significant impacts to water supplies from the implementation and enforcement of the Endangered Species Act ("ESA") became a reality when The Aransas Project ("TAP") filed suit in 2009 against the Texas Commission on Environmental Quality ("TCEQ") alleging a "take" of whooping cranes as a result of TCEQ's administration of its water rights permitting program. On June 30, 2014, the U.S. Fifth Circuit Court of Appeals reversed the decision of the district court and held that TAP had failed to establish a "taking" of whooping cranes pursuant to Section 9 of the ESA. On March 16, 2015, TAP filed a petition for writ of certiorari to the U.S. Supreme Court to appeal the decision of the Fifth Circuit. Although the battle continues in the lawsuit, it is not the only battle on the horizon relating to the ESA's impacts on water rights. Water rights holders should prepare for the listing of candidate aquatic-dependent species, specifically freshwater mussels, whose listing and protection under the ESA could severely limit water supplies within the river basins in which the species are located.

Because the listing of freshwater mussels could affect water availability and economic development, the Texas Comptroller of Public Accounts, who presides over the Interagency Task Force on Economic Growth and Endangered Species ("ESA Task Force"), has been closely following the proposed listing of these freshwater mussels. The following five central Texas mussels are currently proposed for listing in 2017 or later: Texas fatmucket (Lampsilis bracteata); Texas pimpleback (Quadrula petrina); Golden orb (Quadrula aurea); Texas fawnsfoot (Truncilla macrodon); and Smooth pimpleback (Quadrula houstonensis). One mussel species, the Texas hornshell (Popenaias popei), is proposed for listing this year.

There is no doubt that the listing of freshwater mussels will impact the development of future water supplies in Texas. In fact, in anticipation of the potential impacts from listing these mussels, the Texas Comptroller commissioned an economic study to determine what the potential economic impacts might be from listing these species. The study, published in 2013, examined the economic impacts that may occur if certain environmental flows had to be maintained for the mussel species (if listed) in rivers and streams in the Brazos, Colorado, and Guadalupe-San Antonio River Basins. The study found that unless mitigation is undertaken to transfer water supplies during drought conditions, one-year impacts for losses in the commercial/industrial, municipal, and agricultural sectors in Bexar, Medina, and Tom Green counties alone could range from $37 million to $80 million.

When Texas Comptroller Glenn Hegar took office on January 1, 2015, he hired Dr. Robert Gulley to oversee federal endangered species issues as Director of Economic Growth and Endangered Species Management in the Comptroller's office and as liaison with the ESA Task Force. Dr. Gulley is well-known in the ESA arena, particularly for his extraordinary efforts as the Director of the Edwards Aquifer Recovery Implementation Program established by Senate Bill 3 in 2007. Recognizing the wide-reaching impacts that listing freshwater mussels could have on water supplies, Dr. Gulley is working to form stakeholder groups within the state to collaborate on efforts to address the potential listing of freshwater mussels and designation of associated critical habitat. Such collaboration would likely include information sharing

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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.

To receive an electronic version of The Lone Star Current *via e-mail, please contact Jeanne Rials at 512.322.5833 or jrials@lglawfirm.com. You can also access* The Lone Star Current *on the Firm's website at www.lglawfirm.com.*

FIRM NEWS

James F. Parker, III has joined the Firm's Litigation and Employment Practice Groups as an Associate. James focuses on defending clients in commercial and employment litigation in cases ranging from complex antitrust and real estate litigation to employment discrimination and ERISA disputes. Prior to joining Lloyd Gosselink, James represented clients in business litigation matters and employment law in both Dallas and San Antonio. James received his B.A. in Government from the University of Texas at Austin and his J.D. from Southern Methodist University Dedman School of Law. He is a member of the State Bar of Texas. He has been admitted to the U.S. District Courts for the Western, Northern, Southern, and Eastern Districts of Texas, the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the D.C. Circuit.

The Firm was recognized by *Texas Monthly* as one of the 100 Best Companies to Work for in Texas. For the fourth year in a row, the Firm has been recognized for creating a culture where employees love to work. The Firm was the highest ranking law firm and the only law firm recognized in the small companies category (15-99 employees).

Ashley Thomas, Melissa Long, Hannah Wilchar, and Elizabeth Hernandez participated in the Austin Young Lawyers Association's fifth annual Day of Service Project in Austin on January 19th. This local project is modeled after the national Martin Luther King Day of Service, a day for Americans across the country to come together in the spirit of service by helping their local communities.

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Senator Charles Perry, Chair

Senate Committee on Agriculture, Water, and Rural Affairs

Charles Perry, a practicing CPA from Lubbock, was first elected to the Texas Senate in 2014 after serving two terms in the Texas House of Representatives. Sen. Perry represents the largest Senate District in the State of Texas; there are a total of 51 counties in the District 28. He currently chairs the Senate Committee on Agriculture, Water, and Rural Affairs, and is the first freshman senator to hold a committee chairmanship since 1993. This committee has jurisdiction over legislation that addresses the wide range of water issues facing Texas, as well as legislation impacting rural communities and the agriculture industries in Texas. Sen. Perry also serves as a member on the Senate Committee on Criminal Justice, the Senate Committee on Health and Human Services, and the Senate Committee on Higher Education. In the Texas House, then-Rep. Perry served on the House Committee on Appropriations, as Vice-Chair of the House Committee on Government Efficiency and Reform, and the Select Committee on Transparency in State Agency Operations.

In addition to his work in the Legislature, Sen. Perry has served his community as president of the Lubbock Boys and Girls Club, American Business Clubs, Community Partners, on the board of the National Council on Family Violence, and the National Teen Dating Abuse Helpline. He is also a deacon at his church, Southcrest Baptist.

Sen. Perry grew up in the district he currently represents, graduating from Sweetwater High School in 1980. In 1984, he earned his Bachelor of Business Administration in accounting and management information systems from Texas Tech University. He has been married to his wife Jacklyn for over 32 years, and together they have a daughter, Jordan, and a son, Matthew. The entire family are graduates of Texas Tech University.

The Lone Star Current recently had the opportunity to interview Chairman Perry, who graciously responded to several questions. We appreciate his willingness to take the time during the busy legislative session to share his unique perspective with our readers.

Lone Star Current: What do you think is the most important aspect of your position as Chair of the Senate Committee on Agriculture, Water, and Rural Affairs?

Perry: The most important aspect to me is the ability to start a debate on the issues that I think need to be debated. From water quality to water supply, from surface water to brackish groundwater, from reservoirs to desalination, there are plenty of water issues that need to be debated, vetted, and resolved to ensure Texans have the water resources they need to continue leading the nation in job creation and economic growth.

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

Perry: To me, the biggest surprise has been how many new friends you make when you become a chair of a committee! Joking aside, the biggest revelation has been how much I enjoy engaging my staff and colleagues on agriculture and water issues.

LSC: With Texas currently experiencing a drought of record, while at the same time seeing its population continuing to grow, what do you think are the most important actions the Legislature can take to ensure we don't run out of water?

Perry: I think the most important thing the Legislature can do to ensure Texans have the water resources they need is to continue to provide technical expertise and low-cost loans to local communities.

LSC: What life experiences do you think have influenced your actions as a Senator and Committee Chair?

Perry: The two personal things that influence me most in my capacity as a senator and committee chairman are my faith in God and my wife of 32 years, Jacklyn.

LSC: If you weren't serving as a senator, and it was possible to pursue any trade or profession, what would it be and why?

Perry: I truly love being a CPA, but I wouldn't need to pursue that because I do that for a living right now.

Further guidance is needed from the Texas Legislature or Texas courts to determine whether municipalities must meet the population requirement in § 43.121 of the Local Government Code to annex property under § 43.129. The Attorney General was asked by the City of Orange whether the population requirement in § 43.121(a) of the Texas Local Government Code applies to a "limited purpose annexation" under the Code when 100% of the applicable landowners consent to the annexation. The section of the Code governing such "consensual annexations," § 43.129, does not itself contain a population requirement. Chapter 43 of the Code, Subchapter F covers all "limited purpose annexations," and § 43.129 is included within Subchapter F. The opening section of Subchapter F, § 43.121(a), does contain a population requirement on annexations occurring under that section, specifically authorizing a "home-rule municipality with more than 225,000 inhabitants" to annex an area for defined limited purposes. The AG undertook a statutory construction analysis focusing on legislative intent, specifically stating that such intent shall be "derived from the statute as a whole, not by reading individual portions in isolation." Section 43.121(a) authorizes general annexation provisions for qualifying municipalities. Sections 43.123-43.128 discuss planning and public hearing requirements for a municipality that exercises the authority granted in § 43.121. However, § 43.129 contains a new authorization, specifically annexation for limited purposes by consent. The AG focussed on this distinction, the general limited purpose annexation authority authorized in § 43.121(a) (the specific requirements of which are discussed in §§ 43.123-43.128), as opposed to the consensual annexation authorized under § 43.129. The AG stated that because similar language is not used, nor is there a reference back to § 43.121, a Texas court construing § 43.129 might be unwilling to read the population requirement language from § 43.121 into § 43.129 without clearer evidence that the Legislature intended to do so. Tex. Att'y Gen. Op. GA-1096 (2014).

The Commissioners Court is the proper entity to receive public donations to the county, and a county sheriff shall forward any donations received on to the Commissioners Court for proper handling. The Attorney General was asked whether a county sheriff may receive donations and if a sheriff may solicit such donations without violating criminal provisions of the Texas Penal Code. The Wood County Sheriff's request for equipment was denied by the Commissioners Court because there were no funds budgeted for the purchase. However, the Commissioners Court passed a resolution authorizing the acceptance of donations specifically for the Wood County Sheriff's Department to be directed to the requested equipment. As to the direct receipt of donations by the sheriff or his office, the AG notes that a sheriff may only exercise the powers that Texas statutes and the Texas Constitution authorize explicitly or implicitly. Article V of the Texas Constitution states that a sheriff's duties shall be prescribed by the Legislature, and case law provides that a sheriff lacks authority to perform any function not specifically so authorized by statute. There is no statute authorizing a sheriff to accept donations from the public to the county; § 81.032 of the Local Government Code provides that the Commissioners Court may accept a donation on behalf of a county for the purpose of performing a function conferred by law on the county or a county officer. Therefore, the county sheriff should forward any donations he receives to the Commissioners Court for proper handling. As to the solicitation of donations, AG noted that there is no statute that specifically authorizes a sheriff to solicit donations. However, the sheriff is explicitly authorized in the Texas Code of Criminal Procedure to enforce the law within the county. Further, case law states that within that explicit authorization is the implied "reasonable authority to attain the end result" of enforcing the law. Previous AG opinions have stated that pursuant to that implicit authority, a sheriff may request from the Commissioners Court equipment necessary to enforce the law. Texas Penal Code § 36.08 makes it a crime for a public servant to solicit any benefit from "a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency." While the AG notes that a sheriff is certainly a "public servant" for these purposes, whether § 36.08 was violated is a question of fact and therefore beyond the scope of an AG opinion. Tex. Att'y Gen. Op. KP-0003 (2015).

The Edwards Aquifer Authority may enter into an agreement with, and provide funding to, the U.S. Fish & Wildlife Service for the implementation of a refugia program. The Attorney General was asked whether the Edwards Aquifer Authority ("EAA") may provide funding, by agreement, to the U.S. Fish and Wildlife Service ("FWS") for the implementation of a "refugia program" under certain terms and conditions provided by FWS. The EAA obtained an "incidental take" permit from the FWS which precludes liability under the Endangered Species Act for any taking of an endangered species that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." To obtain the permit, the EAA submitted a plan to

minimize and mitigate these incidental takings, and as part of the plan the EAA is required to support and coordinate with FWS on the development of certain "refugia," which are essentially off-site, artificial habitats to protect species from negative effects of a disturbance of their natural habitat. As to whether the EAA can provide funding directly to the FWS for facilities related to a refugia program (specifically buildings, works, and facilities that will be owned solely by FWS), the AG cites Article III § 52 of the Texas Constitution, which specifically prohibits a political subdivision from loaning public money to an "individual, association, or corporation." Therefore, the primary determination for this question is whether the FWS, a federal agency, qualifies as an "individual, association, or corporation." The AG notes that while some Texas courts have considered some local governmental entities, such as school districts, to be "corporations" for purposes of Art. III § 52, the Texas Supreme Court has specifically concluded that a state agency does not qualify as an individual, association or corporation under section 52(a), and thus the provision does not prohibit transfers of public funds to a state agency. While there is no case on point regarding a federal agency, the AG surmises that a Texas court would likely conclude that the same rationale that applies to a state agency would apply to a federal one. As to whether the EAA has the statutory authority to enter into an agreement with FWS regarding the refugia program, the AG first notes the broad grant of authority by the Texas Legislature to the EAA to "enter into contracts," and the grant of all powers and authority necessary to manage, conserve, preserve, and protect the Edwards Aquifer. The AG concludes, if the EAA determines that entering into a contract with FWS regarding the refugia program under the terms proposed by FWS is necessary to "manage, conserve, preserve, and protect" the Edwards Aquifer, a Texas court would likely conclude the EAA has the requisite statutory authority to do so. Tex. Att'y Gen. Op. KP-0008 (2015).

Municipal Corner is prepared by Troupe Brewer. Troupe is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

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regarding studies on candidate freshwater mussel species that could be used to argue that the listing of a species as threatened or endangered is not warranted, or that a proposed designation of critical habitat is unfounded.

Like the ESA Task Force, the Texas Water Conservation Association ("TWCA"), whose membership is comprised of many water suppliers, also recognized the significant impacts that listing freshwater mussels may have on water supplies, and formed a Native Mussel and Endangered Species Committee in the spring of 2014. This committee is in part charged with examining the availability of data and information on mussel species proposed for listing and also examining the legal issues that may face water rights holders, if and when these mussels are listed. The TWCA Native Mussel and Endangered Species Committee is currently working with the ESA Task Force on these issues and will participate in the Task Force's mussel stakeholder group(s), once formed.

Although a majority of the freshwater mussels are not expected to be listed until at least 2017, the clock is ticking to gather information to potentially negate listings of these mussel species or to limit the designation of critical habitat for these species, if listed. It is crucial that water suppliers make every effort to determine whether they may be impacted by the listing of these mussels and the designation of critical habitat, and if so, to take steps to prepare for this federal action. The first step for many potentially affected water suppliers should be to get up to speed on developments with the mussel stakeholder group(s) established by TWCA and the ESA Task Force, and if possible, to collaborate with others in their respective river basins that may be similarly impacted by mussel listings in order to fully prepare for the battle ahead.

Sara Thornton practices water, environmental and endangered species law in the Firm's Water Practice Group, and serves as Chair of the TWCA Subcommittee on Legal/Regulatory Issues for the TWCA Native Mussel and Endangered Species Committee. For more information, you may contact Sara Thornton at 512-322-5876 or sthornton@lglawfirm.com.

84TH LEGISLATURE - REGULAR SESSION MIDWAY REPORT

by Ty Embrey, Thomas Brocato, Troupe Brewer, and Hannah Wilchar

The Texas Legislature is on the downhill portion of the Regular Session and, as with anything headed downhill, the pace of legislative activity is rapidly increasing. March 13 marked the bill filing deadline for bills of general application and was the 60th day of the 140-day Regular Session that ends on June 1. As mentioned in January's issue of *The Lone Star Current*, the House and Senate are filled with many new members who, considering this session's high bill-filing activity, appear to have adjusted quickly to their new roles.

As of March 13, a total of 6,305 bills and resolutions were filed, which is the second highest number of filings in the Legislature's history. With the possibility of even more local bills being filed, legislative committees will be busy holding hearings on bills during the session's final two months.

In addition to hot topics like tax cuts, border security in HB 11 [Bonnen (R – Friendswood), et al.] and "campus carry" authorization in SB 11 [Birdwell (R–Granbury) et al.], several significant issues receiving substantial legislative attention this session include water, municipal authority, and utilities. Below is a summary of particularly important bills on these issues.

Water Bills

Most of the groundwater legislation approved by the Texas Water Conservation Association discussed in January's *The Lone Star Current* is progressing. Among other issues, these bills address aquifer storage and recovery, revisions to the contested case hearing and permit renewal processes, state audits of groundwater districts, and apprenticeships for well drillers and pump installers.

Rep. Larson (R – San Antonio) filed a package of bills (HB 30, HB 835, HB 836) aimed at launching statewide development of brackish groundwater resources by establishing "brackish groundwater management zones." The bills vary as to what entity can establish a zone and when the Texas Water Development Board ("TWDB") becomes involved. All three bills are currently pending in the Special Water Districts subcommittee.

The new chairman of the House Natural Resources Committee, Rep. Keffer of Eastland, filed a bill that adds significant oversight to groundwater district decisions, specifically the setting of desired future conditions and permit decisions. HB 200 creates an appeals process for these decisions and gives the TWDB reviewing power. On March 25, the House Natural Resources Committee held a hearing on the bill and received a significant amount of testimony from many stakeholders of the water industry, and it remains pending in committee.

Sen. Eltife (R – Tyler) and Rep. Crownover (R – Denton) filed companion bills (SB 912 and HB 2051) regarding the reporting of sanitary sewer overflows. Currently, all spilled wastewater of any amount is required to be reported to the Texas Commission on Environmental Quality ("TCEQ"). The water and wastewater utility industries in Texas want to create a distinction between a minor "spill" and an "unauthorized discharge," which requires significant administrative compliance measures. Both bills have had a committee hearing, and SB 912 was voted out favorably to the local and uncontested calendar.

Municipal Bills

HB 40 by Rep. Darby (R – Wichita Falls) seeks to preempt municipal ordinances related to oil and gas activities. After hearing significant testimony on the bill on March 23, the House Energy Resources Committee considered and reported favorably on the bill's committee substitute on March 30. The substitute amended HB 40 to specifically allow cities to set commercially reasonable setbacks the distance from well sites to homes, schools, and businesses. The committee substitute represents a compromise between HB 40's biggest supporter, the Texas Oil and Gas Association ("TxOGA"), and its biggest opponent, the Texas Municipal League ("TML"), which views the bill as an overreaching impairment of municipal power to regulate local issues on behalf of citizens. On March 31, the leadership of TxOGA and TML signed a letter agreeing to remain unopposed to the committee substitute for HB 40, so long as any future amendments are mutually agreed upon. Meanwhile, HB 40's companion, SB 1165 by Sen. Fraser (R–Horseshoe Bay), was heard by the Senate Natural Resources and Economic Development Committee and reported favorably without amendments on March 25.

Sen. Estes' (R – Wichita Falls) SB 360 redefines a "regulatory taking" to include a political subdivision's series of actions or decisions over a 10-year span, thus greatly increasing the scope of a regulatory taking requiring compensation. To date, the bill has not been heard and is pending in the Senate State Affairs Committee.

Rep. Workman (R – Austin) filed a bill (HB 947) that would amend the Election Code to allow political subdivisions in Texas to move their election dates from May to the general election date in November with the adoption of a resolution by the political subdivision. This is an effort to minimize election-related expenses and ultimately to save taxpayer dollars. The bill was referred to the House Committee on Elections, where it remains pending.

Utility Bills

More than 120 utility-related bills were filed with many impacting gas and electricity customers. Most of the bills are being considered in the House State Affairs or Energy Resources committees or the Senate Natural Resources and Economic Development committees. Many relate to the Railroad Commission (RRC), including

several that rename the Commission to accurately reflect its current function of regulating Texas' energy industry.

Sen. Keffer's HB 2256 seeks to unify and simplify utility ratemaking by moving gas ratemaking from the Railroad Commission ("RRC") to the Public Utility Commission ("PUC"), which already regulates electric and water ratemaking. Also by Sen. Keffer, HB 2988 and its companion SB 1905 [Perry (R – Lubbock)] reverse rules recently adopted by the RRC, at the urging of gas utilities, that impair cities' ability to participate in gas utility cases. Specifically, the rules directly assign regulatory costs to only those customers that reside in cities that participate in a RRC ratemaking proceeding, despite the fact that all customers benefit from the cities' involvement. Additionally, the rules automatically align multiple cities and arbitrarily limit the amount of discovery allowed. HB 2988 and SB 1905 repeal these rules. Sen. Keffer also filed the related HB 3749, which requires reasonable RRC rate case expenses to be collected equally from all customers in a utility's service area regardless of their geographical location in order to effectuate system-wide rates. Historically, the RRC has preferred setting system-wide rates, but the newly adopted rules that directly assign rate case expenses will cause cities within the same division to have different rates. HB 3749 seeks to correct this inequity by codifying the RRC's long-established practice of setting system-wide rates.

On March 18, House State Affairs heard testimony on HB 911 [Sheets (R – Dallas)], which increases the number of PUC commissioners from three to five, with four commissioners appointed by the Governor with Senate approval and one selected from a House list. The bill remains pending in the committee.

HB 1535 [Frullo (R – Lubbock)] and its companion SB 841 [Creighton (R – Beaumont)] relate to rates and certificates of convenience and necessity for certain non-ERCOT electric utilities. The bills, proposed by non-ERCOT utilities, allow electric utilities located outside the state's main power grid to expedite rate relief by various alternative rate mechanisms, including allowing accelerated hikes that correspond with transmission system investments. On March 25, House State Affairs heard HB 1535, which remains pending in the committee.

Other noteworthy utility bills include HB 962 [Krause (R – Fort Worth)], which prohibits "capacity payment" subsidies to big generation companies, and HB 1101 [S. Turner (D – Houston)], which extends the life of the System Benefit Fund. The Fund was created to help low-income Texans pay their electricity bills, but approximately $200 million will remain in the Fund when the current budget cycle ends, unless the legislature acts to extend the Fund's time period, meaning that these funds will end up reverting to general revenue. HB 1101 would extend the Fund's period to 2017 so that the remaining millions of dollars will instead go to the dedicated purpose of providing electricity discounts to low-income Texans. On April 1, HB 1101 was referred from the House Appropriations Committee to its Budget Transparency and Reform Subcommittee, where a committee substitute was heard and left pending on April 8.

Lastly, HB 2184 [R. Miller (R – Sugar Land)] and its companion, SB 1444 [Taylor (R – Friendswood)] seek to facilitate public access to hike and bike trails in transmission corridors by protecting an electric utility from liability arising from public use of trails on the utility's premises. These bills expand legislation passed last session granting such protections to a Harris County electric utility by expanding the protections to utilities statewide. On March 25, House State Affairs heard testimony on HB 2184, which remains pending in the committee.

The accelerating pace of activity in the remaining weeks of the session will mean that the status of the bills discussed in this article can change overnight. Readers are advised to check in regularly to the Legislature's on-line services to stay abreast of developments.

Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups, Thomas Brocato is a Principal in the Firm's Energy and Utility Practice Group, Troupe Brewer is an Associate in the Firm's Water, Litigation, and Districts Practice Groups, and Hannah Wilchar is an Associate in the Firm's Energy and Utility 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, Thomas at 512.322.5857 or tbrocato@lglawfirm.com, Troupe at 512.322.5858 or tbrewer@lglawfirm.com or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.

HITTING THE "REFRESH" BUTTON ON YOUR EMPLOYEE POLICIES

by Sheila Gladstone and Elizabeth Hernandez

You have an employee handbook and your policies were created by people who knew what they were doing. However, it has been a few years since you updated the policies, and even the most skillfully crafted employee policies need updates as the law and your practices evolve. In addition to checking for plain English and removing any remaining legalese, you've simply got to keep up with the law. This article will provide tips on how to refresh employee policies to ensure they are up-to-date, helpful to employees, and provide useful evidence in the event of future litigation.

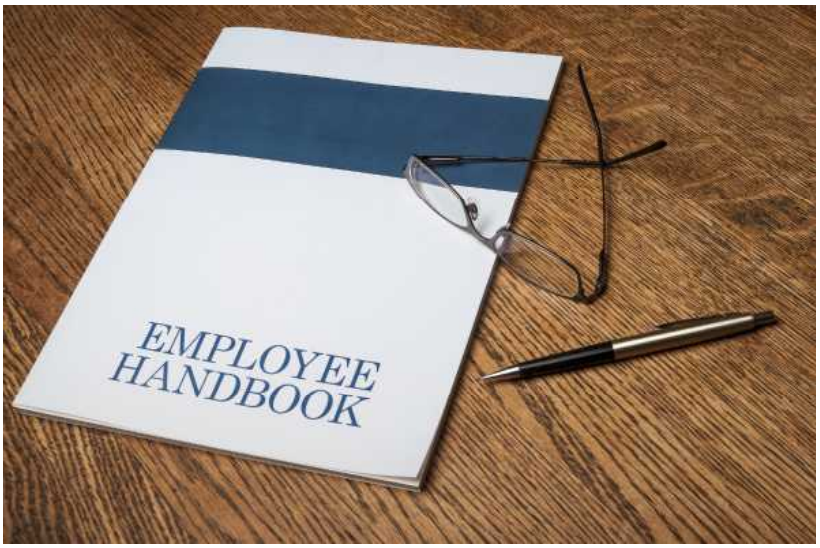
Update the Definition of "Spouse" in Your Family and Medical Leave Act (FMLA) Policy

On March 27, 2015, a new rule issued by the U.S. Department of

Labor went into effect that changed the definition of "spouse" for FMLA purposes. Now all couples who are legally married in any jurisdiction—in the United States or abroad—and otherwise eligible for FMLA can take leave to care for a spouse or family member, even same-sex couples who live in a jurisdiction such as Texas where same-sex marriage is not legal. Change the definition of "spouse" in your FMLA policy to those whose marriage is legal in the state of celebration, not the state of the employee's residence as was previously the case. (At the time of publication of this article, litigation has begun that could delay this new definition's application to governmental employers in Texas.)

Update Definitions to Comply with the Affordable Care Act

The health insurance eligibility requirements of the Patient Protection and Affordable Care Act of 2010 define full-time employees as those working 30 or more hours per week (or 130 hours per month for variable hour employees). It is still permissible for an employer to keep its current 40 hour per week definition of "full-time" for purposes other than health insurance eligibility, but update the manual so that it does not incorrectly exclude employees working 30-39 hours from eligibility. Sections to review include those with benefits policies, and descriptions of employee classifications.



Add Break Time for Nursing Mothers Policy

The Affordable Care Act also requires employers to accommodate employees who are new mothers and who wish to continue to pump breast milk after returning to work. Your policy should make clear that you will provide "reasonable break time" to nursing mothers to express breast milk for up to one year after the child's birth. The place provided must be private, and may not be a bathroom. When needed, the room should have a door lock, perhaps a "do not disturb" sign, a comfortable place to sit, and a nearby electrical outlet and refrigerator for the employee to store the breast milk. The employer is not required to pay the employee for the time spent pumping milk, but the employee may use reasonable break times already provided to pump milk, and employers should generally work to accommodate the pumping.

Restrictions on Random or Blanket Drug Testing Apply to Public Sector Applicants and Current Employees

Applicants for government employment, like government employees, may be subjected to across-the-board drug testing only if they are applying for safety-sensitive positions or if other exceptions exist. Review your hiring and drug testing policies to correct this common error and ensure that you conduct pre-employment screening only for appropriate positions.

Firearms Policies and the "Parking Lot" Amendment

In 2011, the Texas Legislature passed a law requiring employers to allow employees to keep a firearm or ammunition locked in their privately-owned vehicles, even when parked in an employer-provided parking area. Review your entity's weapons policies, and remove any restrictions about employees keeping legally owned firearms and ammunition secured in their own vehicles, even if the vehicles are parked on employer property, and even if the employee uses his or her own vehicle to conduct governmental business. The employer may still restrict weapons from employer-owned vehicles, so if there is a concern, employees who insist on keeping firearms in their own car could be issued an employer vehicle for a particular trip or job duty.

Gender Discrimination and Caregivers

The EEOC has focused in the past several years on discrimination against caregivers, who are people who care for another person, such as a child or an aged parent. Discriminating against caregivers may constitute illegal discrimination on the basis of sex, disability, or other protected traits. Make sure your leave policies do not treat men and women who take time off for caregiving differently. Although women who give birth may be treated more favorably under an employer's paid sick leave policy for the disability portion of the leave, they should not be treated more favorably than men under policies addressing "baby bonding" outside of the period of physical disability.

Update Dress Codes

Legal issues surrounding dress codes concern sexual discrimination, sexual identity, religious garb, and disability and pregnancy accommodation. Reasonableness and flexibility are the keys to defending such claims. Make sure that dress requirements have a reasonable relationship to legitimate business needs, and avoid unnecessary gender differences. Be ready to be flexible if an employee needs an exception to the dress code for legitimate religious reasons or to accommodate a temporary or permanent health issue. For example, an employee whose foot is swelling may need to wear athletic shoes for a while.

Social Media Policies

Governmental employers must make sure that their social media policies, and enforcement of those policies, do not abridge the free speech rights of employees under the First Amendment of the Constitution. To determine whether public employees' speech is protected under the law, courts consider whether the employee is speaking as a citizen or in his or her role as a public employee; whether the speech is a matter of public concern; and whether the speech is overly disruptive to the employer's operations. Make sure your social media policy does not punish employees for statements made in their roles as private citizens on matters of public concern, unless such speech is overly disruptive to the organization's goal of an efficient and effective workplace.

Private sector employers are under higher scrutiny and must ensure their social media policies don't violate the National Labor Relations Act, which applies to all private employers, whether or not unionized. The Act protects employees from discipline for freely discussing with others concerns about the terms and conditions of their employment, and recent rulings have found social media policies that are vague and overbroad violate this right. Review policies to remove general prohibitions against disparaging the employer, and make sure any prohibitions against harassment or revealing confidential information have sufficient examples so that employees will know they are not prevented from voicing and discussing their work concerns on social media.

Review Attendance Policies That May Violate the Americans with Disabilities Act (ADA)

The EEOC is targeting employers who have no-fault attendance policies, which provide for automatic termination for missing a particular number of days or weeks of work. Under the ADA, an employer must engage in an interactive process with a disabled employee in order to determine how the employer can make accommodations, and, in some cases, the accommodations might include allowing a disabled employee additional time off, beyond the days allowed under the attendance policy. Review your attendance policies to make sure they do not preclude the employer offering an additional, specified amount of time off, and be prepared to show you are willing to be flexible on a case-by-case basis where additional absences may be considered a reasonable accommodation.

Include New Military Regulations Under the FMLA

In March 2013, revisions to the FMLA regarding time off for the family of military members went into effect. Changes required to FMLA policies include, among other things, making sure the definition of military member includes members of the National Guard and Reserves, as well as traditional Armed Forces; clarifying that "covered active duty" now requires deployment to a foreign country; expanding the definition of "serious injury or illness" to include certain pre-existing conditions and certain veterans; allowing leave to help care for a military member's parent while the military member is on active duty; and increasing from five days to 15 days the time available for a family member to spend with a military member on rest and recuperation leave.

Remember, personnel policies can only help you if they are accurate and understandable to all your employees.

Sheila Gladstone is the Chair of the Employment Law Practice Group, and Elizabeth Hernandez is an Associate in the practice group. If you would like additional information or have questions related to this article or other matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com, or Liz at 512.322.5808 or ehernandez@lglawfirm.com.

ASK SHEILA

Dear Sheila,

At our workplace we occasionally host "Lunch and Learn" sessions for our clerical staff, with topics relating to stress management, wellness, and organizational skills, as well as training on office software and programs. Other times, we have staff meetings at lunch time to discuss workplace issues and upcoming changes. We always provide food, so employees get a free lunch with the information. A secretary recently submitted a time sheet claiming a lunch hour as time worked, and said we owe her overtime because she worked 41 hours that week. Is this true?

Sincerely,
No such thing as a free lunch

Dear Free Lunch:

The answer depends on the subject matter of the particular lunch, and whether attendance was truly "voluntary." For non-exempt employees such as clerical staff, an employer must count any time spent in meetings that are required or directly related to the employee's current job. This is true even if the employees want to attend and even if you feed them. The relevant questions are, what is voluntary, and what is job-related.

A stress management or wellness topic is likely voluntary and not directly job-related, so you may require employees to "clock out" for such luncheons. However, if employees are evaluated or otherwise judged on their attendance at such meetings, then they could claim the lunch must be counted as working time based on the employer's expectation that they attend. Do not

pressure employees in any way to attend meetings (or parties) that you don't want to be on-the-clock. Make sure supervisors don't express disappointment that an employee is not a "team player" because she does not attend social events or wellness luncheons.

A staff meeting where information is relayed that is important to the employee's job is always working time, and must be counted towards the total hours worked in a week for overtime purposes. Meetings about policies, office procedures, safety, new software, and other work-related topics are compensable. It doesn't matter how good the food is or how willing the employee is to attend.

To avoid unexpected overtime, consider holding work-related or mandatory meetings during regular working hours, or allow employees to go home an hour early in the same week that the meeting occurs. Neither federal nor Texas law requires paying overtime for working extra hours in a day, so long as the total hours for the week do not exceed 40.

Employees who are exempt from overtime under the Fair Labor Standards Act's "white collar" exemptions need not be paid extra for attending meetings outside working hours. It is common, though, for employers to misclassify employees as exempt. Simply paying an employee a salary does not mean that overtime doesn't apply. The Department of Labor has been cracking down on misclassified employees, and assessing big penalties. If you want help determining the correct FLSA classification for various positions, give one of us in the Employment Law Practice Group a call.

"Ask Sheila" is prepared by Sheila Gladstone, the Chair of the Employment Law Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com.

IN THE COURTS

Vine Street, LLC v. Borg Warner Corp., 776 F.3d 312 (5th Cir. Jan. 14, 2015).

Applying the holding from the U.S. Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. U.S.*, the Fifth Circuit Court of Appeals recently held that there is no Superfund liability from the sale of a useful chemical when there is no intent to dispose, even if the seller has knowledge that a release might occur. The Fifth Circuit found that Borg Warner Corp. was not an "arranger" for selling perchloroethylene to a dry-cleaning company because Borg Warner intended for the chemical to be used and not disposed of by the dry-cleaning company.

Sierra Club v. ICG Hazard, LLC, No. 13-5086, 2015 WL 643382 (6th Cir., January 27, 2015).

The Federal Court of Appeals in Cincinnati issued an opinion expanding the scope of the 4th Circuit Court's existing test for determining when a Clean Water Act ("CWA") general permit shields a company from a CWA citizen suit. ICG Hazard, LLC, operates a surface coal mine under the authority of a National Pollutant Discharge Elimination System ("NPDES") general permit issued by the Kentucky Division of Water. The Sierra Club sued ICG Hazard under the CWA citizen suit provision, alleging that ICG Hazard's discharges from the mine exceeded water quality standards set under the CWA, specifically those for selenium. The Sierra Club argued that because the Kentucky general permit did not expressly list selenium as an allowable pollutant, ICG Hazard's discharges were unauthorized. The court held that the general permit shields ICG Hazard from citizen suit enforcement despite its silence with regard to selenium. The court applied a two-prong test that had previously only be used by federal courts in determining whether individual discharge permits shield entities from citizen suits. The decision sets a new precedent that discharges under general permits have the same protection from citizen suits as discharges made under individual discharge permits.

Coyote Lake Ranch, LLC v. City of Lubbock, No. 14-0572 (Texas Supreme Court).

On January 30, 2015, the Supreme Court requested briefing on the merits of Coyote Lake Ranch, LLC's appeal of the Amarillo Court of Appeals' decision to decline to apply the accommodation doctrine of oil and gas law to the law of groundwater rights. The appellant has urged the Supreme Court to extend its holding in *Edwards Aquifer Authority v. Day* – applying the oil and gas ownership-in-place doctrine to groundwater - to also include the accommodation doctrine. That doctrine states that where a surface owner's existing use of land would be precluded or impaired by activities of a mineral interest owner, the rules of reasonable usage of the

surface require alternative methods of exploration and production on the part of the mineral interest owner. The appellate court expressly deferred to the Supreme Court on the issue of whether the *Day* decision should be interpreted to apply all doctrines of oil and gas law, including the accommodation doctrine, to groundwater.

Environmental Processing Systems v. FPL Farming, No. 12-0905, 2015 WL 496336 (Tex. 2015).

The Texas Supreme Court has issued a highly anticipated opinion regarding underground trespass through waste injection. However, the Court's decision did not reach the issue of whether deep subsurface migration is actionable as a common-law trespass claim. Environmental Processing Systems ("EPS") operated a deep subsurface wastewater injection well on lands adjacent to property owned by FPL. FPL sued for trespass alleging deep subsurface water migration from the EPS site to areas underlying FPL's land. EPS argued that deep subsurface invasion cannot constitute trespass and that FPL's predecessor in title consented to the entry. The Amarillo Court of Appeals held that Texas law recognizes a trespass cause of action for deep subsurface migration, and that consent is an affirmative defense and therefore places the burden to prove lack of consent on defendant. The Supreme Court reversed the appellate court, holding that FPL failed to meet its burden to prove that whatever entry EPS made on its property was unauthorized. Therefore, the Court reasoned, a trespass could not have occurred, whether through subsurface migration or any other entry. Accordingly, the Court declined to address the question of whether deep subsurface migration could have constituted a trespass under Texas law.

Texas Commission on Environmental Quality v. Texas Farm Bureau, No. 13-13-00415-CV (Texas 13th Court of Appeals).

On April 2, 2015, the 13th Court of Appeals in Corpus Christi affirmed a Travis County District Court ruling that invalidated two TCEQ rule provisions regarding water rights curtailments during times of drought that were adopted pursuant to Texas Water Code § 11.053. The drought rules allow TCEQ to exclude certain junior priority water rights users from curtailment or suspension orders when, in the judgment of the TCEQ, such exclusion is necessary to protect human health and safety. In drought suspension orders issued during 2012 and 2013, the TCEQ exempted municipal and electric generation water rights from its requirement that all junior priority water rights cease using water in favor of certain downstream senior rights holders. The court held that § 11.053 does not authorize the TCEQ to deviate from the well-established system of seniority known as the prior appropriation doctrine. Section 11.053 authorizes the TCEQ to suspend or adjust water rights "in accordance with the priority of rights established by Section 11.027" and in a manner that, "to the greatest extent practicable, conforms to the order of preferences established by Section 11.024[.]" The TCEQ argued that the reference to § 11.024, which sets a hierarchy of preferences by type of use, authorizes the TCEQ to give preference to certain types of use ahead of time priority. The court disagreed, and held that the Legislature's use of the term "to the greatest extent practicable" indicates its intent that prior appropriation take precedence in any type of suspension or adjustment. The court further held that the TCEQ's general powers under Chapter 5 of the Water Code do not allow the TCEQ to circumvent unambiguous statutory provisions.

Guadalupe-Blanco River Authority v. **Texas Attorney General, et al.**, No. 03-14-00393-CV, 2015 WL 868871 (Tex. App. – **Austin, 2015).**

The Third Court of Appeals in Austin affirmed the decision of a Travis County district court to dismiss a lawsuit brought under Chapter 1205 of the Texas Government Code by Guadalupe-Blanco River Authority ("GBRA") seeking a declaratory judgment validating GBRA's issuance of certain bonds and activities related to the bonds. The bonds specifically concern GBRA's project to construct a water supply reservoir. Chapter 1205 allows expedited declaratory judgment actions relating to the issuance of public securities and expenditure of funds derived therefrom. The effect of the declaration sought by GBRA would be to effectively bar the TCEQ from issuing a water reuse permit to the San Antonio Water System ("SAWS") that GBRA believes would negatively impact the reliability of its downstream water supply reservoir project. Numerous parties intervened in the suit and filed pleas to the district court's jurisdiction. The Court of Appeals held that GBRA's requested declarations fall outside the scope of Chapter 1205 because they do not relate to bond issuance, but rather seek only declarations based on the continued availability of water discharged into the Guadalupe River Basin by SAWS.

City of Richardson, Texas v. Oncor Electric Delivery Company, LLC, No. 05-14-00843-CV. (Tex. App. – Dallas 2014).

At issue in this case is whether Oncor should be responsible for the cost of relocating poles and equipment to accommodate a public improvement project to widen alleys in the City of Richardson. The City argued that cities have long acted in reliance upon a utility's common law duty to bear the cost of relocation of its poles and equipment to accommodate necessary widening for a public improvement project. The City also argued that the PURA specifically provides that a municipality may require relocation at the utility's expense for the widening or straightening of a "street." Oncor maintains that an "alley" is not a "street." The trial court granted a summary judgment in favor of the City last summer. The case is currently on appeal in the Fifth Court of Appeals in Dallas. Oral argument is scheduled for May 6, 2015.

State of Texas' Agencies and Institutions of Higher Learning, et al. v. Public Utility Commission of Texas, et al., No. 15-0005, (Tex. 2015).

Three years after hearing the case, on August 6, 2014, the Third Court of Appeals issued its opinion in *State of Texas' Agencies and Institutions of Higher*

Learning, et al. v. Public Utility Commission of Texas, et al., Cause No. 03-11-00072-CV – the appeal of Oncor Electric Delivery Company, LLC's ("Oncor") 2008 rate case, PUC Docket No. 35717, *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*. In February 2015, three parties filed petitions for review at the Texas Supreme Court. The Steering Committee of Cities Served by Oncor requested review of the Commission's denial of recovery of franchise frees. Oncor requested review of the franchise fee issue and the Commission's denial of the application of a consolidated tax-savings adjustment. Additionally, the agencies requested review of the Commission's decision that permitted Oncor to discontinue the 20% rate discount for state universities located in Oncor's electric service territory. The petitions remain pending.

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

AGENCY HIGHLIGHTS

Environmental Protection Agency

Environmental Advocacy Group Pushes EPA to Mandate Permits for Stormwater Discharges to Watersheds with Total Maximum Daily Load ("TMDL") Limits. The Conservation Law Foundation ("CLF") has urged the EPA to require National Pollutant Discharge Elimination System ("NPDES") permits for stormwater discharges from commercial, industrial, and high density residential discharges in certain localized watersheds, particularly in the northeast United States. The CLF argued that the EPA is obligated to regulate such discharges because the EPA has determined the discharges contribute to violations of water quality standards and that additional controls are needed to address stormwater pollution. The Clean Water Act and other regulations specify that only certain industrial and municipal stormwater sources must be authorized by an NPDES permit; however, under the EPA's "residual designation authority," the EPA may regulate other sources based on the localized adverse impact of stormwater on water quality. If the EPA requires NPDES permits for these discharges pursuant to the CLF's demands or litigation, such action could set national precedent.

Possible Amendments to Jurisdictional Waters Rulemaking Previewed. On February 4, 2015, EPA Administrator Gina McCarthy told a joint Congressional committee that EPA is considering potential changes to the "waters of the United States" rulemaking, published in 2014. Among other comments, McCarthy suggested that exceptions for stormwater infrastructure as well as a revised definition of "tributary" are under review by the agency. Stakeholders have opined that the proposed rule should include additional parameters to ensure that certain public works infrastructure is not captured.

Last Federally-Issued Greenhouse Gas Permit in Texas Approved. On February 19, 2015, the EPA issued a greenhouse gas ("GHG") permit to the South Texas Electric Cooperative. Following its Tailoring Rule mandating permits for certain emissions of GHGs, and Texas' initial refusal to implement GHG regulations, EPA became the permitting authority for GHG emissions in Texas. In October 2014, EPA approved Texas' program to implement a GHG permitting program, and EPA began transitioning GHG permitting to the TCEQ. The South Texas Electric Cooperative permit was the last permit to be issued by the EPA.

Rule Revises the National Ambient Air Quality Standards for Fine Particulate Matter. On January 13, 2013, the EPA published a final rule revising the national ambient air quality standards ("NAAQS") for fine particulate matter ("PM2.5"). The rule revised the annual PM2.5 level from 15.0 to 12.0 µg/m3, but retained the other primary and secondary PM standards. The EPA also proposed a rule on March 10, 2015, addressing State Implementation Plans ("SIP") requirements for moderate and serious nonattainment areas for both the current and future PM2.5 NAAQS. The rule also addresses requirements for permitting in nonattainment areas and reclassification of nonattainment areas. EPA's rule would set a deadline of October 2016 for states with nonattainment areas to submit state implementation plans for meeting the standards. EPA will be accepting comments on the proposed rule until May 22, 2015.

Implementation Requirements for 2008 Air Quality Standards for Ozone Finalized. On February 13, 2015, nearly seven years after the EPA set new air quality standards for ozone, the EPA

finalized requirements for implementation of the standards. The final rule includes nonattainment area state implementation plan requirements, with compliance requirements for new attainment and appropriate attainment demonstration under the new standards. The rule also rescinded the 1997 ozone standards.

More Stringent Air Toxics Rule for Off-Site Waste, Recovery Facilities Finalized. On March 18, 2015, the EPA published a final rule requiring increased controls of hazardous air pollutants ("HAP") for tanks and process vents at facilities storing, treating, recovering or disposing of waste, used oil, or used solvents. The rule also includes more stringent requirements for leak detection and valve and pump repairs, and removes the exemption for air toxics emissions during start up, shut down, and malfunctions. The rule also requires facility operators to submit compliance reports electronically.

Federal Communications Commission

Net Neutrality. On March 12, 2015, the FCC released its much-publicized and long-awaited order on net neutrality. The 400+ page report declares the FCC's intent to regulate internet service providers as common carriers under the provisions of Title II of the federal Communications Act, while at the same time exercising the Commission's authority to forbear from applying many hundreds of rules and regulations to the providers. Calling the regulatory framework a "Title II tailored for the 21st century," the Commission stated as its goal the continued ability of consumers to have unfettered access to the internet over their fixed and mobile broadband connections, and the "unprecedented access" of providers to hundreds of millions of consumers across the county and around the world. During the lead up to this report, the Commission received over four million comments. The Order bans, subject to reasonable network management: (1) blocking - internet providers may not block lawful content, applications, services, or non-harmful devices; (2) throttling - internet providers may not impair or degrade lawful internet traffic on the basis of internet content, application, or service, or use of a non-harmful device; and (3) paid prioritization – internet providers may not accept payment to manage the network in a way that benefits particular content, applications, services, or devices (i.e., no "fast lanes" are allowed). Certain broadband providers had threatened legal challenges to the Order; this is an area that bears watching.

Municipal Broadband. The second order released on March 12, 2015, granted the petitions filed by the Electric Power Board of Chattanooga, Tennessee and the City of Wilson, North Carolina, and preempted challenged provisions of Tennessee and North Carolina law restricting municipal provision of broadband services. The cities had considered a wide range of options, including requesting improved broadband services from the private sector (and being turned down), before examining the option of municipal broadband networks for their communities. The Commission determined that Section 706 of the Telecommunications Act of 1996 authorizes it to preempt state laws that primarily serve to regulate competition in the broadband market, and that specifically regulate the provision of broadband by political subdivisions, because these laws act as barriers to investment and competition, and do not serve a core state function in controlling political subdivisions. The imposition of burdens on municipal providers with the effect of protecting incumbent providers is deemed by the Commission to be most deserving of preemption. The Commission noted that while its order only addresses the two petitions, it "will not hesitate to preempt similar statutory provisions in factual situations where they function as barriers to broadband investment and competition."

Texas Commission on Environmental Quality

Rule Adopted Updating Construction Stormwater Effluent Limitation Guidelines. On February 4, 2015, the TCEQ adopted revisions to the construction stormwater Effluent Limitation Guidelines ("ELG") to adopt by reference the EPA's latest update to the rule. The revisions include defining "infeasible"; clarifying the applicability of requirements to control erosion caused by discharges; providing additional details on areas where buffers are required; clarifying requirements for soil stabilization, preservation of topsoil, and pollution prevention measures; and withdrawing the numeric turbidity effluent limitation and associated monitoring requirements. The revisions were the result of a December 2012 settlement agreement between the EPA and several petitioners. The TCEQ rule became effective on February 26, 2015.

Changes Proposed to Chapter 290 Public Drinking Water **Regulations**. The TCEQ recently proposed rule changes related to public drinking water systems. The rulemaking will amend 30 Tex. Admin. Code Chapter 290 for consistency with 2013 legislation transferring the utilities and rates programs from the TCEQ to the PUC. The rulemaking will also implement federal changes reducing the maximum lead content requirement in pipes, pipe fittings, and plumbing fittings and fixtures, as well as federal changes to E. Coli thresholds for small public water systems. The rulemaking will also provide clarification on and streamlining of existing practices on: (1) the process for submitting plans; (2) TCEQ's ability to cite a violation for failure to comply with a condition of a granted exception; (3) allowing the use of chloramines without an exception; (4) allowing the use of desalination technology without an exception; and (5) adding additional options for overflow pipe outlets without an exception. The proposed rulemaking was approved at the Commissioner's Agenda on January 21, a public hearing was held on February 26, and comments were due on March 10. TCEQ staff has not yet issued a draft for adoption.

Additional Watermaster Needs Evaluated. TCEQ is currently evaluating the need for a watermaster program in the Red River Basin and Canadian River Basin. State law requires the TCEQ to evaluate each basin that does not have a watermaster program

at least once every five years. TCEQ-sponsored stakeholder meetings will be scheduled later this year. Following its review of stakeholder input, the TCEQ will evaluate options and prepare recommendations for each basin. The new lower Brazos River Watermaster program, approved in 2014, is scheduled to begin operations on June 1, 2015.

LCRA Emergency Orders Regarding Water Management Plans Approved. On March 4, 2015, TCEQ considered two Lower Colorado River Authority ("LCRA") emergency orders initially issued by the TCEQ Executive Director on February 18, 2015. The first order allows LCRA to suspend interruptible releases to certain irrigation customers (otherwise required under LCRA's Water Management Plan ("WMP")). The second order allows LCRA to comply with a less restrictive streamflow requirement of 300 cfs, down from the 500 cfs required in LCRA's WMP to assist the Blue Sucker habitat. Both orders expire on June 18, 2015.

Revisions to Oil and Gas General Operating Permits Proposed. On March 6, 2015, the TCEQ requested public comments on its renewal of, and revisions to, the existing oil and gas General Operating Permits ("GOP"). The revisions would affect oil and gas GOP facilities located in all Texas counties through various revisions adding emission terms and requirements. The deadline for public comments is April 7, 2015, and a notice and comment hearing is scheduled for April 6, 2015.

Public Utility Commission of Texas

Project No. 43871, *PUC Rulemaking Project to Amend Chapter* ***24 for the Implementation of Phase II of the Economic Regulation of Water and Sewer Utilities;*** Project No. 43876, ***PUC Form Revisions for Phase II of the Implementation of the Economic Regulation of Water and Sewer Utilities (Class A Utilities);*** Project No. 43967, *PUC Form Revisions for Phase II* ***of the Implementation of the Economic Regulation of Water and Sewer Utilities (Class B and C Utilities); and*** Project No. 43969 – *PUC Rulemaking Project to Amend Chapter 22 for* ***the Implementation of Phase II of the Economic Regulation of Water and Sewer Utilities***. The implementation of the transfer of the economic regulation of water and wastewater utilities from the Texas Commission on Environmental Quality to the Public Utility Commission continues. The Commission has approved for publication draft rules revising both procedural and substantive rules. With publication in the Texas Register on March 20, the expected date of final approval will be later this spring. Comments may be provided to the proposed rules, and a public hearing may be scheduled.

Project No. 42330, *Rulemaking Proceeding to Propose New* ***Procedural Rule 22.146, Relating to Limitations on Discovery*** *in Rate Proceedings*. In March 2014, the Commission opened a rulemaking to amend the PUC procedural rule governing discovery in rate proceedings. Various parties filed initial comments and reply comments in May 2014. After hearing those comments, the Commission approved a proposal that was published in the Texas Register on November 7, 2014. The proposed rule would require a discovery control plan to be established by an order entered by the presiding officer of the Commission. The rule prescribes specific discovery limitations on requests for information, requests for admission, and deposition by oral examination, while affording the presiding officer latitude in granting requests for additional discovery upon a showing of good cause. Modifications by the presiding officer or the PUC are also authorized upon the occurrence of certain events. Additionally, PUC Staff is exempted from the discovery limitations. A public hearing was held on January 20, 2015. Additional comments have been filed since the hearing. The date by which the proposed rule will be formally adopted has not been set. The Commission has until May 7, 2015 to act on the rulemaking, otherwise the proposed rule is automatically withdrawn.

Project No. 42740, ***Rulemaking to Amend Substantive Rule 25.101, Relating to Certification Criteria***. In August 2014, the Commission discussed the need for a rulemaking to address two issues related to routing transmission lines: (a) route deviations to accommodate engineering constraints after a route has been approved; and (b) elimination of the preference for transmission routes to parallel pipelines. In October 2014, the Commission held a workshop to receive stakeholder input on a strawman proposal addressing these two issues. Following the workshop and numerous stakeholder comments, in January 2015 the PUC staff filed a proposal for publication of amendments to Subst. Rule 25.101. The proposed amendments modify Subst. Rule 25.101(b)(3)(B), which relates to the Commission's routing criteria for new transmission facilities, by clarifying that the Commission will consider whether a proposed route parallels or utilizes existing compatible rights-of-way, and by including a list of compatible right-of-way features, including roads, highways, railroads, telephone utility easements, property boundaries, or fence lines, but intentionally omits natural gas or other pipelines. The Commission approved the proposed amendments for publication on January 15, 2015, and the proposal was published in the Texas Register on January 30, 2015. In March, five utilities filed additional comments on the approved amendments; however, because one was not requested, the Commission will not hold a public hearing. No final date or time has been set for an open meeting to permanently adopt the amendments.

Docket No. 42511, ***Complaint of Calpine Corporation and NRG*** *Energy, Inc. Against the Electric Reliability Council of Texas and Appeal of Decision Concerning the Houston Import Project*. On May 13, 2014, Calpine Corporation ("Calpine") and NRG Energy, Inc. ("NRG") filed a complaint against Texas' grid operator, the Electric Reliability Council of Texas ("ERCOT"). Calpine and NRG alleged that ERCOT violated its procedures in making the determination that new transmission investment is necessary to import power into the Houston area. On December 16, 2014, the Commission issued an order denying the complaint and appeal on grounds that Calpine and NRG failed to show that ERCOT violated any law that the Commission has jurisdiction to administer, any

order or rule of the Commission, or any protocol or procedure adopted by ERCOT. Calpine and NRG appealed to Travis County District Court on March 2, 2015.

Docket No. 43950, ***Application of Cross Texas Transmission, LLC for Authority to Change Rates and Tariffs***. On December 23, 2014, Cross Texas Transmission, LLC filed an application for authority to change rates as required by the final order in Docket No. 40604. Cross Texas requested a revenue increase in the amount of $3,130,889, or 4.5% over current rates. Several parties filed motions to intervene, including the Office of Public Utility Counsel, the Steering Committee of Cities Served by Oncor, and Texas Industrial Energy Consumers. The parties have reached an agreement that will be presented to the commission for approval.

Docket No. 44435, *Appeal of CenterPoint Energy Houston Electric, LLC from an Ordinance of the City of Pearland.* On February 10, 2015, CenterPoint filed an appeal of the City of Pearland's ordinance requiring utility facilities to be located underground, alleging that the ordinance conflicts with CenterPoint's authorized tariff. According to the tariff, CenterPoint's general policy for new construction is to install aboveground facilities. CenterPoint claims that new facilities are required in Pearland in order to continue providing safe and reliable service. The Commission has referred the case to SOAH and has ordered the parties to file a list of issues to be considered by March 25, 2015. The Commission plans to consider and possibly adopt a preliminary order in this docket at its open meeting on April 17, 2015.

Agency Highlights *is prepared by attorneys from the Firm's different practice areas. If you have questions or need any additional information, please contact our Editor at editor@lglawfirm.com.*

News continued from 2

Paul Gosselink will moderate "Landfill Mining" on April 17 and Sheila Gladstone will be discussing the "Do's and Don't's of Interviewing and Hiring" on April 18 at the TxSWANA Annual Conference in El Paso.

Jason Hill will present "Water What? Unraveling the Texas Water Law Tangle for Practitioners" at the 38th Annual General Practice Institute at Baylor Law School on April 24 in Waco.

Brad Castleberry will be presenting "Water Rights" at the Texas Banker's Association - Intermediate Trust & Estate Administration Meeting on April 30 in San Antonio.

Nathan Vassar will participate in a round-table discussion on "Effectively Communicating and Implementing Your Decree with the Public and Political Leaders" at the National Association of Clean Water Agencies 2015 Wet Weather Consent Decree Workshop on April 30 in Philadelphia.

Sheila Gladstone will be discussing the "Do's and Don't's of Interviewing and Hiring" at the Texas Business Conference on May 1 in San Marcos.

Sheila Gladstone will present "Have you Updated Your Policies and Procedures in the Last 5 Years?" at the V.G. Young Institute of County Government (Texas A&M) on May 27 in San Marcos.

Elizabeth Hernandez will be discussing "Employment Law" at the CenTex Chapter of the American Payroll Association on June 11 in Austin.

Sheila Gladstone will give an "Employment Law Update" at the Texas Statewide Telephone Cooperative Spring Managers' Conference on June 11 in South Padre Island.

Stefanie Albright will discuss "Ethics in Emergencies" at the Capital Area Suburban Exchange Summer Conference on June 13 in South Padre Island.

Georgia Crump and Thomas Brocato will be presenting "Electric and Gas Utility Legislative and Regulatory Update" at the Texas City Attorneys Association Annual Conference on June 17 in Bastrop.

Sheila Gladstone will be giving an "Employment Law Update" at the Texas City Attorneys Association Annual Conference on June 18 in Bastrop.

We are encouraging our readers to enjoy *The Lone Star Current* in its electronic format. If you would like to join us in being a better environmental steward by switching to the email-only version, please contact our editor at editor@lglawfirm.com and ask to be added to our email list. If you do not receive the emailed version and would like to do so, please send us your email address (at editor@lglawfirm.com) and ask us to add you to the "email only" list. You may also continue to access *The Lone Star Current* on the Firm's website at www.lglawfirm.com.

Thank you for your support!

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