Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 21, NO. 2 JULY 2016

THE LONE STAR CURRENT

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

STILL EMERGING, NOT YET CONCERNING: CUTTING OFF CONTAMINANTS OF EMERGING CONCERN AT THEIR SOURCE

by Ashleigh K. Acevedo

Even those without a green thumb know that the best way to stop the spread of weeds in their gardens is to pull them up by their roots. But for those of us that use weed killer, which can be effective, it is no substitute for simply cutting the plants off at their source. This concept of addressing unwanted matters at the source likewise holds true for addressing contaminants in the public water supply. For instance, the 2015 Microbead-Free Waters Act (the "Act") recently passed by the United States Congress, which seeks to limit the introduction of contaminating microplastics in rinse-off cosmetics into the aquatic environment, demonstrates a growing trend towards regulating the source of contaminants rather than imposing stricter treatment standards on water utilities.

The Act's passage has been fodder to once again bring contaminants of emerging concern ("CECs") to the foreground of public discussion. CECs include a broad spectrum of unregulated contaminants, including pharmaceuticals, household chemicals, personal care products, pesticides, and flame retardants, among others. However, the ubiquitous use of CECs in everyday consumer products means CECs are especially difficult to regulate at the consumer level. Enforcing regulations across a wide array of chemical compounds with an equally wide array of proper disposal requirements for millions of consumers would be complex and likely ineffectual. At the water utility level, on the other hand, the sheer volume of CECs and the lack of concrete scientific evidence of adverse health effects inhibits CECs regulation through revised water quality standards or mandated treatment processes. Some say, consequently, that the most practical form of CEC regulation is controlling CECs at their source, i.e. manufacturers.

How CECs are regulated, if at all, is crucial for water utilities, not just in terms of water quality management, but in evaluating potential water supply sources. Parallel to the regrowth in attention to CECs is the growing practice by water utilities to reuse water to meet the increasing demands for domestic water supplies. Thus, the regulatory framework for CECs matters for public drinking water suppliers because, among many other reasons, reuse efforts could foreseeably be impacted by CEC regulation.

Cultivating Water Resources for Growing Populations

Overall population growth- but especially population growth in urban areas- has led to a greater strain on water supplies in Texas. In response, water utilities have increasingly been turning to reusing water and wastewater. Texas' 2017 State Water Plan predicts this trend will continue over the next fifty years. By 2070, the Plan estimates that water reuse will provide 14% of the State's water needs, up from the projected 4% in 2020. Treated wastewater can be reused for varying purposes, such as for agricultural irrigation and for further treatment and distribution in public drinking water systems. The latter form of reuse, known as potable reuse, would potentially be subject to more stringent regulation of CECs.

Greater demand for potable water in urban centers and finite sources of water are both fueling the growth of potable water reuse. Unlike other forms of reuse, potable reuse requires more stringent water quality standards because of its potential for direct human health effects. The state regulations for reusing reclaimed water for agricultural and

Still Emerging continued on 5

IN THIS ISSUE

Lloyd Gosselink
ATTORNEYS AT LAW

THE LONE STAR CURRENT

Published by
Lloyd Gosselink
Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
512.322.5800 p
512.472.0532 f
lglawfirm.com

David J. Klein
Managing Editor
dklein@lglawfirm.com

Christie L. Dickenson
Assistant Editor
cdickenson@lglawfirm.com

Jeanne A. Rials
Project Editor

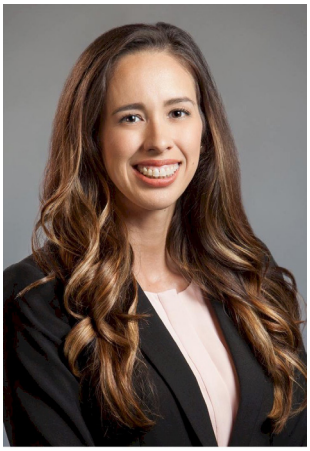
Lloyd Gosselink Rochelle & Townsend, P.C., provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

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



Lauren Munselle has joined the Firm's Employment and Litigation Practice Groups as an Associate. Lauren's practice focuses on providing employers practical day-to-day compliance advice and representing employers in employment-related litigation. She routinely drafts employment handbooks, policies, employment agreements, non-competition agreements, and severance agreements. Lauren conducts investigations and counsels clients through hiring, firing, and other employment-related decisions, as well as represents clients in all aspects of litigation. She has defended employers against discrimination and retaliation claims, breach of contract claims, and other employment-related torts. Lauren received her B.A in English from St. Edward's University and her J.D. from Texas Tech School of Law where she was a member of the *Estate Planning and Community Property Law Journal*. She is a member of the State Bar of Texas, the Austin Bar Association, and the Austin Young Lawyers Association.

Thomas Brocato will be presenting "Back to the Future… A New Era of MOU Rate Appeals Before the PUC" at the Texas Public Power Association Conference on July 26 in Austin.

Sheila Gladstone will be discussing "A Day in the Life" at a Texas Bar CLE - Government Law Bootcamp on July 27 in Austin.

Sheila Gladstone will be presenting "Violence in the Workplace" at a Texas Bar CLE - Advanced Government Law on July 29 in Austin.

Jason Hill will be discussing "Water Issues" at the 28th Annual Texas Environmental Superconference on August 4 in Austin.

Nathan Vassar will be discussing "Life After SB 912: SSO Reporting and Enforcement in Texas" at the CMOM 2016 Workshop on August 16 in Austin.

Nathan Vassar will be presenting "Passing the Salt: Desalination Brine Disposal Challenges" at TexasDesal 2016 on September 30 in Austin.

Sheila Gladstone will be discussing "Ethics" at the International Municipal Lawyers Association (IMLA) Annual Conference on October 2 in San Diego.

Members of the Firm collected fans and donations for the 2016 Austin Family Eldercare Summer Fan Drive in June.

Peter Lake, Board Member

Texas Water Development Board

Peter Lake was appointed to the Texas Water Development Board by Governor Greg Abbott on December 15, 2015. Lake has held a variety of financial roles across a number of industries. Previously, he acted as director of research and head of automated trading at Gambit Trading, a member firm of the Chicago Board of Trade and the Chicago Mercantile Exchange. In this capacity, he led the firm's market research initiatives and directed the development of its first automated trading programs. As one of the firm's proprietary market makers he also traded interest rate derivatives, primarily focusing on U.S. Treasury bond futures. He has also served as director of business development for Lake Ronel Oil Company, where he focused on financial analysis of upstream oil and gas opportunities. In addition, he served as director of special operations for VantageCap Partners. In this position he played a key role in the due diligence, valuation, and transactional aspects of the successful divestment of the firm's primary investment. Lake graduated with a bachelor of arts in public policy with a specialization in economics from the University of Chicago, and he earned a master's of business administration from Stanford University's Graduate School of Business. Lake was born and raised in Tyler, Texas.

The Lone Star Current recently had the opportunity to interview Peter Lake, who graciously responded to our questions. We appreciate his willingness to take the time to share his unique perspective with our readers.

Lone Star Current: What do you think is the most important aspect of your position as Board Member for the Texas Water Development Board?

Lake: I serve as the designated finance member of the Board (state law requires that the three-person Board include an engineer, an attorney, and someone with a finance background). As a result, I'm very focused on making sure that the financial resources the people of Texas entrusted to the TWDB are efficiently utilized to develop the water infrastructure the state will need over the next 50 years.

LSC: What has been your biggest surprise or revelation since becoming a TWDB Board Member?

Lake: I have been amazed at the breadth of activities undertaken by the TWDB—it's far more than just water infrastructure finance. The agency engages in a tremendous amount of water science and research, which drives the integrated State Water Plan that then guides the water infrastructure financing. And I haven't even mentioned the flood management activities and the amazing geospatial imaging work of the Texas Natural Resources Information System (a division of the TWDB)!

LSC: What life experiences do you think have influenced your actions as a TWDB Board Member?

Lake: My background in sovereign bond markets overlaps with the bond activities of the TWDB, so I spend a lot of time working with our finance team on transactions to fund water infrastructure projects for Texas.

LSC: Tell us about one of your hobbies that people might be surprised to know you enjoy.

Lake: I like to hunt and fish as much as I can. I did a lot of deer hunting when I was growing up, but now I primarily go after dove, quail and turkey. It's hard to beat the opening weekend of dove season in West Texas.

LSC: What was the last great book you read and a movie that you enjoyed?

Lake: "Unbroken" by Laura Hillenbrand. Humbling and inspirational at the same time. As for movies, I'm a big Star Wars fan so I loved getting to see "The Force Awakens."

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

Lake: A Jedi knight, obviously.

MUNICIPAL CORNER

The Texas Department of Transportation may enter into a design-build contract for a highway project with a construction cost estimate of $150 million or more, but may not enter into more than three such contracts in each fiscal year. Tex. Att'y Gen. Op. KP-0077 (2016). The Attorney General ("AG") was asked by the Chairman of the Texas House of Representatives Committee on Transportation to clarify the authority of the Texas Department of Transportation ("TXDOT") to enter into certain "design-build" contracts for highway projects during the 2016-2017 fiscal biennium. Chairman Pickett brought this question to the AG's attention due to a potential conflict between Section 223.242 of the Texas Transportation Code (the "Code") and a specific rider to the General Appropriations bill of the 84th Texas Legislature.

Section 223.242 of the Code provides that TXDOT may enter into "design-build" contracts for highway projects in certain circumstances, specifically, when the project has an estimated cost of $150,000,000 or more and so long as TXDOT has not already entered into three such contracts in a fiscal year, as the statute provides for a maximum of three such contracts per fiscal year. However, the General Appropriations Act from the 84th Legislative Session (the "Act") provides conflicting restrictions on TXDOT's authority to enter into such contracts. Specifically, Rider 47 from the Act provides that TXDOT may enter into "no more than ten design-build contracts in the 2016-2017 biennium," and the cost of such projects must have an estimated cost of $250,000,000 or more, a $100,000,000 higher entry cost than what is provided in Section 223.242 of the Code.

The AG is quick to note that while § 223.242 of the Code and Rider 47 from the Act are in apparent conflict, Rider 47 also contains the following language: "If provisions in Transportation Code §223.242, or similar general law, establish a limit on the number of design-build contracts that the Department of Transportation may enter into in each fiscal year or biennium that is less than the amount authorized by this section, then the limitation established by general law prevails." The limitations provided in § 223.242 are indeed less than those established in Rider 47; specifically, § 223.242 allows for only three such contracts per year as opposed to ten, and sets the entry price estimate for such contracts at $150,000,000, which is $100,000,000 less than what is provided by Rider 47.

The AG states that TXDOT may enter into no more than three such "design-build" contracts, as the limit in § 223.242 controls. Additionally, the AG explains that as Rider 47 "does not speak to or otherwise limit" TXDOT from entering into "design-build" contracts estimated to cost between $150,000,000 and $250,000,000, Rider 47 is a "restriction or qualification on the use of appropriated funds that does not conflict with the general law in section 223.242." In support of this position, the AG cited to Texas Supreme Court precedent stating that any rider "may not alter existing substantive law." See *Strake v. Ct. App. for First Sup. Jud. Dist. of Tex.*, 704 S.W.2d 746, 748 (Tex. 1986). Thus, the AG concludes that TXDOT may enter into a "design-build" contract for a highway project with a cost estimate of $150,000,000 or more.

Governmental entities should follow these recommendations related to posting notice to prohibit the otherwise lawful carry of handguns under Texas Penal Code §§ 30.06 and 30.07 during open meetings of the governmental entity. Tex. Att'y Gen. Op. KP-0098 (2016).

The AG was asked several questions on the requirements a city must follow in posting notice regarding the carrying of handguns in meetings of a governmental entity in certain circumstances. As a preliminary matter, the AG first notes that the Texas Penal Code ("TPC") distinguishes situations for intentional, knowing, or reckless carrying of a handgun in open and closed meetings of governmental entities. Specifically, TPC § 46.035(c) makes it a criminal offense to carry a handgun "in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting." The AG then cites the definitions from the Open Meetings Act (contained in Chapter 551 of the Texas Government Code), concluding that subsection 46.035(c) is expressly limited to open meetings, and, thus, it is not a criminal offense for individuals authorized to attend the closed meeting to carry handguns into that meeting unless the closed meeting is held in a location where handguns can otherwise be prohibited through other provisions of the TPC.

Next, and assuming the questions involved open meetings of governmental entities, the AG was asked specific questions on where in a governmental entity's office or place of meeting notice should be posted, and if a governmental entity may prohibit entry into a building entirely or just the room where the meeting takes place while carrying a handgun. The AG states that TPC § 46.035(c) prohibits carrying of handguns only "in the room or rooms where a meeting" of a governmental entity is taking place.

The AG then concludes that, under this statutory language, the Legislature clearly did not intend to allow a city to restrict entry into an entire building, but only into the room or rooms where a meeting is taking place. Therefore, posting notice at the entrance of the building (versus at the entrance of the meeting room), could suggest that a license holder is prohibited from carrying throughout the building when, in fact, that is not the law.

In addition, the AG was asked whether the handgun carry notices could remain posted during times when the governmental entity was not meeting. The AG responded that, if the room at issue is used for purposes other than open meetings of the governmental entity, the city may not provide notice under section 30.06 or 30.07 excluding the carrying of handguns when the room is used for purposes other than an open meeting.

Lastly, the AG was asked whether or not requirements under the Penal Code are different for notices provided by "card or other document." The AG states that the more important question regarding such a form of notice is over the message that is conveyed when these cards or documents are distributed. Specifically, any such card that is distributed must fully inform the recipient that the prohibition against licensed carry applies only in the room where the open meeting occurs and should be handed out at the entrance to that room. The AG also provides that a governmental entity could include notice of the prohibition as part of its general open meeting notice.

It is important to note that the AG states throughout this opinion that the failure to properly post notice under the guidance provided in this opinion could expose a governmental entity to liability for civil penalty under § 411.209 of the Texas Government Code.

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.*

Still Emerging continued from 1

industrial purposes, on the other hand, do not require treatment of such water to potable water quality standards because any contaminants in the reclaimed water would pass through several additional mediums before any conceivable human consumption, so CEC concentrations in reclaimed water are likely negligible.

Therefore, if public water supplies are regulated for CECs, an increased reliance on potable reuse may bring greater scrutiny from regulators as well as the general public. Consequently, the water reuse permitting process could become increasingly more complex and difficult to navigate. More attention may be focused on what contaminants enter potable water systems, how they enter it, and at what levels. The existence of CECs in untreated water supplies could pose challenges for utilities both discharging wastewater into upstream waterbodies and for those that divert from the waterbody for reuse. Many CECs, especially those derived from consumer products, enter our water supplies through wastewater discharges. While waterbodies have the ability to cleanse contaminants from water, that ability is finite; as more water is diverted, the assimilative capacity of the waterbody is diminished. Therefore, this increased scrutiny would likely be directed at both water providers and wastewater dischargers, potentially fueling the ever-increasing protests to water reuse permits.

At this time, however, it appears that no data definitively demonstrates that the use or continued use of reused water would pose and undue risk to human health. Furthermore, the effectiveness of current water and wastewater treatment processes coupled with the recognized effectiveness of pulling unwanted constituents out by their roots cultivates the source control approach instead.

Shelve the Pesticide Treatment Alternative …

The trend in CEC regulation by the Environmental Protection Agency ("EPA") has thus far not been to increase treatment requirements, which would unduly place the burden of contaminant removal on public water utilities. Instead, the movement in CEC regulation maintains the adage that pulling the weeds that are CECs up by their roots is the most potent form of contaminant management.

Some believe that existing federal environmental laws and state laws derived therefrom are ill-equipped to address CECs. (For a discussion of the existing statutory regime and the shortfalls therein, see Gabriel Eckstein, *Drugs on Tap: Managing Pharmaceuticals in Our Nation's Waters*, 23 N.Y.U. ENVTL. L.J. 37 (2015)). For instance, one of the contenders for potential regulation of CECs at the water utility level is through the Safe Drinking Water Act ("SDWA"), which authorizes the EPA to establish national standards for drinking water quality and contaminant regulation in public water systems. These national primary drinking water regulations set legally enforceable, health-based maximum levels of contaminants in public water systems or mandate water treatment procedures and techniques. For contaminants such as CECs that do not have such regulations, EPA maintains the Contaminant Candidate List ("CCL"), a list of 116 unregulated substances known to exist in public water systems and that potentially will require a national primary drinking water regulation in the future. Three conditions must be met for a contaminant to be placed on the CCL: (1) the contaminant may have an adverse health effect, (2) the contaminant is known or likely to occur at levels of concern, and (3) regulation offers a meaningful opportunity for risk reduction. However, with so many new and changing CECs and the inability to effectively and thoroughly evaluate the impacts of each on human health in the environment, staggeringly few CECs have been added to the CCL. To circumvent these shortcomings, recent regulatory proposals approach the management of CECs from their source, namely, manufacturers and distributors. Using the Act as a litmus test for how

Congress will approach contaminant management, source control appears to be the federal government's preferred method of CEC regulation at this point.

Contributing to the source control trend is the notion that public water systems are currently equipped to meet and exceed state and national drinking water quality standards and are already well-situated to sufficiently treat many CECs. Some scientific studies indicate that current water treatment practices can be effective at removing high rates of many commonly-recurring CECs, both on and off the CCL, from public water supplies. (See, e.g., *Blair et al., Assessing Emerging Wastewater Regulations to Minimize the Risk from Pharmaceuticals and Personal Care Products*, 26 MGMT. OF ENVTL. QUALITY: AN INTERNATIONAL JOURNAL 6 (2015)). Because the chemical compounds of CECs vary so greatly, no single treatment process can remove all CECs to meaningful levels. Thus, multiple-barrier treatment approaches (i.e., a combination of treatment approaches such as natural buffers, coagulation/flocculation, chlorination, membranes, ozonation, activated carbon, etc.) appear to be the most effective at removing CECs. As such, indirect reuse – whether for potable and/or non-potable purposes – is an advantageous solution, because additional treatment is inherent to its design, filtering water through an environmental buffer prior to diversion for further treatment by a public water system.

… But Do Not Discard It Just Yet

Although no immediate cause for concern yet exists, public drinking water utilities have the ability to proactively prepare for potential, future CEC regulations, in whatever form. Managing CECs for the sake of safeguarding future reuse and other projects is both prudent and practical. Albeit each utility will have unique challenges that may require case-specific solutions, easy first steps in insulating projects from potential CEC regulation include knowing what CECs are present in source water, what CECs are being discharged with wastewater, and what levels of each are potentially adverse to human health and ecological integrity using the CCL list as guidance for potentially problematic contaminants. A mid-level option may include monitoring of those potentially problematic CECs that occur at high levels within the water system.

For those utilities that can implement proactive measures, treatment processes may be optimized to address a broader spectrum of CECs and increasing public concerns. As permitting cycles come up and wastewater treatment plants are built, expanded, or modernized, public drinking water utilities should, at the very least, consider a combination of advanced treatment processes that have the ability to remove high levels of common CECs, especially for those plants that do not treat beyond secondary treatment. Treatment processes do not necessarily need to be designed for these contaminants, but their consideration and potential inclusion may prove to be an efficient expenditure of resources. Notably, for indirect reuse, a multiple-barrier, combination treatment design is the standard to protect public health from known and unknown health risks, especially within the indirect potable reuse system. As such, consideration of an advanced treatment process may dually serve both potential CEC regulation and future reuse projects.

Although the trend in CEC regulation is focused on pulling up the roots of the contaminants, and an approach that proposes treatment of CECs in the water supply is not likely to occur in the foreseeable future, public water utilities may be well-served by tailoring a broad spectrum of treatment processes that, incidentally, come close to an all-in-one weed killer for CECs.

Ashleigh Acevedo is an Associate in the Firm's Water, Districts, and Enforcement and Compliance Practice Groups. Significant contributions to this article were also provided by Sam Richards, a summer law clerk at Lloyd Gosselink Rochelle & Townsend, P.C. and current student at the University of Texas School of Law. If you would like additional information or have questions related to this article or other matters, please contact Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com.

MARSHALL AND THE FOUR CORNERS DOCTRINE: 10 YEARS AFTER

by Martin C. Rochelle and Nathan E. Vassar

This year marks the 10th anniversary of the Texas Supreme Court's decision in *Marshall v. Uncertain*, 206 S.W.3d 97 (Tex. 2006), where the court squarely identified the factors to be considered by the Texas Commission on Environmental Quality ("TCEQ") in its assessment and approval of certain water right amendments, and thus by applicants in their preparation of amendment applications. Following that decision, TCEQ implemented a stakeholder process to define a procedural protocol for implementing the court's direction. Thereafter, TCEQ Commissioners took quick action to approve several applications involving the most prevalent types of amendments, and without notice or the opportunity for expensive, time-consuming hearings. Since then, many dozens of amendments to water rights have been issued by TCEQ following the agency's review, and without the requirement of notice or the opportunity for a contested case hearing.

To date, our water supply planning series has focused on the value of water supply audits to identify supply shortfalls and prioritize needs, and the availability of exempt interbasin

transfers ("IBTs") to enable the provision of water supplies across river basin boundaries. Like the exempt IBT approach, the "Four Corners" or "Full Use" doctrine assessed by the Texas Supreme Court in *Marshall* can, if implemented appropriately, afford water suppliers an avenue to maximize their use of existing water supplies without the risks of protests or hearings. The doctrine is a product of statutes, case law, and agency action, and as such, its benefits become available by framing water right amendment applications in a manner that honors the doctrine's historical and legal foundations.

The requirement that water right holders secure amendments has evolved, beginning with case law dating to the 1940s. In *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 684 (Tex. Civ. App.—Austin, 1947, no writ), the court determined that one of the TCEQ's predecessors, the Texas Board of Water Engineers, maintained jurisdiction over changes of purpose and place of use by water right holders. The current statute addressing amendments to water rights (Texas Water Code § 11.122(b)) incorporates the "Four Corners" doctrine. It provides that certain amendments "shall be authorized" if specific requirements are met. These provisions reflect policy enacted in 1997 via Senate Bill 1, where the Legislature directed TCEQ to authorize certain water right amendments – those that did not propose to enlarge the diversion right or increase the rate of diversion, and did not cause adverse impacts to other right holders or the environment of "greater magnitude" than if the base water right (without the amendment) were "fully exercised." In short, the Legislature directed, and the Supreme Court subsequently confirmed in *Marshall*, that certain water right amendments are not subject to notice and hearing requirements if the amendment would not pose any greater impact to other water rights or the environment than if the pre-amendment right were fully used.

The statutory and judicial history of "Four Corners" has certainly informed TCEQ practice in the decade since the *Marshall* decision. If applicants for amendments are to avail themselves of the opportunity that Four Corners affords, they must frame their applications to address statutory requirements related to a host of "limited public interest" factors, including conservation, beneficial use, and consistency with state and regional water plans, and they must also address possible impacts of the proposed amendment "irrespective of the full use assumption." Needless to say, the construction of amendment applications since *Marshall* has demanded a thoughtful approach.

The scope of water right amendments that are candidates for the "Four Corners" treatment continues to evolve, as new amendment applications are presented to and considered by TCEQ. Among the amendments that are currently available for streamlined actions by TCEQ are applications to: (1) cure ambiguities in a water right; (2) change the place or purpose of use of a water right; (3) move a diversion point when there are no interjacent water users between the existing and proposed diversion locations; and (4) increase rates and/or periods of diversion from storage reservoirs. Depending on a variety of factors, including location, other non-noticed amendments may also be secured.

An appropriately crafted amendment application may invoke the "Four Corners" doctrine and take advantage of the benefits afforded through it, if the applicant can demonstrate that it meets the doctrine's statutory requirements, as detailed by the court in *Marshall*. By framing amendment applications in a manner that avoids the hurdles, costs, and delays that accompany notice and hearing, water suppliers may implement the very purpose of Senate Bill 1 – as quoted in *Marshall*, to "make better use of existing supplies, . . . encourage conservation, . . . and to encourage systematic water-resource planning." As such, adjusting water rights in order to address current and future service needs through water right amendments that use the "Four Corners" doctrine can be among the most effective water planning tools available to water suppliers.

Martin C. Rochelle is the Chair of the Water Practice Group at Lloyd Gosselink Rochelle & Townsend, P.C. in Austin. Martin's practice is focused on representing clients in complex water rights, water quality, and water reuse matters before state and federal administrative agencies, and in the development and implementation of sound water policy. He represents a wide array of water interests across Texas, including cities, river authorities, regional water districts, and other political subdivisions of the state, as well as industrial and commercial interests. Nathan Vassar is an Attorney in the firm's Water Practice Group. Nathan's practice focuses on representing clients in regulatory compliance, water resources development, and water quality matters. Nathan regularly appears before state and federal administrative agencies with respect to such matters. For questions related to the use of water supply planning tools, including amendment applications pursuant to the Four Corners doctrine, please contact Martin Rochelle at 512.322.5810, mrochelle@lglawfirm.com, or Nathan Vassar at 512.322.5867, nvassar@lglawfirm.com.

EMPLOYEE DRUG TESTING AND THE RIGHTS OF THE PUBLIC EMPLOYEES

by Sheila Gladstone and Ashley Thomas

An employer may choose to drug test its employees as a means to avoid employing individuals who use illegal drugs, thereby reducing the risk of having impaired employees in the workplace and deterring drug abuse (as well as catching signs of abuse early). While these goals are laudable and may make good business sense, as governmental entities, public employers (unlike private employers) that wish to implement drug testing policies must avoid infringing on their employees' constitutional rights. This article provides an overview of the legal framework public employers must work within when drug testing their employees.

The Fourth Amendment Governs

It is well established law that a governmental entity's collection of blood, breath, hair, or urine is considered a search under the Fourth Amendment, which prohibits unreasonable governmental searches and seizures. However, in the context of workplace drug testing, the United States Supreme Court has created two exceptions to the requirement that all searches be conducted pursuant to a warrant: if (i) the government can show a "special need" to conduct the drug test, or (ii) there is "reasonable suspicion" of drug use.

Special Needs Exception

The U.S. Supreme Court explained the meaning of the first exception, the "special needs test," in *Skinner v. Railway Labor Executives' Association*. A special need arises when the position is one that is safety-sensitive, high-security, or involves the detection of illegal drugs, and the government's interest in conducting the test outweighs the individual's interests in being free from such testing. For employees and applicants in safety and security sensitive positions, testing may be done randomly, across-the-board, or otherwise without individualized suspicion. A safety-sensitive position is one "fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences." Courts have upheld such suspicionless drug testing for positions, such as, for example, an elementary school custodian working with dangerous chemicals, a public works department crew leader who operated heavy groundskeeping equipment, and sanitation workers operating dump trucks. These have all been considered safety-sensitive. However, simply because a position requires the operation of an automobile or working with children does not make it subject to suspicionless testing.

Additionally, public employers may require random drug testing for positions that require a commercial driver's license ("CDL") or are otherwise regulated by the U.S. Department of Transportation. Suspicionless drug testing for employees who work in heavily regulated industries, such as water and wastewater utilities, has also been considered permissible because of the employees' diminished expectation of privacy.

Testing Job Applicants

Across-the-board drug testing in a pre-employment context is also unconstitutional, unless the position for which the candidate is applying meets the special needs exception. In *Chandler v. Miller*, the U.S. Supreme Court held unconstitutional a Georgia state law requiring candidates for certain elected offices to pass a urinalysis drug test. This law was not in response to any previous drug problems, and the officials covered under the law typically did not perform high-risk, safety-sensitive tasks. Rather, it was simply meant to be a statement that Georgia did not condone drug abuse, and a symbolic statement was found to be insufficient justification for suspicionless testing. Another case held that a city could not drug test applicants to a library page position, even though the job required working with children.

Reasonable Suspicion Drug Testing Exception

In the absence of meeting the special needs exception, a government employer may legally test its employees if it has a reasonable suspicion that an employee is engaging in drug abuse while on the job. The reasonable suspicion standard

is permissible because it is considered less intrusive than random testing since it is conducted as a result of the employee's own conduct. In one case, a court approved an agency's reasonable suspicion drug testing plan, which provided that reasonable suspicion may be based on "observable phenomena, such as direct observation of drug use or possession and/or physical symptoms of being under the influence of a drug." A gut feeling or rumor that an employee is using drugs, however, will not be enough.

Post-Accident Drug Testing

Post-accident drug testing is also considered less intrusive than random drug testing since it is based on a triggering event. The U.S. Supreme Court has upheld post-accident drug testing, noting that such testing is helpful in determining the cause of serious accidents, and empowers the government to undertake appropriate measures to safeguard the general public by pointing to drug use as a potential cause of a workplace accident or eliminating drug use as the cause. However, across-the-board testing after any work-related injury for all employees, without showing individualized suspicion, a special need, or a connection between the incident and drug impairment, is impermissible. The testing requirement should cover only those employees reasonably believed to have caused the accident.

Conclusion and Recommendations

Public employers have a higher duty to their public employees than private employers, since the Fourth Amendment applies to governmental, rather than private, actions. Public employers must weigh the government's interest against the employee's privacy interest, considering the job's duties, the need for testing, the nature of the work environment, and safety concerns. Employers that wish to drug test should include a drug-testing policy in their employment handbook that sets out the specific triggering events for post-accident and reasonable suspicion drug testing, and that lists the positions that are subject to random testing. Employers that currently conduct random drug testing should audit the subject positions to ensure they qualify as safety- or security-sensitive. In doing so, public employers will increase the chance that their policies will withstand legal scrutiny.

Sheila Gladstone is Chair of the Firm's Employment Law Practice Group and Ashley Thomas is an Associate in the Employment Law and Litigation Practice Groups. 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 Ashley Thomas at 512.322.5881 or athomas@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We have an employee who is a perpetual whiner. She gripes about every change, complains continuously about working conditions, and basically brings constant negativity to the office. We've told her to lighten up, to no avail. She's even poisoning our new employees with this attitude. Can we finally get rid of her?

Signed,
She's Harshing my Chill

Dear She's Harshing my Chill:

It depends on what she's griping about. When dealing with a whiner, you want to make sure she is not being disciplined or terminated for complaining about something she has a legal right to complain about. Otherwise, you can be exposed to a claim of unlawful retaliation. Sometimes, it is the last straw in an employee's string of complaints that is the protected one, and that is where employers get in trouble.

Governmental employers need to watch out for the Texas Whistleblowers Act, which can protect public employees from retaliation for reporting unlawful activity, and the First Amendment to the U.S. Constitution, which protects political speech and speech on matters of public concern. Other statutes protect employees who complain about safety violations, corruption, unpaid overtime, or workplace discrimination and harassment. Employees in the health professions have protection when raising concerns about patient care. The National Labor Relations Act broadly protects private sector, non-management employees from negative treatment for raising concerns about "terms and conditions of employment."

Protected workplace statements can be in the form of verbal statements at work, formal written complaints, or even posts on social media.

If you discipline an employee for workplace negativity, be sure to focus on the behavior (how and where the conduct occurs) rather than just the content. "Stop rolling your eyes and snorting at meetings" is safer than "stop assuming everything that happens to you is because of your gender." Check that you would have disciplined any employee for the behavior, not just the one you are tired of. And, ensure that the latest gripe is not protected under the many laws containing retaliation provisions. Retaliation is the most prevalent and fasting growing type of employment claim, and often successful plaintiffs in retaliation actions were thought of as "difficult" and "problem employees" prior to their termination.

"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

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 15-290, -- S.Ct. ----, 2016 WL 3041052 (May 31, 2016); Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs, 14-493, -- S. Ct. ----, 2016 WL 3128836 (June 6, 2016).

On May 31, 2016, the U.S. Supreme Court unanimously affirmed the Eighth Circuit Court of Appeals, holding that Jurisdictional Determinations ("JDs") issued by the Army Corps of Engineers (the "Corps") constitute a final agency action under the Administrative Procedure Act (the "Act") and are thus subject to immediate judicial review. The Corps argued against a JD constituting a final agency action and asserted that a JD is non-binding advice without legal consequence that does not reach the level of an action "by which rights or obligations have been determined, or from which legal consequences will flow." Moreover, the Corps predicted that such a ruling would make the agency hesitant to release JDs to the public. Landowners, on the other hand, argued that such action is a final agency action because an affirmative JD means the landowner must stop using the property or risk an enforcement action. The Court concluded that a JD is binding and carries legal consequences in certain cases and is, thus, a final agency action.

The ruling resolves a Circuit split between the Eighth and Fifth Circuits. The Court subsequently vacated the contrary Fifth Circuit opinion in *Kent Recycling Services, LLC v. U.S. Army Corps of Engineers*, and remanded the case back to the Fifth Circuit for reconsideration in light of Hawkes. For details on the facts and history of these cases at the circuit level, see the I*n the Courts* section of the October 2015 edition of *The Lone Star Current*.

Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699, 2700, 192 L. Ed. 2d 674 (2015).

In March 2016, Michigan, Texas, and eighteen other states filed a petition for a writ of certiorari to address a circuit split on whether a court may leave an unlawful agency rule in place when the agency promulgated that rule without any statutory authority. In *Michigan v. Environmental Protection Agency ("EPA")*, 135 S. Ct. 2699 (2015), the Supreme Court held that the Clean Air Act required EPA to consider economic factors before it could impose certain regulations on power plants, and remanded the challenge to the rules to the D.C. Circuit. The D.C. Circuit, however, did not vacate the regulations at issue even though EPA has not promulgated the statutorily required cost determinations. Petitioners requested review of the D.C. Circuit Court's opinion on remand, arguing the opinion was not consistent with the earlier Supreme Court decision. On June 13, 2016, the Court denied cert, effectively leaving the regulations in place. For details on the facts and history of this case, see the *In the Courts* section of the July 2015 edition of *The Lone Star Current*.

United States v. Sawyer, 15-5181, 2016 WL 3125986 (6th Cir. June 3, 2016).

On June 3, 2016, the Sixth Circuit U.S. Court of Appeals held that criminal restitution payments to reimburse the EPA for Superfund cleanup costs are permissible. The EPA spent more than $16 million cleaning up an asbestos-ridden industrial site after defendants allowed asbestos to enter the ambient air during cleanup. The Court of Appeals upheld the lower court's ruling that defendants were jointly and severally liable for $10.6 million in restitution damages to the EPA.

Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp., 15-20030, 2016 WL 3063302 (5th Cir. May 27, 2016).

On May 27, 2016, the United States Court of Appeals for the Fifth Circuit vacated the district court's decision in favor of ExxonMobil ("Exxon") and remanded the case back to the district court for assessment of penalties concerning air emission violations. The initial suit against Exxon was brought by Environment Texas and the Sierra Club ("plaintiffs") under the citizen suit provision of the Clean Air Act, regarding Exxon's emissions from its Baytown, Texas facilities. The Court of Appeals reviewed five counts brought against Exxon for its (1) unauthorized "upset emissions," (2) Maximum Allowable Emission Rate Table ("MAERT") emission violations, (3) Highly Reactive Volatile Organic Compounds ("HRVOC") emission violations, (4) visible emissions from flares, and (5) additional violations documented in deviation reports submitted to the TCEQ. The Court of Appeals held that four of the five causes were actionable, and remanded the case to the lower court with instructions to assess civil penalties for these violations.

A. I. Divestitures, Inc. v. Tex. Comm'n on Envtl. Quality, 03-15-00814-CV, 2016 WL 3136850 (Tex. App.—Austin June 2, 2016, no. pet. h.).

On June 2, 2016, the Third Court of Appeals in Austin dismissed a suit for declaratory relief under the Uniform Declaratory Judgments Act and the Administrative Procedure Act brought by A. I. Divestitures, Inc. ("A. I.") against the Texas Commission on Environmental Quality ("TCEQ") relating to a 2013 compliance history rating assigned by TCEQ. The rating is a reflection of a regulated entity's performance over the preceding five-year period. TCEQ assigned A.I. the "unsatisfactory performer" rating – the lowest rating – based on information gathered prior to an agreed final judgment between the parties, which expressly denied admission to any violation of law or statute. A. I. asserted that in assigning the compliance history rating in that manner, TCEQ improperly used the underlying enforcement action in violation of the court's order, and A.I. was consequently subjected to future negative environmental permit decisions, increased site investigations, increased risk of claims brought against the company, and poor public perception. On appeal by both parties, the Court of Appeals held that the subsequent compliance history ratings issued in 2014 and 2015 made the 2013 rating moot, and dismissed the case for lack of subject matter jurisdiction.

BCCA Appeal Group, Inc. v. City of Houston, 13-0768, 2016 WL 1719182 (Tex. Apr. 29, 2016).

On April 29, 2016, the Texas Supreme Court reversed a Texas Court of Appeals court opinion, holding that the City of Houston ("City") does not have the proper authority to enforce city air pollution ordinances or to collect fees from air emitters. Here, the City's air ordinance made it unlawful to operate a facility within the city limits without registering it with the City, and provided the City with an enforcement mechanism to punish air polluters that are in violation of TCEQ regulations- separate from TCEQ enforcement regulations. BCCA Appeal Group Inc. ("BCCA") brought suit against the City, arguing that the City's ordinance was preempted by the Texas Clean Air Act ("the Act"). Citing legislative intent for consistent enforcement statewide, the Supreme Court ultimately held that the Act does not allow for parallel city regulation and that the City ordinances were preempted by the Act.

Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, 15-0029, 2016 WL 1514542 (Tex. Apr. 15, 2016).

On April 15, 2016, the Texas Supreme Court issued an opinion in favor of Wheelabrator Air Pollution Control, which sought attorney's fees from the City Public Service Board of San Antonio ("CPS Energy"), a public utility operator. The claims arose from a contract dispute over failure to compensate for the installation of pollution controls on a coal-fired power plant owned by the Utility. CPS Energy argued they were shielded from suit due to governmental immunity. However, the Court distinguished between governmental and proprietary acts, particularly when assessing breach of contract claims brought against municipalities, and relied on recent precedent from the Court holding that proprietary acts by a municipality are not protected by governmental immunity. The Court ruled that a municipality's maintenance and operation of its own public utility is a proprietary function. Therefore, contract claims and claims for attorney's fees arising from that activity are not barred by governmental immunity.

Citizens Against the Landfill in Hempstead v. Texas Comm'n on Envtl. Quality, 03-14-00718-CV, 2016 WL 1566759 (Tex. App.—Austin Apr. 13, 2016, no. pet. h.).

On April 13, 2016, the Texas Third Court of Appeals in Austin held that the TCEQ acted within its authority when it granted a registration for a solid waste transfer station. The group Citizens Against the Landfill in Hempstead ("CALH") appealed the granting of the registration citing three issues: (i) TCEQ should have required a permit rather than a registration, (ii) the authorization by registration denied CALH due process right to hearing, and (iii) the TCEQ should have returned the application after it had issued two notices of deficiencies ("NODs"). The Appeals Court upheld the lower court's decision in favor of the TCEQ on all three issues.

Austin Bulldog v. Leffingwell, 03-13-00604-CV, 2016 WL 1407818 (Tex. App.—Austin Apr. 8, 2016, no. pet. h.).

On April 8, 2016, the Third Court of Appeals in Austin ruled that personal email addresses of Austin city officials acting in their professional capacity are not shielded from disclosure under the Public Information Act's ("PIA") exception for "an email address of a member of the public" when the personal email address is used to transact official government business. The suit was brought by The Austin Bulldog, an online news site, after several 2011 open records requests to the city yielded documents with redacted email addresses. The email addresses were redacted subject to the PIA's "member of the public" exception in Texas Government Code Section 552.137. The lower court granted summary judgment in favor of the City Officials and interpreted the exception to include city officials, as they are also members of the public. The Appeals Court, relying on the plain language of the statute, reversed, holding that the "member of the public" language did not apply to government personnel acting in an official capacity. As a result, their personal email addresses are not excepted from the PIA and must be disclosed.

Texas Comm'n on Envtl. Quality v. Exxon Mobil Corp., 03-14-00667-CV, 2016 WL 1406859 (Tex. App.—Austin Apr. 8, 2016, no. pet. h.).

On April 8, 2016, the Texas Third Court of Appeals in Austin upheld a lower court decision denying a Texas Commission on Environmental Quality ("TCEQ") plea to the jurisdiction in a suit brought by Exxon Mobil and Shell Oil. The case arose from an administrative order issued by the TCEQ related to the cleanup of the Voda Petroleum State Superfund Site. The Appeals Court examined the relationship of two types of administrative orders under the State Superfund program: Texas Health and Safety Code ("THSC") § 361.188 orders and § 361.272 orders. The Texas Attorney General, on behalf of the TCEQ, argued that the administrative order was issued under THSC § 361.188 and governed by the more lenient substantial-evidence standard. Despite the TCEQ's argument, the Court of Appeals held that the two orders are not mutually exclusive, allowing both to be issued

simultaneously and forcing the TCEQ to meet the higher burden of proof when seeking to enforce the administrative order.

Texas Comm'n on Envtl. Quality v. Guadalupe County Groundwater Conservation Dist., 04-15-00433-CV, 2016 WL 1371775 (Tex. App.—San Antonio Apr. 6, 2016, no. pet. h.).

On April 6, 2016, the Texas Fourth Court of Appeals in San Antonio held that a groundwater conservation district's claim against a landfill developer is not ripe until the TCEQ has issued a landfill permit. The Guadalupe County Groundwater Conservation District ("GCGD") filed suit against Post Oak Clean Green, Inc. ("Post Oak"), claiming that the proposed landfill would violate a district rule prohibiting the disposal of solid waste in certain areas. The TCEQ intervened and filed a motion to dismiss, arguing that the GCGD's requested relief was preempted by the Texas Solid Waste Disposal Act, Texas Health & Safety Code Chapter 361. Although the district court denied the motion to dismiss, the Court of Appeals reversed that decision, granting the TCEQ's plea to the jurisdiction on the basis that the lawsuit is not ripe until the TCEQ either grants or denies the Post Oak landfill permit application.

Guadalupe-Blanco River Auth. v. Tex. Att'y Gen., 03-14-00393-CV, 2015 WL 868871 (Tex. App.—Austin Feb. 26, 2015, pet. denied).

On May 27, 2016, the Texas Supreme Court denied the petition to review a suit brought by the Guadalupe-Blanco River Authority ("GBRA") against the San Antonio Water System ("SAWS") over a water permit application with the TCEQ to reuse surface- and groundwater-based return flows. GBRA filed suit under the Expedited Declaratory Judgment Act, Texas Government Code Chapter 1205, after GBRA began the process of applying for bond money to fund a new water storage project. GBRA contended that SAWS's reuse project would result in less water for the GBRA water storage project, thereby impeding GBRA's ability to secure bonds. Chapter 1205 allows bond issuers a quicker means of calming securities disputes by vesting in trial courts the ability to make declarations regarding the legality and validity of public bonds and the official acts of the issuer related to those bonds. The Court of Appeals ruled that it lacked subject matter jurisdiction under Chapter 1205 because the water dispute was too loosely linked to bond issuance for Chapter 1205 to apply. The Texas Supreme Court denied GBRA's petition for review, leaving in place a Third Court of Appeals decision which refused to expand the scope of Chapter 1205 to matters collateral to the legality and validity of the public bonds.

In the Courts *is prepared by Jeff Reed in the Firm's Air and Waste Practice Group, Ashleigh Acevedo in the Firm's Water Practice Group, and Hannah Wilchar in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Jeff at 512.322.5835 or jreed@lglawfirm.com, Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.*

AGENCY HIGHLIGHTS

United State Environmental Protection Agency

Golden-cheeked warbler to remain on the Endangered Species List, 81 Fed. Reg. 35698 (June 3, 2016). On June 3, 2016, the U.S. Fish and Wildlife Service ("FWS") denied a petition to remove the golden-cheeked warbler from the Federal List of Endangered and Threatened Wildlife ("the List"), and that it did not to warrant a status review. In a petition submitted June 30, 2015, the Texas Public Policy Foundation requested the golden-cheeked warbler be removed from the List due to recovery or error of information. The FWS found that the petition did not present substantial scientific or commercial information to suggest the golden-cheeked warbler should be delisted, and therefore, denied the petition.

EPA Announces 2017-2019 National Enforcement Initiatives. Every three years, the United States Environmental Protection Agency ("EPA") selects National Enforcement Initiatives to focus resources on environmental problems where significant non-compliance exists and federal enforcement can make a difference. The EPA has released its National Enforcement Initiatives for 2017-19, which include four repeat initiatives, one expanded initiative, and two new initiatives to take effect Oct. 1, 2016. Of the four repeat initiatives, one is aimed at keeping raw sewage and contaminated stormwater out of U.S. waters, and another is to prevent animal waste from contaminating surface and groundwater. The two new National Enforcement Initiatives are meant to keep industrial

pollutants out of the nation's waters and to reduce the risk of accidental releases at industrial chemical facilities.

EPA Finds That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units. In response to the U.S. Supreme Court's ruling in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the United States Environmental Protection Agency ("EPA") has weighed the cost of regulating hazardous air pollutants ("HAP") emissions from coal- and oil-fired electric utility steam generating units ("EGUs"), and concluded that the regulation is appropriate and necessary. EPA concluded that its prior determination that EGUs are properly included in section 112(c) of the Clean Air Act remains unchanged.

EPA - Proposed rule changes to NPDES permitting, 80 Fed. Reg. 31344 (May 18, 2016). On May 18, 2016, the EPA proposed revisions to the National Pollutant Discharge Elimination System ("NPDES") permitting process to "eliminate regulatory and application form inconsistencies; improve permit documentation, transparency and oversight; clarify existing regulations; and remove outdated provisions." The most significant proposed change would allow the EPA to designate administratively continued permits – those permits that have expired but for which the applicant timely submitted its renewal application – as proposed permits in an effort to prevent indefinitely non-renewed permits. Under the proposal, the EPA could designate a permit as a proposed permit if it has been administratively continued beyond either two or five years from the date the underlying permit expired. This would allow the EPA to assume responsibility over the review and processing of the permit as a federal EPA permit unless the state initiated review under the normal processes within the proposed 180-day notice period. The proposed rule would specifically include the state antidegradation requirement as an element of state water quality standards when deriving water quality-based effluent limitations in 40 CFR 122.44(d). Similarly, the proposed rule would also incorporate into 40 CFR § 122.44(d) the anti-backsliding language added in the 1989 revisions of the Clean Water Act into the NPDES rules. Additionally, the proposed rule would revise 40 CFR § 122.44(d) to specify that dilution allowances as well as decisions of assimilative capacity must comply with applicable state water quality standards and be supported by data or analyses quantifying or assessing pollutant presence in the receiving water. The deadline for comments on the proposed changes is August 2, 2016.

EPA Proposes to Remove NESHAP Exemption for Site Remediation Activities. On May 13, 2016, the EPA proposed a rule that would remove the Site Remediation exemption from the National Emission Standards for Hazardous Air Pollutants ("NESHAPs"). Currently, certain site remediation activities performed under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA") are exempted from NESHAPs, but the new proposed rule would end the exemption. Comments concerning the proposed changes were due June 27, 2016, and the EPA will be evaluating those comments thereafter.

EPA to Remove Affirmative Defense Air Permitting Language. The EPA has recently proposed a rule that would remove the affirmative defense for industrial facilities that violate emissions standards during emergencies. The proposed rule would amend 40 C.F.R. Parts 70 and 71 involving federal Title V operating permits, and would require states that include the affirmative defense in their state implementation plans ("SIPs") to amend their SIPs to remove this defense. Public comments must be received by the EPA on or before August 15, 2016.

Texas Commission on Environmental Quality

GCD "affected person" rulemaking. The TCEQ adopted non-substantive, conforming amendments to certain provisions of 30 Texas Administrative Code, Chapter 293 in accordance with statutory amendments to Chapter 36 of the Texas Water Code made during the 84th Texas Legislative Session. Primarily, the rules clarify who may file petitions to review the activities of groundwater conservation districts. Specifically, 30 Texas Administrative Code §293.23(a), which defines "affected person", is amended to align with the definition of "affected person" under Texas Water Code § 36.3011.

TCEQ Approves New Chapter 326 Regulating Medical Waste. The TCEQ approved rules separating the regulations covering medical waste from those of municipal solid waste. The rulemaking repealed portions of 30 Tex. Admin. Code, Chapters 330 and 335, related to medical waste, and adopted a new chapter 326, establishing regulations specifically for medical waste.

Public Utility Commission

OPUC's Initial Comments on complaints, Project No. 45116. The Office of the Public Utility Council ("OPUC") has recommended changing the language of § 22.242 of the Texas Water Code to clarify what entities may be the subject of complaints to the Public Utilities Commission (the "Commission" or "PUC"). The previous language limited complaints to an "entity regulated by" the Commission, but the proposed language would include a "person under the jurisdiction of" the Commission. The new language is meant to clarify which entities complaints may be filed against. Additionally, it aims to standardize the language of the statute to more consistently refer to those who may file complaints. OPUC also recommended the PUC make the list of public utilities not under exclusive original jurisdiction more prominent on the PUC website, as the current location is too hard to find.

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(l)-(m), and 39.915*. Hunt Consolidated's plan to take over Oncor Electric Delivery Company LLC ("Oncor") has come to a standstill. The Public

Utility Commission ("PUC") approved Hunt's plan in March but added some major stipulations that ultimately killed the deal. Hunt's plan called for turning Oncor into a real estate investment trust ("REIT"), which would have allowed Oncor to save hundreds of millions of dollars in federal income taxes a year. During the PUC approval hearing, the Oncor Steering Committee, PUC Staff and other intervenors argued that Oncor should share its tax savings with customers. The PUC ultimately approved the deal with the condition that a portion of the tax savings be returned to ratepayers, making the deal less attractive to Hunt's investors. After its investors refused to close on the $18 billion deal with the PUC stipulations, Hunt first filed a request for a rehearing but then eventually withdrew its proposal. According to Hunt's official statement, "it is obvious now that, as written, the transaction will not close, so we believe that it is best to clean the decks and start over. Hunt is working to develop a model that can work for all parties involved, including EFH, investors, Oncor customers and management. We continue to pursue a new transaction that will allow Oncor to remain under the management of Texans for Texans." Oncor's fate is now unclear.

Electric Utilities' Distribution Cost Recovery Factor Cases. Utilities made their annual Distribution Cost Recovery Factor ("DCRF") filings with the PUC and cities in their service areas in April. The Public Utility Regulatory Act ("PURA") and PUC rules permit an electric utility to file an annual, limited-issue rate proceeding to adjust its rates to reflect increased distribution investment since its last full base-rate case. The resulting charge, called a DCRF, is charged to every electric customer in the utility's service territory. Municipalities that participate in a DCRF proceeding are entitled to have their reasonable rate case expenses reimbursed by the utility. CenterPoint Energy Houston Electric, LLC ("CenterPoint") requested an increase in distribution revenues of $49.4 million for the period of September 1, 2016 to August 31, 2017, and increasing to $60.6 million thereafter. AEP Texas Central Company ("AEP TCC") requested a $54.0 million increase and AEP Texas North Company ("AEP TNC") requested an increase of $16.4 million. City groups intervened in these proceedings, filed testimony, and have now reached settlement agreements. Under the proposed settlement in the CenterPoint case, CenterPoint would reduce its request by $4.4 million for 2016. The Company would then not increase its DCRF revenue requirement in September 2017 from $49 million without filing an additional DCRF application. Meanwhile, AEP TNC agreed to reduce its request by $1 million, and AEP TCC agreed to reduce its request by $3.5 million. The settlement agreements now await Commission approval.

Electric Utilities File to Adjust Energy Efficiency Cost Recovery Factors. Pursuant to the PUC's energy efficiency rules, utilities made their annual filings at the end of May 2016 to adjust their Energy Efficiency Cost Recovery Factors ("EECRF") to be charged in 2017 to recover energy efficiency program costs and performance bonuses. The filings also true-up any over- or under-collection of energy efficiency costs resulting from the use of the EECRF pursuant to PURA § 39.905 and 16 Tex. Admin. Code § 25.181. During 2017, Oncor seeks to recover approximately $54.9 million; CenterPoint seeks approximately $45.9 million; TNMP seeks approximately $6.07 million; AEP TNC seeks approximately $1.78 million; and AEP TCC seeks approximately $9.05 million. City groups are participating in these proceedings to ensure that the amounts requested by the utilities comply with PURA and PUC rules. Cities will review the utilities' demand and energy goals, the program incentive costs, the evaluation, management, and verification expenses, and the performance bonuses, in addition to other issues. Each of the cases will proceed along an accelerated schedule to have a final PUC order late in the summer.

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. ("BEPC") and Denton County Electric Cooperative, Inc. d/b/a CoServ Electric ("CoServ") jointly filed an appeal in September 2015 from certain zoning and land use ordinances of the City of The Colony, Texas and are seeking a declaratory order that would overturn the City's zoning ordinances and land use regulations as applied to BEPC and CoServ. The joint applicants argue that The Colony is wrongfully prohibiting them via The Colony's zoning ordinances from building a substation on property they have condemned in the City. On January 29, 2016, BEPC and CoServ filed a Joint Motion For Partial Summary Decision On Jurisdiction, which PUC Staff supported and The Colony opposed. On March 11, 2016, the State Office of Administrative Hearings's ("SOAH") Administrative Law Judge granted Brazos and CoServ's motion, ruling that the PUC has appellate jurisdiction over zoning ordinances that affect the siting of an electrical substation within the corporate limits of a city. At its June 9, 2016 Open Meeting, the Commissioners of the PUC requested additional briefing, due by noon, June 24, 2016, from interested parties as to the PUC's ability to exercise jurisdiction in the dispute.

Docket No. 45570, *Application Of Monarch Utilities I, L.P. For Authority To Change Rates for Water and Sewer Service*. Monarch Utilities I, L.P., has filed a Class A Water and Wastewater Rate Increase Application – the first of its kind since the PUC gained jurisdiction over water and wastewater ratemaking proceedings in September, 2014. The application was referred to SOAH on March 3, 2016, for a contested case hearing. The matter is currently under abatement, with a hearing on the merits yet to be scheduled.

Docket No. 45702, *Application of the City of Cibolo to*….. The City of Cibolo has filed an application for single sewer certification under Texas Water Code § 13.255, which is currently in review by the PUC. At the PUC's June 29, 2016, open meeting, the Commissioners of the PUC evaluated whether it had jurisdiction to consider federal laws in its processing of this application, ultimately finding that it did not have such authority and that the PUC's review should be limited to applicable state laws.

Railroad Commission of Texas

Atmos Mid-Tex RRM Settles. The Atmos Cities Steering Committee ("ACSC") reached a settlement with Atmos Energy Corporation, Mid-Tex Division ("Atmos Mid-Tex") resolving all issues related to the company's 2016 Rate Review Mechanism ("RRM") filing. On March 1, Atmos Mid-Tex made a filing at the Railroad Commission of Texas ("RRC") requesting $35.4 million in additional revenue on a system-wide basis. This was the company's fourth RRM filing under the renewed RRM Tariff. ACSC and Atmos Mid-Tex were able to reach an agreement to reduce the company's request by $5.5 million. This results in a rate increase of $29.9 million on a system-wide basis, or $21.9 million for Mid-Tex Cities, exclusive of the City of Dallas, which has a separate rate review process. The monthly bill impact for the typical residential customer consuming 46.8 ccf will be an increase of $1.26, or about 2.43%. The new rates will become effective July 1, 2016.

Railroad Commissioner Party Candidates. The party nominees for the open seat on the RRC have been announced. Former state representative Wayne Christian won the Republican nomination over real estate developer Gary Gates with 51% of the vote. Grady Yarbrough, a former educator, defeated Travis County Democratic precinct chairman Cody Garrett for the Democratic nomination. The candidates now head to the November 8th general election.

Sunset Update. The Sunset Advisory Commission published its staff report on the RRC, which is currently undergoing Sunset review. The report includes recommendations for changes to the agency based on the RRC's self-evaluation report and interviews with stakeholders. The Sunset Advisory Commission is a 12-member legislative panel that reviews state agencies and recommends changes for the Legislature to vote on during the legislative session. The Sunset report found that the RRC's current name does not reflect its responsibilities, misleads the public, and impedes transparency. The report further found that contested hearings and gas utility oversight are not core functions of the RRC, and therefore, should be transferred to other agencies to promote efficiency, transparency and fairness. Sunset staff also criticized the agency's oil and natural gas enforcement program and said the agency struggles to maintain and report basic data pertaining to that program. The report marks an initial step in a months-long process that will include Sunset Advisory Commission hearings sometime after June and the filing of a RRC reauthorization bill during the 2017 legislative session.

Texas Ethics Commission

HB 1295 Clarification Rule Changes. During the 2015 Texas legislative session, the Legislature passed House Bill 1295 ("HB 1295"), effective September 1, 2015, which requires most contracts with Texas government entities entered into after January 1, 2016, to include a certificate of "interested parties" listing certain parties with a financial stake in the contract. The disclosure requirement applies to contracts that exceed $1 million in value or require a vote from a governing body. Since HB 1295 went into effect, questions have arisen regarding the practical scope of the parties and the kind of information that is intended to be disclosed. In an effort to clarify who and what information is affected by the new law, the Texas Ethics Commission adopted new rules and a new reporting form at its June 1, 2016 meeting that became effective on June 22, 2016. The rules clarify, among other things, that for purposes of determining when a contract is entered into, a "contract" with a governmental entity is formed at the earlier of the time it is voted on by the governing body or at the time it binds the governmental entity. Additionally, a "controlling interest" does not include an officer of a publicly held business or its wholly owned subsidiaries. Finally, the rules specify that the value of the contract is based on the amount of consideration received by the business entity from the governmental entity under the contract.

Agency Highlights *is prepared by Jeff Reed in the Firm's Air and Waste Practice Group, Ashleigh Acevedo in the Firm's Water Practice Group, and Hannah Wilchar in the Firm's Energy and Utility Practice Group. If you would like any additional information or have questions related to this article or other matters, please contact Jeff at 512.322.5835 or jreed@lglawfirm.com, Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.*

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!

Lloyd Gosselink
ATTORNEYS AT LAW

816 Congress Avenue
Suite 1900
Austin, Texas 78701