Lloyd Gosselink
ATTORNEYS AT LAW

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THE LONE STAR CURRENT

A Publication of Lloyd Gosselink Rochelle & Townsend, P.C., for the Benefit of Its Clients & Friends

WATER SUPPLY PLANNING OPPORTUNITIES: EXEMPT INTERBASIN TRANSFERS

by Martin C. Rochelle and Nathan E. Vassar

The arrival of a new year presents opportunities for water utilities to take stock of their current supplies and their ability to lawfully and most efficiently use those supplies within their current and future service areas, and bearing in mind their existing and projected water supply needs. The recent drought is an important reminder that there remain many water supply challenges across our state that cannot be solved by short-term rains or the current El Niño weather pattern. One important proactive planning tool that can be employed is a comprehensive assessment of a utility's current sources of water, so as to ensure that supplies may be lawfully used to address current and projected water demands. Attorneys in the Firm's Water Practice Group routinely review our clients' portfolios of supplies as part of such a comprehensive assessment and in light of long-term water supply planning.

In evaluating a utility's lawful rights to use water, one issue that is often the subject of confusion is the geographic service area limit that may be imposed in either a state-issued surface water right or a groundwater conservation district's production permit. While "place of use" limitations are not always included in water rights authorizations, when they are applicable it is important for utilities to understand such limitations and comply with them. One significant constraint that has been the subject of significant conflict over the last one hundred years involves the use of surface water supplies within the geographic limits of the basin in which the supplies are located (the "basin of origin"). Without explicit authorization from the state, no surface water right holder may divert such supplies outside of the basin of origin. Such authorizations, referred to as "interbasin transfer" rights, have been the subject of much debate at the Texas Capitol and the source of significant litigation in the courts. Indeed, the interbasin transfer statute, Water Code § 11.085, was substantively amended in 1997 via the Legislature's enactment of Senate Bill 1, to significantly increase the burden on applicants seeking interbasin transfer permits.

While securing a post-Senate Bill 1 interbasin transfer ("IBT") authorization comes with a host of significant legal and technical challenges, the Texas Legislature has thankfully afforded a few useful exceptions to the Water Code's IBT permitting requirements. These exceptions can be employed by utilities to provide surface water supplies to areas that may be located outside of the surface water right's basin of origin. Specifically, an exempt IBT provides a relatively quick and cost-efficient option to allow a utility to plan now in order to serve future demands in projected growth areas that may be geographically located across a river basin boundary.

Exempt IBTs are specifically authorized under § 11.085(v) of the Texas Water Code. Section 11.085(v) includes a menu of options that, if applicable and

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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.

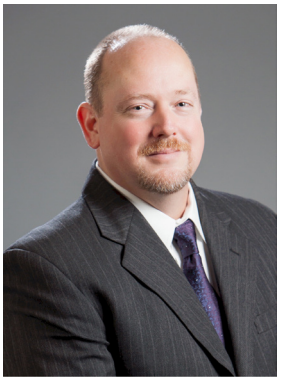
Based in Austin, the Firm's attorneys represent clients before major utility and environmental agencies, in arbitration proceedings, in all levels of state and federal courts, and before the Legislature. The Firm's clients include private businesses, individuals, associations, municipalities, and other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

We are pleased to announce that **Stefanie Albright** has been elected Principal effective January 1, 2016. Stefanie is a member of the Water Practice Group and the Districts Practice Group. Her client work focuses on general counsel services to water utilities, including the organization and operation of water districts and water supply corporations. She also assists clients with various permitting, compliance, and enforcement issues related to water quality matters. Stefanie received her undergraduate degree from Southwestern University and earned her doctor of jurisprudence from the University of Houston Law Center. Before joining the Firm, Stefanie served as a lead staff member in the Texas House of Representatives. Stefanie is a member of the State Bar of Texas, the Austin Bar Association, the Texas Water Conservation Association, the Austin Young Lawyers Association, and the Capital Area Suburban Exchange.



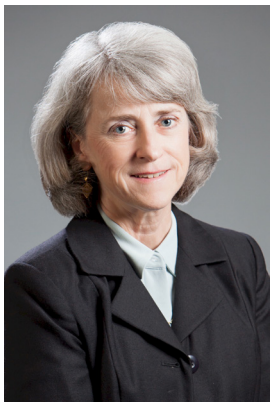
We are pleased to announce that **Jeffrey Reed** has been elected Principal effective January 1, 2016. Jeff is a member of the Air and Waste Practice Group and the Compliance and Enforcement Practice Group. Jeff's practice focuses on permitting and enforcement related to solid waste and air emissions. Jeff assists clients in permitting landfills, transfer stations, emission sources, and wastewater discharges, and defending permits through the full appellate process. He handles enforcement issues, spill remediation, and reporting issues. Jeff also assists clients with environmental due diligence in significant real estate transactions and with negotiating and drafting contracts for transfers of water and for sales of services. Before becoming a lawyer, Jeff received his degree in civil engineering from the University of Texas and worked as a civil engineer for almost a decade. He obtained his law degree from Southern Methodist University Dedman School of Law in 2006. Jeff is actively involved in the Air and Waste Management Association, where he served as Chair of the Central Texas Chapter in 2013. Jeff is a member of the State Bar of Texas, the Austin Bar Association, and the Lone Star Chapter of the Solid Waste Association of North America.

We are pleased to announce that **Sara Thornton** has been elected Principal effective January 1, 2016. Sara is a member of the Water Practice Group and the Compliance and Enforcement Practice Group. She assists clients with various water supply and water quality permitting, compliance, and enforcement issues and has particular expertise in wastewater permitting, Clean Water Act Section 404 permitting, TCEQ enforcement, and compliance with the Endangered Species Act and the National Environmental Policy Act.

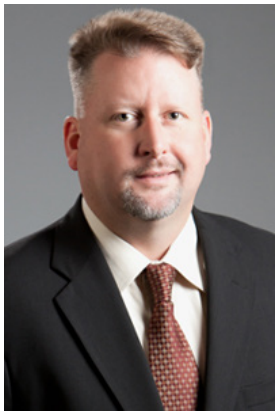
Sara received her undergraduate and master's degrees from Texas A&M University. While earning her Master of Urban Planning degree, Sara conducted research in urban sprawl, collaborative ecosystem management, and wetland mitigation banking, and was a co-author on several articles related to this research. Sara graduated *cum laude* from Texas Tech University School of Law in 2008, and is a member of the State Bar of Texas, the Austin Bar Association, the Water Environment Association of Texas, and the Texas Water Conservation Association.

Ashleigh K. Acevedo has joined the Firm's Districts Practice Group and Water Practice Group. Ashleigh's practice focuses on water utility law and providing general counsel services to water districts, water and wastewater utilities, and other political subdivisions. She also assists clients in a broad range of water quality issues, including permitting, compliance, and enforcement. Ashleigh received her undergraduate degree from Baylor University and her doctor of jurisprudence from the University of Texas School of Law. In law school, Ashleigh served as the Editor-in-Chief of the Texas Environmental Law Journal. Before law school, Ashleigh was a Bob Bullock Scholar with a member of the Texas Senate. Ashleigh is a member of the State Bar of Texas.

Tanya R. Leisey has joined the Firm as a Paralegal in our Energy and Utility Practice Group. Tanya became a paralegal in 2009 and has a background in administrative law. She received both her master's degree in legal studies and her bachelor's degree in print journalism from Texas State University.



Georgia N. Crump has been chosen to succeed Geoffrey M. Gay as Chair of the Energy and Utility Practice Group. Georgia has been actively involved in municipal law, energy law, and utility law throughout her legal career, assisting both private and municipal clients. Her substantial experience includes representing individual and coalitions of municipalities in gas and electric rate proceedings at the Railroad Commission of Texas and the Public Utility Commission, representing municipally- and privately-owned water and wastewater utilities at state regulatory agencies, advising clients in the development of telecommunications facilities and agreements, assisting municipalities in gas and electric franchise negotiations and renewals, and a multitude of municipal law issues.



The Firm has established a new **Compliance and Enforcement Practice Group** to focus on the Firm's experience in regulatory compliance and enforcement matters. **Brad Castleberry** is the Chair of this new group, which consists of Firm attorneys who have served clients in a variety of compliance and enforcement settings, from defending environmental damages actions for public and private entities to developing compliance protocols and advocating before regulatory agencies. While the Compliance and Enforcement Practice Group is new, the Firm's client services in this arena have long been a part of the Firm's offerings. The Compliance and Enforcement Practice Group is a team committed to meeting clients' needs in securing permits, negotiating settlements, and analyzing existing compliance, among other services. For more information on the Compliance and Enforcement Practice Group, please visit http://www.lglawfirm.com/practice-areas/compliance-and-enforcement/.

Best Lawyers® BEST LAW FIRMS U.S.News & WORLD REPORT 2016

Lloyd Gosselink has been listed as one of the best law firms in Texas by ***U.S. News & World Report's 2016 Best Law Firms*** listing, receiving Tier 1 rankings in the areas of Water Law and Energy Law. Our Water Practice Group has been forged over the past 30 years, comprising the largest group of water lawyers in Texas, with a distinct reputation for handling the most complex

and challenging water issues facing our great State. Our Energy and Utility Practice Group is an acknowledged leader in the practice of rapidly-changing utility and administrative law, and is uniquely qualified to represent public and private clients in all areas of this dynamic and challenging field. We are extremely proud of the hard work and dedication to our clients that led to this prestigious recognition.

Giving Thanks 2015

The Firm was pleased to donate $5,000 to the non-profit organization Feeding Texas, on behalf of everyone who participated in our Giving Thanks 2015 initiative. We appreciate the contributions of those who Gave Thanks and helped to put meals on otherwise empty tables all over Texas. Visit www.givingthankswithlg.com to see the Thanks that were given.

Nathan Vassar will be presenting "Clean Water Rule Under the Microscope: Permitting, Enforcement, and Litigation Update" at the WEAT Central Texas Section Meeting on January 19 in Austin.

James Aldredge will be speaking on "Ethical Dilemmas for Engineers, Geoscientists & Contractors" at the Texas Groundwater Association 2016 Annual Convention January 28 in San Marcos.

Jason Hill will be discussing "Administrative Water Law" at the Law Review Symposium at Texas Tech School of Law on February 26 in Lubbock.

Sheila Gladstone will be making numerous presentations this spring:

- "Workplace Investigations and Demotions, Disciplines, and Civil Service" at the Texas Municipal Human Resouces Association 30th Annual Civil Service Workshop on February 4 in Bastrop.
- "Fair Labor Standards Act" at the Heart of Texas Council of Governments - Texas Association of Regional Councils Meeting on February 3 in Austin.
- "Tips & Pitfalls for Conducting Internal Investigations of Employee Complaints" webinar for the International Municipal Lawyers Association on February 17.
- "Workplace Harassment" at the Certified Public Manager Conference on February 26 in San Marcos.
- "How to Deal With Difficult People" at the Texas Association of Counties - County Management & Risk Conference on March 10 in Galveston.
- "Social Media" at the Correctional Management Institute of Texas Women in Criminal Justice Conference on March 30 in Conroe.

MUNICIPAL CORNER

A commissioners court is not required to employ private counsel to provide legal representation for a county official or employee unless the official or employee has been sued for an action arising from the performance of public duty. The Attorney General was asked whether a county commissioners court has a legal duty to employ and pay for private legal counsel to represent an employee or officer in a civil suit, in accordance with §§ 157.901(a) and (b) of the Local Government Code. Under §157.901, when a district or county is providing legal representation in a suit, the county may be required to provide additional private counsel only when a county official or employee is sued "for an action arising from the performance of public duty." The commissioners court must first determine whether a suit against an employee or official arises from the performance of public duty. A prior AG opinion on the predecessor statute opined that such suits must concern events occurring during the course of the public servant's performance of public duties within the scope of the authority of the office or position. The AG considered the constitutional prohibition on the use of public funds for private purposes in the context of providing legal representation to an individual officer or employee. In order to avoid this constitutional prohibition, the expenditure of funds for private representation of an employee or official must

serve a legitimate interest of the political entity and does not merely benefit the individual. Whether a legitimate interest of a commissioners court is met by providing legal representation to an employee or official is a question of fact. Tex. Att'y Gen. Op. KP-0031 (2015).

A political subdivision may not contract with or appoint a private business to enforce privileged parking provisions. The Attorney General was asked whether a city may contract with, or appoint on a volunteer basis, a private business or individual to enforce the disabled parking provisions of the Texas Transportation Code. Section 681.0101 of the Code specifically provides that a political subdivision may appoint a "person" to have authority to file a charge against a person who commits an offense on Chapter 681 (related to privileged parking). However, that "person" is not entitled to compensation under § 681.0101(d). A definition of "person" is not provided under Chapter 681, nor does the Code itself supply a general definition that would apply to Chapter 681. The Code Construction Act, specifically defines "person" to include a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." However the AG noted that when a statute or context in which a word is used requires a different definition, the default definition from the Code Construction Act does not apply. In subsection 681.0101(b), an appointee must, among other requirements, be "a United States citizen of good moral character," and must take an oath of office. Such requirements cannot be met by a business or any kind of other entity, and thus the Code Construction Act definition of "person" would not apply to Chapter 681; §681.0101 likely refers to a natural person and not a legal entity. Therefore, §681.0101 does not authorize a political subdivision to appoint a private business to enforce disabled parking provisions. Enforcement of the Transportation Code, especially provisions related to disabled/privileged parking, is an exercise of a police power and therefore is a governmental function that cannot be abdicated or bargained away, and is inalienable under Texas common law. While there may be circumstances under which a city could contract with a private business to perform particular acts that are necessary for the enforcement of disabled parking provisions, whether any particular contract falls within these parameters is a question of fact. Tex. Att'y Gen. Op. KP-0033 (2015).

Open Carry Laws construed. Since the close of the 84th Legislative Session, numerous questions have emerged from both the public sector and concerned private citizens regarding the implementation of the new Open Carry laws in Texas. The Attorney General recently released four separate opinions addressing a range of topics related to the Open Carry laws, including campus carry, notice, and other exclusions to licensed carrying in state buildings/offices:

Authority of an institution of higher education to establish certain rules regarding the carrying of handguns on campus. Tex. Att'y Gen. Op. KP-0051 (2015);

Application of Penal Code §§ 30.07 and 46.03, relating to the open carry of handguns, to school districts. Tex. Att'y Gen. Op. KP-0050 (2015);

Questions regarding a notice prohibiting entry with a handgun onto certain premises under § 30.06 of the Penal Code and § 411.209 of the Government Code. Tex. Att'y Gen. Op. KP-0049 (2015); and

The extent to which firearms may be excluded from buildings that contain courts, offices utilized by the courts, and other county officials. Tex. Att'y Gen. Op. KP-0047 (2015).

The biggest issue raised so far, and as clearly indicated by two of these first four opinions, is when and where on school campuses in Texas firearms may be carried. To illustrate the difficulties of implementing the new laws, while providing adequate protection to both students and to constitutional rights, these opinions provide that students may carry handguns anywhere on college campuses (including dorms), but may not carry at certain school-sponsored events, such as sporting events or musicals. These four opinions are likely just the first of many pieces of guidance that will be issued by the AG on the topic of Open Carry. The new laws have garnered state-wide attention, and have wide-reaching implications across Texas.

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.

Interbasin Transfers continued from 1

utilized, can avoid the burdensome requirements for extensive application details, broad and expensive notice, public meetings, evidentiary hearings, and evidence of heightened water conservation implementation, among other requirements that apply to non-exempt IBTs. Significantly, exempt IBTs also escape the application of the "junior rights" provision of § 11.085, such that an existing water right proposed to be transferred outside the basin of origin pursuant to an exempt IBT retains its original priority date.

Several exempt IBT categories are available under the statute. Section 11.085(v)(1) allows the transfer of not more than 3,000 acre-feet of water per year, in combination with other transfers authorized under the same water right. In addition, applicants may use § 11.085 (v)(3) to transfer water from the water right's basin of origin into that basin's adjacent coastal basin. For regional water suppliers whose existing and future service areas may straddle river basin boundaries, § 11.085(v)(4) allows transfers within the entire retail service area of that utility, as well as to the geographic areas of a county or municipality that fall outside of

the basin of origin. Emergency transfers and transfers of water imported into the state are also permitted as exempt IBTs under §§ 11.085(v)(2) and 11.085(v)(5), respectively.

One or more of these options may prove helpful in meeting growing water supply needs in the coming years, particularly for potential customers with relatively modest annual demands (less than 3,000 acre-feet per year), utilities located near river basin boundaries (either in a retail service area or by county/municipal geographical limits), or those utilities that may wish to meet demands in one of Texas' eight coastal basins. Further, an applicant may seek an exempt IBT on the basis of several of these options in the same application, as may be applicable to an applicant's particular circumstances.

The value of exempt IBTs extends to both time investment and risk of protest, and the expense and delays that accompany same. Exempt IBT applications may be prepared and processed within a short period, making them attractive "low-hanging fruit" planning tools. In addition to being exempt from the significant substantive IBT requirements of § 11.085(b)-(u), the courts have ruled that applications for exempt IBTs do not require notice or the opportunity for a contested case hearing.

The year ahead will undoubtedly present time-intensive water supply challenges, lengthy permitting processes, and unique legal hurdles for many water utilities across the state. Contrasted against these realities, an exempt IBT may provide an efficient, low-risk solution to supply water – or to position a utility to supply water – to meet demands that may fall outside of the utility's authorized service area. As the new year gets underway, water suppliers may wish to take advantage of one or more of these available vehicles, as the use of such a proactive effort now may avoid the need for more reactive approaches down the road. Future editions of *The Lone Star Current* will address other matters that should be considered by water utilities in assessing the adequacy of their water supplies, and particularly in light of their current and projected water demands.

Martin Rochelle is the chair of the Firm's Water Practice Group. Martin focuses on the development and implementation of sound water policy and on representing clients in water quality, water supply, and water reuse matters before state and federal administrative agencies. Nathan Vassar is an Associate in the Firm's Water Practice Group. Nathan's practice focuses on regulatory compliance, water resources development, and water quality. He also represents clients on important water supply and water quality matters before state and federal administrative agencies. For questions related to water rights or water supply planning, including exempt interbasin transfers, please contact Martin at (512) 322-5810 or mrochelle@lglawfirm.com, or Nathan at (512) 322-5867 or nvassar@lglawfirm.com.

THE BUZZ FROM THE FAA: REGISTER THAT DRONE!

by Georgia N. Crump

Did you get a new drone or model airplane from Santa? If you did, then you'd be well-advised to check out the new registration requirements recently adopted by the Federal Aviation Administration ("FAA"). Effective December 21, 2015, all small unmanned aircraft – including drones and model airplanes – must be registered with the FAA's Unmanned Aircraft System ("UAS") registry. If the drone or model airplane is newly purchased or never used before December 21, the aircraft must be registered before it takes to the air. Aircraft used before December 21 must be registered by February 19, 2016. If your drone or model plane weighs less than 55 pounds and more than 0.55 pounds (250 grams) on takeoff, including everything on board or otherwise attached, then the registration requirements apply.

Recognizing the popularity of these aircraft (the FAA estimates 2015 sales will top 1.6 million aircraft), and the resulting number of owners and operators who are "new to aviation," the FAA has determined that registration of the aircraft will help identify the aircraft in the event of an incident or accident, and will also provide an opportunity to educate the operators in order to avoid problems.

The registration process is available on-line at www.faa.gov/uas and costs $5 for each aircraft, although the fee is waived through January 20, 2016. Upon registration, each aircraft will receive a Certificate of Aircraft Registration and a unique identifier that must be displayed on the aircraft. The registration is good for three years, and will cost another $5 to renew. These new registration requirements are for recreational users only; governmental users should continue to use the registration process for public operations: www.faa.gov/uas/public_operations/. Also, be aware that Chapter 423 of the Texas Government Code creates criminal and civil penalties for certain drone-related activities, such as using drones to take pictures of private individuals and operating drones over critical infrastructure facilities.

Play safe and register your drone or model airplane – civil penalties for failing to register can be as high as $27,500, and criminal penalties (including a hefty fine and up to three years in jail) can also apply.

Georgia Crump is Chair of the Firm's Energy and Utility Practice Group. If you have questions or would like additional information, please contact Georgia at 512.322.5833 or gcrump@lglawfirm.com.

DON'T GET TRIPPED UP ON TRAVEL TIME

by Sheila Gladstone and Elizabeth Hernandez

Any employer knows the Fair Labor Standards Act ("FLSA") comes with its share of nuances and quirks about when a non-exempt employee is on the clock for purposes of figuring overtime. One such point of frequent confusion involves travel time, particularly when the travel involves leaving the home community and traveling outside of normal working hours. This article provides a brief explanation of when travel time is compensable time under the law.

Is travel time away from home considered compensable?

Except for travel between home and work, any travel time spent during a normal workday is compensable, regardless of whether the employee is a driver or passenger. A "normal workday," for purposes of this rule, also includes time spent traveling during corresponding working hours on non-working days. In other words, if an employee regularly works 8 a.m. to 5 p.m. Monday through Friday, then time spent traveling between 8 and 5 on a weekend would also be compensable.

Outside of normal working hours, all travel time for one-day out-of-town trips (no overnight) is compensable. If the employee is not traveling by car, time between the employee's home and the airport or train station may be deducted from the total travel time. Meal periods may also be deducted from the total time.

For multi-day trips with an overnight stay, travel time outside of normal working hours is compensable only if the employee is driving. It is not work time for an employee to sit as a passenger on a plane or in a car. Employees who are passengers outside of working hours are not "working" because they are free to use their time to eat, sleep, read, talk on the phone, or engage in any other activity possible as a passenger. However, the driver must be compensated for time spent driving.

How about travel in the home community (in-county)?

Travel near home is simpler. Employers must compensate non-exempt employees for all travel time as part of their principal activity of work, including travel between job sites during the work day. Time spent commuting from home to an office or to the first worksite in the day is not compensable. In most cases, an employee would be on the clock upon arrival at the first worksite of the day, and off the clock when he or she leaves the last worksite of the day. An exception would be if the employee is required to do substantial preparatory work at home prior to traveling to the first worksite. Remember, though, if the first worksite of the day is far enough away, you may have to treat the travel like a one-day out-of-town trip.

What is the rule on mileage reimbursements?

FLSA rules regarding travel time do not address mileage or other expense reimbursements. No federal or state law dictates when or whether you pay traveling employees mileage reimbursements. However, for practical purposes, many employers find it administratively simple to make mileage reimbursement and compensable time consistent, and reimburse for mileage only when the travel time is compensable.

You can always do more.

This article sets out the minimum requirements under the law for counting time spent traveling. Some employers allow non-exempt employees to claim more compensable time than is required by the FLSA. For example, some employers allow all time spent as a passenger to be counted, so that everyone in the car is paid the same. Some employers allow employees to count as time worked all time spent waiting at the airport. The important thing is to know what the law requires and to have policies that are consistently applied.

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.

ENVIRONMENTAL AUDITS: AN OFTEN OVERLOOKED TOOL FOR POLITICAL SUBDIVISIONS

by Brad B. Castleberry and Ashley D. Thomas

The Texas Environmental, Health, and Safety Audit Privilege Act (the "Act") provides a unique opportunity for regulated entities to achieve compliance with environmental and occupational health and safety laws while also gaining protection from potential penalties. The Act allows entities to conduct voluntary audits of a facility's compliance with environmental health laws and regulations in exchange for privilege of audit reports and immunity from penalties for violations discovered during the audit, with certain exceptions. The Act's stated purpose is "to encourage voluntary compliance with environmental and occupational health and safety laws." In other words, the Act aims to incentivize owners and operators of regulated facilities to take affirmative corrective acts. Significantly, the Act's protections have allowed for entities to conduct more extensive investigations of their operations without concerns about any resulting costly penalties.

The privilege granted under the Act provides a limited evidentiary privilege for audit reports developed according to the Act. An audit report may include: (1) a description of the scope of the audit; (2) memoranda and documents; (3) implementation plans or tracking systems; and (4) attached supporting information such as interviews, field notes, legal analyses, lab data, and photos. Each document in a report should be labeled as privileged, although failure to do so does not result in automatic waiver under the Act. Pursuant to the privilege provided by the Act, an audit report is generally not admissible as evidence or subject to discovery in a civil or administrative proceeding. The burden to demonstrate the privilege's applicability is on the entity asserting the privilege.

There are several waivers and exceptions under the Act. For example, the Act does not grant privilege to documents, reports, or data that are required to be disclosed under state or federal law or to information obtained outside of the audit process, such as information obtained from compliance with reporting requirements under a water quality discharge permit. Additionally, the Act's privilege does not apply to the extent the owner or operator of the entity expressly waives the privilege, or if a court or administrative hearings official determines that the privilege was asserted for a fraudulent purpose. Similarly, the privilege does not apply if a court or administrative hearings official determines that the audit report demonstrates noncompliance but that efforts to achieve compliance were not promptly initiated or pursued with reasonable diligence.

It should also be noted that the privilege does not apply to criminal proceedings. Privileged information may not be disclosed to the EPA or other federal agencies; if information is shared, the privilege granted under the Act will be waived. Thus, it is important for entities that seek to take advantage of the Act's privileges to ensure that audit report documents are properly identified and labeled, facility personnel are advised of their obligations under the Act, and operators do not voluntarily disclose audit information not otherwise required for reporting under federal or state law.

In addition to the privilege afforded by the Act, an entity may enjoy immunity for voluntary disclosures of violations discovered during a voluntary audit conducted pursuant to the Act. This immunity does not affect the TCEQ's authority to seek injunctive relief, make technical recommendations, or generally enforce compliance. To receive immunity under the Act, an entity must first submit a Notice of Audit ("NOA") to the TCEQ. The NOA must specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the planned audit's general scope. If during the audit any violations are discovered and the entity wishes to take advantage of immunity provided by the Act, the entity submits a Disclosure of Violation ("DOV") to the TCEQ in writing by certified mail promptly after the violation is discovered. Immunity is contingent on the fact that the violation was noted and made as a result of the audit; in other words, the violation must not have been detected independent of the audit.

Then, to enjoy immunity, within a reasonable amount of time following the DOV the entity must take appropriate action to correct the violation, including cooperating with the appropriate agencies in the investigation of any issues discovered through the audit. Immunity does not apply if the person who made the disclosure: (1) intentionally or knowingly committed the violation, or (2) was reckless or responsible for the violation and the violation resulted in substantial injury. Likewise, immunity does not apply if the entity claiming immunity has repeatedly committed significant violations and failed to attempt to bring the facility into compliance. An entity claiming immunity for a voluntary disclosure has the burden of proof to establish that immunity applies.

The Act is used extensively by for-profit companies seeking to limit their liabilities. The Act has historically not been availed by political subdivisions, primarily because there is limited understanding of the benefits of the Act. However, when used properly this tool can assist political subdivisions in ensuring ongoing compliance and better regulatory understanding of their permit obligations.

Brad Castleberry is Chair of the Firm's Compliance and Enforcement Practice Group, and is also a member of the Water, Litigation, and Renewable Energy Practice Groups. Ashley Thomas is an Associate in the Firm's Water, Litigation, and Compliance and Enforcement Practice Groups. If you have any questions concerning this article or any other issues, please contact Brad at 512.322.5856 or bcastleberry@lglawfirm.com, or Ashley at 512.322.5881 or athomas@lglawfirm.com.

TEXAS LEGISLATURE BACK AT WORK: INTERIM COMMITTEE CHARGES

by Ty Embrey and Troupe Brewer

To kick-start the preparation process for the next regular session of the Texas Legislature to begin in January 2017, Texas House of Representatives Speaker Joe Straus and Lieutenant Governor Dan Patrick have both issued interim charges to the committees in their respective chambers. This article will highlight some of the charges of interest from select committees.

Texas House of Representatives

Agriculture and Livestock: The Committee is charged with determining the sources of water used by Texans in the production of food and fiber, and will examine current water delivery methods and water conservation goals for agricultural use.

County Affairs: Charges to the Committee are to study the effectiveness and efficiency of current regulations and best practices to determine how to decrease the risk and mitigate the impact of wildfires, floods, and other natural hazards in the wildland-urban interface, and to specifically examine the duties, performance, and jurisdictions of water districts, municipalities, emergency service districts, other similar districts, and state offices, such as the fire marshal and extension services.

Elections: The Committee charges are to examine the local petition process, increase transparency of local bond elections, and identify policy options aimed at improving compliance with campaign finance reporting laws by local officials and candidates for local office.

Energy Resources: The Committee will study the impacts of the declining price of oil on the state economy and current renewable energy regulations in Texas, and will determine if sufficient safety standards exist to protect groundwater contamination from disposal and injection wells.

Environmental Regulation: The work of the Committee will include a review of the varied regulatory schemes for household hazardous waste and tire scrap/rubber wastes disposal (and ways to improve and/or incentivize disposal of such wastes), surface water management entities' current policies and ability to regulate water-borne litter, and initiatives at the local level in order to identify any ambiguities regarding the priority of state or local authorities.

General Investigating & Ethics: In an effort to maintain the public's trust and confidence in government, the Committee will examine ethics laws governing public officers and employees, and will assess whether required financial disclosures by those making governmental decisions adequately inform the public of potential conflicts of interest.

Land & Resource Management: Charges include an examination of the current regulatory authority available to municipalities in their extraterritorial jurisdictions, and a study of current annexation policies in Texas to ensure a proper balance between development, municipal regulations, and the needs of citizens.

Natural Resources: Numerous water-related topics are in the Committee's charge, including: an examination of the regional and state water planning processes; an evaluation of the status of water markets in Texas and the potential benefits and challenges of expanded markets for water; an analysis of the factors contributing to freshwater loss in the state; an evaluation of the progress of seawater desalination projects near the Texas coast as a means of increasing water supplies and reducing strain on existing supplies; an evaluation of the status of legislation to encourage joint groundwater planning; a determination of the sources of water used by Texans in the production of food and fiber; and a determination of whether sufficient safety standards exist to protect groundwater contamination from disposal and injection wells.

State Affairs: The committee must: evaluate the administrative process used to set utility rates to determine if sufficient opportunities exist to ensure customer representation; examine how the Public Utility Commission and utility providers can ensure consumer protection regarding metering devices for water, gas, and electricity service; and review recent examples of inaccurate or confusing billings and offer recommendations on appropriate consumer recourse and appeal.

Texas Senate

Natural Resources and Economic Development: The Committee will: study the impact of, and identify challenges to, the implementation of proposed EPA regulations (including, but not limited to the Clean Power Plan, reduction of methane and volatile organic compounds from oil and gas facilities, ozone standards, regional haze, and waters of the U.S.); study and make recommendations regarding the use of Texas Emission Reduction Plan (TERP) funds; identify and recommend opportunities to streamline programs or services and enhance grid safety while maintaining the mission of ERCOT and the PUC and their programs; and identify barriers ERCOT or the PUC may have in their governance that can be improved or eliminated.

Agriculture, Water, & Rural Affairs: Charges include: a study of ownership, production, and transfer of surface water and groundwater in the state of Texas; a study of how to improve the process of developing and executing the State Water Plan; and a study of the effects of windblown and waterborne litter, including an analysis of the economic effects of litter, any necessary methods to prevent and remediate litter, and an assessment of state and local programs to reduce litter.

State Affairs: The Committee will: gather and review data on the compensation provided to private property owners for

property purchased or taken by entities with eminent domain authority; examine the variance, if any, between the offers and the fair market values of properties taken through eminent domain; and make recommendations to ensure property owners are fairly compensated. In addition, the Committee will: review current ethics laws governing public officials and employees and recommend changes necessary to inspire the public's confidence in a transparent and ethically principled government; review public officials' reporting requirements to the Texas Ethics Commission; examine the categorization of ethics reporting violations; and make recommendations to encourage accurate reporting.

Intergovernmental Relations: The Committee is charged with: identifying areas of concern with regard to statutory extraterritorial jurisdiction expansion and the processes used by municipalities for annexation; reviewing whether existing statutes strike the appropriate balance between safeguarding private property rights and encouraging orderly growth and economic development; examining ways to improve government accountability and transparency in elections regarding the issuance of public debt; and reviewing the information that is currently provided to individuals in the voting booth.

Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups, and Troupe is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. 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, or Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

WHAT'S NEXT FOR ONCOR?

by Jake Dyer

Billionaire Ray L. Hunt and a consortium of investors want to buy Oncor, the state's largest transmission and distribution utility. (Oncor serves approximately 10 million Texans and manages a nearly 120,000-mile-long network of transmission and distribution lines.) The consortium's change-of-ownership application is now pending before the Texas Public Utility Commission ("PUC"). Ratepayer groups, including the Steering Committee of Cities served by Oncor, find that the Hunt plan does not serve the public interest, at least as it's currently structured. According to the Steering Committee recommendations, the PUC should insist on substantial changes as a condition of approving the deal.

Oncor is currently owned by Energy Future Holdings ("EFH"), the bankrupt energy giant based in Dallas. A U.S. bankruptcy judge already has approved a Chapter 11 exit plan for EFH, but that plan can't succeed unless Hunt takes possession of Oncor. This raises the stakes considerably for the PUC.

One of the most controversial aspects of Hunt's proposal is the contemplated creation of a Real Estate Investment Trust ("REIT"). These are corporate entities that own income-producing real estate — typically shopping malls or hotels — and that distribute taxable income as dividends to shareholders. In turn, shareholders pay the income taxes on those dividends. The plan is for Oncor's assets to be placed in a REIT, which would be publicly owned but controlled by Hunt.

Why is this controversial? Some critics warn that employing a REIT in this fashion would result in an unnecessarily complex corporate structure, which would increase the potential for regulatory contentiousness at the PUC. Questions also have been raised about Hunt's ability to place such a large public utility inside a REIT — a feat that would be unprecedented on this scale.

But, most troubling of all is the treatment of the REIT in customer rates. Similar to other public utilities, Oncor's rates cover its operating, infrastructure, and borrowing costs. Its rates also cover the utility's imputed federal tax expense and provide a return to shareholders. This return is the utility's profit.

The Hunt REIT would reduce the utility's imputed federal tax rate from 35% to 3.5%, or perhaps even less, according to a Steering Committee expert who reviewed the plan. But, the utility would continue collecting from ratepayers as if this dramatic reduction never occurred, according to experts. This means that under the Hunt plan, Oncor would charge ratepayers for federal tax expenses that do not exist.

PUC Staff estimates the non-existent tax expense at nearly a quarter of a billion dollars annually. Staff has further warned that this "substantial transfer of wealth from ratepayers to shareholders" would drive the company's returns to a level "that could not be considered acceptable under any reasonable application of economic or regulatory standards." For this reason and others, the PUC Staff has recommended that the PUC commissioners reject the Hunt proposal. The Steering Committee of Cities Served by Oncor also opposes the deal as currently structured.

The Hunt consortium filed its application with the PUC on September 29, 2015. The agency has 180 days from that date to determine whether the proposed change of ownership serves the public interest; a hearing on the merits of the change-of-ownership application began on January 11, 2016. If the Commission ultimately finds that the change serves the public interest, Hunt could take control of Oncor by the middle of 2016.

Jake Dyer is an energy policy expert at the Firm and the author of several in-depth reports on the state's electricity and gas markets, including Natural Gas Consumers and Texas Railroad Commission (2010), The Story of ERCOT (2011), *and* Deregulated Electricity in Texas (2013). *Jake is a former writer for the* Fort Worth Star-Telegram *and the* Houston Chronicle, *where he was nominated for a Pulitzer Prize. For more information, you may contact Jake at 512.322.5898 or rdyer@lglawfirm.com.*

SB 1812 - EMINENT DOMAIN COMPLIANCE AND FILING REQUIREMENTS

by Ty Embrey and Troupe Brewer

The Texas Legislature placed a significant emphasis during the 84th Legislative Session in 2015 on enacting bills that increased governmental transparency. One such bill was Senate Bill 1812 authored by State Senator Kolkhorst and sponsored by State Representative Geren. SB 1812 creates a reporting process for all public and private entities, including common carriers, that are authorized by a general or special law in Texas to exercise the power of eminent domain. Specifically, the bill requires the State Comptroller to create and maintain an online database (an "eminent domain registry") that contains an entity's contact information, a listing of statutes on which the entity bases its eminent domain authority, and the county/counties where the entity operates and exercises its eminent domain authority (in addition to other categories of data). Online submissions can be made through this link: http://comptroller.texas.gov/webfie/eminent-domain/.

Entities with eminent domain authority were required to file documentation with the State Comptroller in a related effort required by SB 18 in 2001. The submissions required under SB 18 were not mandated to be made online and thus were filed with the State Comptroller in various formats. The current online registry effort is aimed at streamlining the submission process and reducing the burden of this effort on both the State Comptroller and the entities themselves.

No later than February 1, 2016, and by every February 1 thereafter, entities possessing eminent domain authority must fill out this online form and submit it to the State Comptroller. Should an entity fail to meet the February 1 deadline in any year, the entity faces a possible $1000 fine and other administrative penalties. However, a failure to file, or to timely file, the form will not result in the revocation of statutory authority to exercise eminent domain powers. SB 1812 requires the State Comptroller to create and publish an eminent domain database on a website maintained by the State Comptroller no later than September 1, 2016.

Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups, and Troupe is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you have any questions concerning legislative issues or any other issues, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com, or Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

ASK SHEILA

Dear Sheila,

The municipal utility I oversee is hiring a new deputy director. I'm worried about getting stuck with someone who has health problems, or someone who wants a high salary. I also don't want to have to train someone on the latest technology. Finally, I want someone who is in it for the long haul and possible future transition to my job; I don't want to hire and train someone only to have them retire in a few years. My plan is to interview only the candidates under the age of 35 because they tend to be the healthiest, are willing to work for less, and are the most willing to learn. Is my strategy allowed under the law?

Sincerely,
Seeking Electric Youth

Dear Electric Youth:

Your strategy will certainly lead to identifying job candidates under the age of 35, but could also lead you quickly to an age discrimination claim. The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against an applicant or employee because of age, if the applicant or employee is at least 40 years old. The law applies to employers with 20 or more employees and includes the public sector. The corresponding Texas law prohibiting age discrimination applies to employers with 15 or more employees. That means a plan to interview only candidates under the age of 35 will result in illegal age discrimination against those who are at least 40 years old.

Many employers accused of age discrimination aren't necessarily trying to eliminate older workers but, like you, are trying to control costs, plan for the future, and build an efficient workforce. But the law protects workers against direct discrimination as well as disparate impact discrimination; in other words, actions by an employer that have the effect of eliminating older workers. Employers who interview only the younger applicants will be looked at with suspicion and will have to show that the older workers were screened for legitimate reasons other than age.

Sometimes, even inadvertent comments during interviews or prerequisites not essential to the job can have the unintended consequence of helping claimants prove up their age discrimination claims. Employers who find themselves in trouble under the ADEA may have:

- Asked an applicant how he feels about reporting to someone younger
- Asked whether the applicant's hair color is her natural color
- Asked applicants where they saw themselves in 20 years (better to keep it under five)

- Mentioned that older workers tend to struggle with learning new technology (instead of simply asking whether the candidate knows or can learn the necessary technology)
- Required fitness tests that are unrelated to the job duties (this could be a violation under disability as well as age discrimination law)
- Made repeated comments relating to age, even if they are good-natured, and even if they show a preference for older workers ("Bob is the grandfather of this office"; "these healthy young college graduates really work their tails off"; "back in our day, things were different")

As you suggest, some employers concerned about health insurance premiums prefer to have healthy employees who statistically are more likely to be younger. It is illegal to require employees to meet certain health standards unless those standards are directly linked to the job duties. For example, if you oversee the county maintenance department, you can require employees working in the field be fit enough to handle the rigors of repairing buildings and landscaping the grounds. An employer may not seek out applicants with a clean bill of health simply to control health insurance costs - such action would be illegal discrimination under the ADEA.

You also suggest that you prefer younger workers because they demand lower salaries. Although it is legal to place a salary range on a position, the decision about whom to interview, or ultimately promote or hire for that position, must be based on qualifications for the job, not on age.

Finally, you mention that you prefer younger workers because you will not have to train them on technology. This is exactly the type of stereotyping that the ADEA was designed to prohibit. Stick to asking about the job duties, and provide each candidate the opportunity during the interview process to show whether his or her skills match, regardless of age.

Sincerely,
Sheila Gladstone

"Ask Sheila" *is prepared by Sheila Gladstone, the Chair of the Firm's Employment 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

American Farm Bureau Federation, et al. v. Environmental Protection Agency, 792 F.3d 281 (3rd Cir. 2015).

The American Farm Bureau Federation filed a petition for a writ of certiorari with the U.S. Supreme Court on November 6, 2015, to overturn the Third Circuit's determination that the EPA's interpretation of the meaning of "total maximum daily load" ("TMDL") under the Clean Water Act is reasonable. Agriculture and homebuilding associations challenged EPA's interpretation of TMDL, claiming that it may consist of only a number representing the amount of a particular pollutant that may be discharged and, contrary to EPA's actions, cannot include allocations of permissible levels of various pollutants and their sources, promulgate target dates for reducing discharges, or obtain assurances from affected states that the TMDL objectives will be fulfilled. The Third Circuit disagreed and deferred to the EPA's interpretation, explaining that the interpretation was reasonable. Should certiorari be granted, the Supreme Court could expand on a trend in recent decisions to rein in deference to executive agencies.

Greater Houston Partnership v. Paxton, 468 S.W.3d 51 (Tex. 2015).

In June 2015, the Texas Supreme Court held that the Greater Houston Partnership, a private entity operating akin to a chamber of commerce, is not subject to public disclosure of its private business affairs under the Texas Public Information Act ("PIA"), overturning the long-standing position of the Texas Attorney General and lower courts to the contrary. The decision centered on whether such an entity may be considered a "governmental body," which under the PIA is "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in party by public funds." Although it received funds from the City of Houston for promoting economic growth, the Court determined the Greater Houston Partnership is not wholly or partially sustained by public funds and thus not subject to the PIA's provisions. To be supported by public funds, the entity must be sustained or maintained by public funds for the purpose of carrying out government functions. In this

case, the funds received by the Greater Houston Partnership from its contracts with the City accounted for less than 8% of its annual revenue. The Court noted, however, that determining whether a partially funded entity qualifies as a governmental body will require a case-specific analysis, "but where, as here, the entity does not depend on any particular source of revenue to exist – public or private – it is not sustained even in part by public funds."

Cerny v. Marathon Oil Corp., 2015 WL 5852596 (Tex. App. - San Antonio, Oct. 7, 2015).

A Texas court of appeals upheld a lower court decision granting summary judgment for oil companies, and dismissed a lawsuit claiming that hydraulic fracturing damaged plaintiffs' home and worsened their existing health problems. The court of appeals found that the plaintiffs had not established a causal connection between the oil companies' actions and the damage claimed. The plaintiffs relied on lay testimony rather than experts to establish the causal link, which the court found "too conclusory and speculative."

Envtl. Integrity Project v. Texas Comm'n on Envtl. Quality, No. D-1-GN-15-005394 (201st Dist. Ct., Travis County, Tex. Nov. 24, 2015).

Environmental groups, including Texas Campaign for the Environment and the Sierra Club, filed suit against the TCEQ in the Travis County District Court. In the suit, the environmental groups allege that TCEQ has failed to take action to either approve or deny multiple Title V permit applications within an 18-month deadline. According to the plaintiffs, TCEQ's inaction deprives them of the opportunity to challenge deficient permits, while the applicants may continue to operate under their application shield. The groups are asking the court to set deadlines for the TCEQ to take final action on the applications, some of which were filed as far back as 2007.

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

Revisions Proposed to Clean Air Act Permitting Public Notice Requirements. On December 29, 2015, the EPA published proposed rules revising the public notice provisions for New Source Review and Title V permits under the Clean Air Act. The proposal would remove requirements for newspaper publication and allow for electronic notification. If finalized, states such as Texas with either delegated programs or EPA-approved programs would have the option to revise their programs accordingly. Comments on the EPA rule must be received by February 29, 2016.

Update to Drinking Water Contaminant Monitoring Rule Proposed. On December 11, 2015, the EPA published proposed rules to revise the Unregulated Contaminant Monitoring Rule ("UCMR") applicable to public water systems under the Safe Drinking Water Act (the "Act"). Pursuant to the Act, the EPA is required to update its list of contaminants every five years. The UCMR requires public water systems to collect occurrence data for contaminants that may be present in tap water but are not yet subject to the Act's standards. The purpose of the UCMR is to assist the EPA in identifying new contaminants for regulation. The proposed rule lists 11 analytical methods for monitoring of a total of 30 chemical contaminants/groups, which includes 10 cyanotoxins/groups, two metals, eight pesticides, one pesticide manufacturing byproduct, three brominated haloacetic acid groups of disinfection byproducts, three alcohols, and three semivolatile organic chemicals. The proposal also includes changes to the monitoring timeframe (will now be from March through November) and sampling locations, as well as revisions to require reporting of quality control data. In addition, the proposal removes the requirement for small system duplicate quality control samples, although EPA has the discretion to select a subset of systems to collect duplicate samples in the future if necessary. The five-year UCMR program would take place from January 2017 through December 2021. A public webinar was held on January 13, 2016. The comment period for the rule proposal ends on February 9, 2016.

Changes to Hazardous Waste Rules Proposed. On September 25, 2015, the EPA proposed changes to the rules governing hazardous waste generators. Among other changes, the proposed rule would change the term "conditionally exempt small quantity generator" ("CESQG") to "very small quantity generator" ("VSQG"), and allow VSQGs to retain their classification as VSQGs even during discrete

events when larger amounts of hazardous waste are generated, such as when tanks are cleaned. The proposed rule would also allow VSQGs to transfer waste to a large quantity generator that is owned by the same company.

Texas Commission on Environmental Quality

Aquifer Storage and Recovery Rules Proposed. On December 9, 2015, the TCEQ approved proposal of rules implementing House Bill ("HB") 655 from the 84th Legislative Session (2015), which established a comprehensive framework for the permitting of Aquifer Storage and Recovery ("ASR") projects. The rulemaking includes revisions to: (1) include public notice requirements for applications for Class V Underground Injection Control Wells; (2) remove requirements for a two-phase ASR project approval procedure; (3) add definitions for "native groundwater" and "marine seawater" as part of requirements to implement HB 2031 for the diversion, treatment, and use of marine seawater; and (4) remove the requirement that injected water meet public drinking water criteria. The rulemaking also revises construction, operation, approval, and reporting requirements. A public meeting was held January 22, 2016, and comments will be due February 8, 2016. The TCEQ anticipates a rule adoption date of April 27, 2016.

Revised Hazardous Waste Rules Proposed. On December 9, 2015, the TCEQ approved publication of proposed changes to the rules governing hazardous waste. The proposed rules would incorporate changes to the federal rules, and would authorize the use of electronic manifests, establish an exclusion for certain steel slag, and revise the definition of solid waste. A public hearing is scheduled for January 25, 2016, and comments on the proposed rules are due by February 8, 2016.

Oil and Gas General Operating Permit Revised. On October 15, 2015, the TCEQ issued general operating permits ("GOP") numbers 511 through 514, governing oil and gas emissions. The GOPs were proposed on March 6, 2015. A current permit holder is only required to submit an application for a new authorization if any of its emission units, applicability determinations, or basis for applicability determinations are affected by the revisions to the GOPs, in which case its application must be submitted by January 13, 2016.

Medical Waste Rules Proposed. The TCEQ approved publication of revised rules regarding medical waste. The proposed rules implement House Bill 2244 that requires the TCEQ to separate medical waste rules from the rules governing municipal solid waste. A public hearing is scheduled for January 22, 2016, and comments on the proposed rules are due on February 9, 2016.

Texas Water Development Board

Peter Lake Appointed to TWDB. On December 15, 2015, Governor Abbott appointed Peter Lake, a Dallas businessman, to the Texas Water Development Board. Lake is currently head of business development for Lake Ronel Oil Company. He has also served as director of special projects for VantageCap Partners and director of research at Gambit Trading. Lake graduated from the University of Chicago with a Bachelor of Arts in public policy specializing in economics, and received his Master of Business Administration from Stanford University's Graduate School of Business. Lake will serve at the pleasure of the Governor until his term expires on February 1, 2021.

Kathleen Jackson Reappointed to TWDB. Governor Abbott reappointed current TWDB board member Kathleen Jackson to a term that will expire on February 1, 2017. Jackson has served on the TWDB since 2014 and is a registered Professional Engineer. Prior to serving on the TWDB, Jackson held positions as chairman of the Southeast Texas section of the American Institute of Chemical Engineers, board member and president of the Lamar Institute of Technology Foundation, and board member of the Lower Neches Valley Authority. Jackson graduated from North Carolina State University with a Bachelor of Science in chemical engineering.

Public Utility Commission

Docket No. 45188, *Joint Report and Application of Oncor Electric Delivery Company LLC, Ovation Acquisition I, LLC, Ovation Acquisition II, LLC, and Shary Holdings, LLC for Regulatory Approvals Pursuant to PURA §§14.101, 37.154, 39.262(I)-(m), and 39.915*. The Commission will soon decide whether to approve the sale of Oncor Electric Delivery Company LLC ("Oncor") to the group led by Dallas billionaire Ray L. Hunt, who is also the owner of Sharyland Utility. The sale is the linchpin of the bankruptcy exit plan of Oncor's parent company Energy Future Holdings, and has received large media attention and stakeholder scrutiny. The Commissioners will hear the case themselves, as opposed to the State Office of Administrative Hearings. The hearing begins January 11; the Commission's decision is due in March. For a more detailed discussion of the implications of the structure proposed by the purchasers, see the article by Jake Dyer in this edition of *The Lone Star Current*.

CenterPoint Appeals of City Undergrounding Ordinances. CenterPoint Houston Electric, LLC's ("CenterPoint") appeal of the City of Pearland's ordinance requiring utility facilities to be located underground (Docket No. 44435) has now been dismissed, but CenterPoint has filed a nearly identical appeal of a similar ordinance of the City of League City (Docket No. 45259). As it did in the Pearland case, CenterPoint claims League City's ordinance conflicts with CenterPoint's Commission-approved tariff that provides that CenterPoint's general policy for new construction is to install aboveground facilities by requiring developers to request underground utility lines. CenterPoint agreed to withdraw its appeal of Pearland's ordinance in September 2015 after Pearland amended its ordinance to clarify that developers requesting underground facilities are responsible for all the associated costs and that CenterPoint may refuse to provide underground service according to its tariff.

CenterPoint's 2016 Energy Efficiency Cost Recovery Factors Approved. The Commission issued a final order in October approving CenterPoint's requested Energy Efficiency Cost Recovery Factor ("EECRF") adjustment for 2016. CenterPoint's 2016 EECRF is approved in the amount of $37,645,874, which allows CenterPoint to recover energy efficiency program costs and performance bonuses.

Transmission Cost of Service Filings Approved. The wholesale transmission rate interim updates filed by Denton Municipal Electric ("DME") and Garland Power & Light ("Garland") have been approved. The Commission authorized wholesale transmission revenue requirement increases for both municipally-owned utilities at 44.51% for DME and 1.1% for Garland. The increases reflect the addition and retirement of transmission facilities and include appropriate depreciation, taxes, and the Commission-allowed rate of return on such facilities, as well as changes in loads.

Project No. 44592, *Relating to a Project Regarding Sharyland Utility Complaints*. The Commission opened this project to investigate Sharyland Utility's rates after receiving hundreds of customer complaints over dramatic electric bill increases in March 2015. Commission Staff issued a report confirming that Sharyland's rates are two to three times higher than other ERCOT utilities, a situation that likely resulted when customer class allocations changed as a result of Sharyland transitioning into the competitive retail market in January 2014. At that time, the Commission set Sharyland's rates and ordered Sharyland to file a rate case in June 2016. Following a hearing in this project in September 2015, and after receiving a request from several legislators from Sharyland's service area, the Commission accelerated the filing date of Sharyland's rate case to April 2016.

Docket No. 45175, *Appeal of Brazos Electric Power Cooperative, Inc. and Denton County Electric Cooperative, Inc. d/b/a Coserv Electric from an Ordinance of The Colony, Texas, and, in the Alternative, Application for a Declaratory Order*. Brazos Electric Power Cooperative, Inc. and Denton County Electric Cooperative, Inc. d/b/a Coserv Electric jointly filed an appeal in September from certain ordinances of the City of The Colony, Texas, and are seeking a declaratory order. The joint applicants argue that The Colony is wrongfully prohibiting them via its zoning ordinances from building a substation on property they have condemned in the city. The appeal has been referred to the State Office of Administrative Hearings.

Railroad Commission of Texas

Chairman Porter Withdraws from Re-Election Bid. Chairman David Porter announced his withdrawal from next year's re-election race. Porter, a CPA from Midland, was elected to the Railroad Commission in November 2010 to serve a six-year term as commissioner, and was elected by his fellow commissioners to serve as Chairman in June 2015. The primary election will involve six Republican and two Democratic candidates who have filed for election to the soon-to-be vacant position.

Sunset Review Underway. The Commission is undergoing review by the Texas Sunset Commission for the 2017 legislative session, and has submitted its self-evaluation report detailing the agency's function, organization, and programs, along with an internal audit report. The Sunset Commission sought information from stakeholders on how the Commission can be improved through the publication of a public questionnaire on its website. The Sunset Advisory Commission will issue a report in late April regarding information collected from stakeholders and the Sunset Commission's recommendations to improve the agency.

2015 Year in Review Published. The Commission recently published a "Year in Review" report for the first time. The 32-page digital report is available on the Commission website in an interactive format including videos, photos, infographics, and links to additional information. The report provides the "accomplishments and advances" of the agency's different divisions, such as the 490 mine inspections conducted by the Surface Mining and Reclamation Division and the Communications Division's initiative to increase contact with the public by launching social media accounts on Facebook, Twitter, and You Tube. According to the report, the RRC improved in 2015 by focusing on innovation, technology, and science, and will continue to do so in 2016.

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.*

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Thank you for your support!

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