Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 22, NO. 1 JANUARY 2017

THE LONE STAR CURRENT

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

LEGISLATORS HEAD TO AUSTIN TO BEGIN 85TH TEXAS LEGISLATURE

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

The 85th Texas Legislature convened at noon on Tuesday January 10th at the State Capitol in Austin, kicking off what will likely be an extremely busy Regular Session. Based on the amount of activity that took place in the legislative interim period and the legislative priorities already released by the legislative leadership, things will get off to a fast start at the State Capitol in 2017. There is more continuity among the membership of the Legislature and the leaders in Texas government, as compared to the beginning of the last Regular Session in 2015 when nearly every position of leadership was held by a new person.

The leaders of the Texas Legislature – Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Speaker Joe Straus – have all given indications of their target policy items for the upcoming session. Lt. Governor Patrick has already released descriptions of 25 bills (with another five bills to be announced before the Regular Session begins) aimed at addressing his legislative priorities. Among those priorities are reforming property and franchise tax reform, ending sanctuary cities, and addressing tuition and school finance. Governor Abbott's previous priority of ethics reform will likely reappear this session, and the Governor would also like the Legislature to address taxation relief and public school finance. Speaker Straus recently highlighted his goals related to public and higher education, child protection, mental health, and cyber-security. In particular, the Speaker has mentioned his specific focus on repairing the state school finance system as well as increasing funding and enacting management reforms to Texas' Child Protective Services Program.

With the rapidly expanding population of Texas, natural resources and environmental issues impacted by such growth continue to receive significant attention from the Legislature during the Regular Session. Building on the momentum gained during the 2015 session, water policy, planning, and related issues will remain a high priority for Texas legislators this coming session. During the legislative interim period leading up to the 84th Regular Session, the Texas Water Conservation Association ("TWCA") formed a subcommittee aimed at developing consensus-based legislation to tackle the groundwater issues facing our state. That committee was active again this past interim, and the TWCA Board of Directors recently approved eleven pieces of legislation for the upcoming 85th Regular Session. Those draft bills are as follows:

- Advisory Committee Bill – The proposed bill adds permissive authority for Groundwater Management Areas (GMAs) to add voting or nonvoting members to the GMA.

- Proposed Export Amendments – The proposed bill amends export permit provisions by altering and clarifying the factors to be considered by a GCD when issuing or amending permits.

- Export Extension Provision – The proposed bill provides for automatic extension of an expired export permit or condition to conform to the term of the related operating permit.

- Application Administrative Completeness – The proposed bill clarifies the list of items a GCD can require for a permit application to what is already listed in statute or in a GCD's rules.

Legislature continued on 4

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.

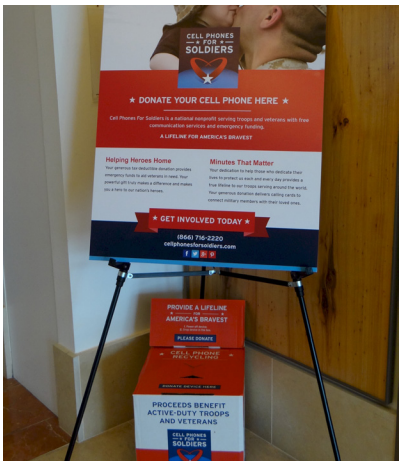
The Lone Star Current reviews items of interest in the areas of environmental, utility, municipal, construction, and employment law. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

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

Baby, it's cold outside. Every child should have a warm coat to wear when it gets cold, so our office was happy to collect and donate coats to this cause as well as volunteering to sort thousands of coats for children in Central Texas.

Spear-headed by our secretary, Sharon Barney, the Firm once again sponsored a collection drive for *Cell Phones for Soldiers*. The nonprofit organization was founded by Robbie and Brittany Bergquist of Norwell, Massachusetts at the ages of 12 and 13. *Cell Phones for Soldiers* is dedicated to providing cost-free communication services to active duty military members and veterans.



Lloyd Gosselink recently played Santa for two Austin-area families. Our team generously donated, wrapped, and delivered gifts as part of Operation Blue Santa here in Central Texas. Austin Police Operation Blue Santa is a 501(c)(3) – non-profit, community based corporation, organized by the Austin Police Department, with support from the Austin Fire Department, Austin Energy, Austin Water Utilities and the Texas National Guard.

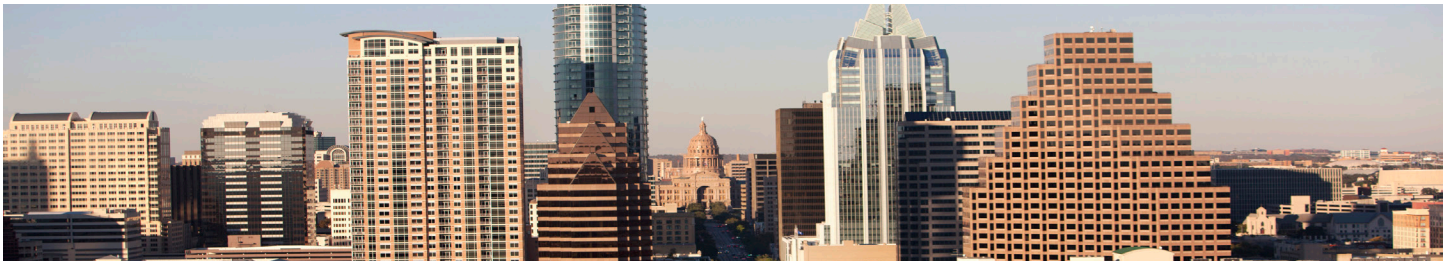
Linda Quintanilla has joined the Firm's Water Practice Group as a paralegal. Linda brings years of exerience in the regulartory and environmental law fields. She received her certificate in Paralegal Studies from Southern Careers Institute in Corpus Christi.

Sheila Gladstone will discuss "Social Media" at the Texas Municipal Human Resources Association Civil Service Conference on February 2 in San Marcos.

David Klein will present "Water-Rate Making for Land Development" at the Changing Face of Water Rights Conference on February 23 in San Antonio.

Troupe Brewer will provide a "Legislative Update CLE" for the Austin Bar Association - Environmental Law Section on March 2 in Austin.

Sheila Gladstone will present a "Management Update" for the Texas Probation Association Annual Conference on April 4 in Austin.



A Texas court would likely construe Texas Water Code § 49.052(a)(2) to disqualify an employee of the county attorney from serving as a member of the board of a water district in the same county when the county attorney also provides professional legal services to the water district. Tex. Att'y Gen. Op. KP-0110 (2016).

The Attorney General ("AG") was asked whether Texas Water Code ("TWC") § 49.052 disqualified an employee of the county attorney's office from serving as a member of the board of a water control and improvement district ("WCID") when the person serving as county attorney also provided professional legal services to the WCID in his private practice. The employee at issue served as an investigator in the county attorney's office and was employed in that role prior to the current county attorney taking office. The individual serving as county attorney also maintained a private practice, and the employee in question was not employed at the attorney's private practice.

The AG's analysis begins with a discussion of the general applicability of TWC Chapter 49 to all general and special law water districts, including a WCID. Section 49.052 lists the specific circumstances under which an individual may be disqualified from service on the board of directors of any such general or special law water district. The AG noted that while § 42.052(f) contains specified exceptions to the application of § 42.052 as a whole, a WCID was not among those types of districts excepted from the provisions of § 42.052. In the present instance, the AG pointed to the provision in § 42.052(a)(2) that mandates disqualification of an individual from service on the board of directors of a water district if the individual "is an employee of any developer of property in the district or *any* director, manager, engineers, *attorney*, or other person *providing professional services to the district*."

The AG focused its analysis on the use of the word "any" in § 42.052(a)(2) quoted above. The AG indicated that the term "any" is to be given the full force of the term "every." *Beck v. Craven*, 360 S.W.2d 827, 830-31 (Tex. Civ. App.-Houston [1st Dist.] 1962, no writ). The AG continued, stating that, on its face, the statute does not make any distinction between an attorney providing legal services to a district and also serving a dual role in another office/position that does not provide any such professional services to a district. Absent such a distinction, the AG concluded that a Texas court would likely decide that § 42.052(a)(2) would disqualify the employee at issue from service on the board of the WCID, even though the employee was employed by the county attorney in a role that did not include provision of legal services to the WCID.

A Texas court will consider deferring to an agency's interpretation of a statute only when the agency adopts the construction as a formal rule or opinion after formal proceedings. Even when the agency has formally adopted a construction, a Texas court will defer to that construction only upon finding that ambiguity exists in the statute at issue and that the agency's construction is reasonable and consistent with the statute's plain language. Tex. Att'y Gen. Op. KP-0115 (2016).

The AG was asked under what circumstances a Texas court would defer to a Texas state agency's interpretation of a statute, particularly in the context of an interpretation via a formal rulemaking procedure versus an interpretation in the issuance of an "agency bulletin." The AG first notes that deferral to state agency statutory interpretation in Texas has its roots in the context of federal jurisprudence, and so the analysis begins in the federal context. The AG states that the common principles of agency deference lie in federal caselaw, particularly the Supreme Court case *Chevron U.S.A., Inc. v. Nat. Res. Def Council, Inc.*, 467 U.S. 837, 843 (1984). This doctrine, known as *Chevron* deference, primarily involves a two-part analysis: (1) whether or not the statute at issue is "ambiguous," and (2) whether or not the agency's interpretation of that ambiguous statute is "reasonable."

While this two-step analysis is the underlying analysis/fundamental factors for consideration, the Supreme Court has added a few other preliminary considerations since the *Chevron* decision in 1984. For example, the Court will now ask initially whether or not the question of interpretation involves deep economic and political significance, such that Congress would not have deferred the matter to an agency. Secondly, the Court will determine whether or not the agency interpretation was the result of a "formal procedure" and, if not, the Court will apply a balancing test of other factors to determine whether or not to treat the interpretation as formal for deferential purposes. If a formal procedure was used, or if the Court decides to treat the interpretation as formal, the Court will begin the traditional *Chevron* analysis.

In Texas, the Texas Supreme Court conducts an analysis that is similar to but somewhat different than the federal

analysis discussed above. In 2011, the Texas Supreme Court consolidated and solidified the deferential analysis conducted over the previous fifty years in its decision in *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011). The first and final steps in the Texas process – whether or not there was a formal process and whether or not the agency interpretation is "reasonable" – clearly parallels the federal process. However, the analysis in between these first and final steps under *Texas Citizens* is slightly different. Particularly, a Texas court will also consider how long-standing the agency interpretation is, whether the statute interpreted is within the agency's area of expertise, and whether the agency interpretation conflicts with the plain language of the statute.

The AG reviewed each of these considerations further in depth, with the formality of the process involved being the most pertinent to the question at issue. The AG concluded that agency deference is given when an interpretation results from formal opinions adopted after formal proceedings and not developed via isolated comments during a hearing or in agency-issued opinions (i.e., a bulletin). Therefore, a Texas state court would give significantly less deference to an agency bulletin as compared to a formal rule on the same issue, and given the Texas Supreme Court's comments in *Texas Citizens* and others, it is possible that a Texas court may not give <u>any</u> deference to an informal agency bulletin.

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 any questions related to these or other matters, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com.*

Legislature continued from 1

- DFC Adoption Process – The proposed bill would require that the next set of desired future conditions (DFCs) be adopted by each GCD within the GMA by January 5, 2022 (deadline for next State Water Plan), and every 5 years thereafter. The bill also includes other cleanup provisions related to the DFC adoption process.

- Modeled Sustainable Definition – The proposed bill adds to Chapter 36 of the Texas Water Code a definition of "modeled sustainable groundwater pumping" to mean the maximum amount of groundwater that the executive administrator determines may be produced from an aquifer on an annual basis in perpetuity using the best available science.

- State Auditor Review – The proposed bill would limit state auditor powers in chapter 36 of the Water Code to a financial audit only (the only one of seven TWCA-approved bills that did not pass during 84R).

In addition to the Groundwater Stakeholder Subcommittee, the TWCA formed a similar legislative committee to discuss and gain consensus on surface water issues. This committee was able to gain consensus on three bills: one bill that pertains to a "clean-up" of Chapter 11 of the Texas Water Code; a second bill that expands the reforms to the contested case hearing process brought by SB 709 last session to other environmental permits; and a third bill that would allow TCEQ to consider groundwater as a substitute for state water or an alternative source of supply and would require notice to local GCDs in such an instance. This last bill was developed in coordination with the Groundwater Legislative Subcommittee.

Electric and natural gas utility issues will also be a high priority this session. As in the past, city coalitions including the Steering Committee of Cities Served by Oncor, the Steering Committee of Cities Served by Atmos, and the Texas Coalition for Affordable Power will play an important role in educating legislators on utility issues, advocating for positive utility legislation and defending against harmful bills. In particular, city coalitions will oppose audit-based ratemaking proposals, or other piecemeal ratemaking efforts, affecting electric and natural gas utilities, as well as bills limiting cities' original jurisdiction over these matters. Protecting the ability of cities and the Public Utility Commission to fulfill their regulatory functions remains a top issue for cities. Cities will also oppose any legislation that seeks to diminish franchise fee payments for electric and natural gas utilities' use of municipal rights-of-way or bills that would infringe on a city's right to require certain utility relocations. In addition, city coalitions will support legislation that would facilitate municipal development of hike and bike trails in electric transmission line rights-of-way. Such a bill was adopted during the 2013 legislative session but was limited to only Harris County. As utility bills continue to be filed in anticipation of the January 10th Session commencement, cities will monitor these and any other utility issues that arise.

The legislative action at the Texas Legislature will soon heat up as legislators try to address the diverse needs of the state. Lloyd Gosselink stands ready to protect the interests of its clients in Austin at the State Capitol.

Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups, Troupe Brewer is an Associate in the Firm's Water, Litigation, and Districts Practice Groups, Thomas Brocato is a Principal in the Firm's Energy and Utility Practice Group, and Hannah Wilchar is an Associate in the Firm's Energy and Utility Practice Group. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com, Troupe at 512.322.5858 or tbrewer@lglawfirm.com, Thomas at 512.322.5857 or tbrocato@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.

WAVE OF ELECTRIC AND NATURAL GAS UTILITY RATE CASES EXPECTED IN 2017

by Jamie L. Mauldin and Cody Faulk

The Public Utility Commission of Texas ("PUC") and Texas Railroad Commission ("RRC") can expect a very busy 2017. These agencies are expected to oversee an unusually large docket of electric and gas base rate proceedings in the upcoming year. The unprecedented number of proceedings will not only test the limits of these regulatory agencies and their staff, but will establish ongoing ratemaking precedent and could have large-scale impacts on municipalities throughout the state. As these agencies and interested parties participate in the ongoing rate cases and prepare for the onslaught of upcoming filings, it is helpful for cities to have an understanding of what these cases may mean for municipalities who are regulatory authorities with rate setting power.

Ongoing Rate Cases

On November 16, 2016, CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas ("CenterPoint") filed with the RRC a statement of intent to increase gas utility rates within its Houston and Texas Coast Divisions. CenterPoint also seeks to consolidate these two divisions into a single Texas Gulf Division. In the filing, CenterPoint asserts that it is entitled to a $31.0 million increase in its revenue requirement in the cities contained in these service areas, or a 10.7% increase over current adjusted revenues, excluding gas costs.

Several city groups have intervened in this proceeding, including the Gulf Coast Coalition of Cities, City of Houston, and Texas Coast Utilities Coalition. Parties have begun conducting discovery and the city groups will file Intervenor Testimony on February 7, 2017.

On December 16, 2016, Southwestern Electric Power Company ("SWEPCO") filed a Petition and Statement of Intent with the PUC seeking to change its base rates to all customers residing in its service area. SWEPCO's service area includes areas of East Texas and the Panhandle. In the filing, SWEPCO asserts that it is entitled to a $69.0 million increase in base revenues, representing a rate increase of about 12.7%.

This rate case is just ramping up, but the Texas Office of Public Utility Counsel and other stakeholders have intervened and have begun the discovery process in advance of the Administrative Law Judge issuing a procedural schedule.

Rate Cases Expected To Be Filed

Sharyland Utilities, L.P. ("Sharyland"), which currently serves approximately 54,000 customers in 29 counties throughout Texas, with transmission facilities located in northwest and south Texas, is expected to file a base rate proceeding in January of 2017. Its last base rate case was filed in May of 2013 and concluded through settlement in January of 2014.

Due to reported over-earning, Electric Transmission Texas ("ETT"), which is a joint venture between subsidiaries of American Electric Power ("AEP") and Berkshire Hathaway Energy Company, was ordered by the PUC to file a base rate proceeding in February. ETT maintains transmission facilities in the northwestern part of Texas, including parts of the DFW Metroplex. ETT proposed that stakeholders engage in discussions to resolve the overearning by agreement instead of filing the February rate case. The stakeholders reached an agreement with ETT to reduce its revenue requirement by over $46 million. ETT filed a letter requesting PUC approval to implement the rate reduction agreement and suspend the requirement to file a rate case. The PUC granted its approval of the reduction and suspension at its January 12, 2017 Open Meeting. ETT's first and only base rate case was filed in January of 2007 and concluded in December of 2007.

Oncor Electric Delivery Company, LLC ("Oncor") is expected to file a base rate proceeding in March of 2017. Currently, Oncor is undergoing a change in ownership after its owner, Energy Future Holdings, went bankrupt last year. NextEra Energy has filed an application with the PUC to purchase Oncor. This Sale/Transfer/Merger ("STM") application is currently making its way through the PUC's regulatory approval process under Docket No. 46238. It is understood that, upon the PUC's approval of the transaction, Oncor will either voluntarily come in for a base rate proceeding or will be required to do so by the PUC. The STM application is scheduled to be heard in late February 2017, with an anticipated approval by the PUC in May of 2017. Prior to the STM filing, Oncor's last base rate case was filed in January of 2011, and was settled in August of that year.

Two additional electric utilities were ordered to file full base rate cases, but both have seemingly reached settlement. On October 28, 2016, the PUC ordered Cross Texas Transmission ("Cross Texas"), along with Lone Star Transmission ("Lone Star"), to file a full base rate proceeding due to a perceived over-recovery of costs. On December 6, 2016, Cross Texas filed correspondence with the PUC advising that an agreement in principle had been

reached between the utility, PUC Staff, and other interested parties for a reduction to its baseline revenue requirement from its currently authorized level of $70.4 million to $63.9 million. If this proposal is acceptable to the PUC, Cross Texas will avoid the need to file a base rate proceeding.

Additionally, pursuant to the October 28, 2016 PUC Order, Lone Star Transmission reached an agreement with stakeholders that resolves all issues and addresses the PUC Staff's concerns regarding Lone Star's 2015 earnings. Under this agreement, Lone Star will file with the Commission an application seeking to implement a decrease in its transmission cost of service and wholesale transmission rate in the amount of $6 million. This settlement allows Lone Star to avoid filing a full rate base proceeding.

In addition to the probable electric transmission rate case filings, several major gas base rate cases are generally expected to be filed in 2017. Atmos Pipeline is expected to file a rate proceeding with the RRC in January 2017. In March, it is anticipated that Atmos Energy Corp.'s Mid-Texas Division will be filing a base rate proceeding. Texas Gas Service Rio Grande Valley is the last major gas utility expected to file a rate proceeding, which may occur sometime in May.

Additionally, pursuant to the PUC's energy efficiency rules, electric utilities will make their annual filings at the end of May 2017 to adjust their Energy Efficiency Cost Recovery Factors ("EECRF") to be charged in 2018, 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.

What Cities Can Expect

With each of these rate proceedings, municipalities can expect higher rates for both electric and gas service. When utilities file base rate cases, they most often file to raise rates in order to cover increasing costs required to run the utility. Additionally, gas utilities, including Texas Gas Service Company ("TGS") and CenterPoint Gas, have consolidated service areas, which also affects rates for those service areas. Both TGS and CenterPoint claim these consolidations facilitate administrative, regulatory, and operational efficiencies. However, each application needs to be analyzed to determine whether one service area will ultimately subsidize another when combined, and whether ratepayers of the consolidated service area will share the benefits of the consolidation. Ultimately, whether to approve the proposed consolidation is up to the RRC, which seems to be in favor of this recent trend of combining service areas.

City groups who intervene in rate cases analyze the utility's filings and make specific, targeted recommendations to ensure reliable service and reasonable rates. Recently, city groups successfully negotiated a significantly lower increase with TGS in its Central Texas Service Area rate case than it originally requested. In fact, cities' participation regularly reduces the authorized increase from the original utility request. In sum, all ratepayers benefit from municipal participation in rate cases, as these city groups are often the most powerful consumer advocates and affect the most change in overall authorized rate increases.

Conclusion

The year 2017 will be an eventful and contentious year for the PUC and RRC, as they oversee an atypically large docket of electric and gas base rate proceedings. These proceedings will impact municipalities acting as regulatory authorities, as well as ratepayer citizens. Municipalities must remain vigilant of these proceedings for not only how the proceedings impact them directly, but how ratemaking precedent may be established that could have far-reaching impacts on future rate cases. If you think your city will be affected by one of these rate cases, please contact us for more information.

Jamie Mauldin and Cody Faulk are Associates in the Firm's Energy and Utility Practice Group, and their practice focuses on a wide range of utility regulatory and ratemaking matters. If you would like any additional information or have questions related to this article or other matters, please contact Jamie at 512.322.5890 or jmauldin@lglawfirm.com, or Cody at 512.322.5817 or cfaulk@lglawfirm.com.

THE RIGHT TEAM: ATTACKING WATER SUPPLY CHALLENGES EFFECTIVELY[1]

by Martin C. Rochelle and Nathan E. Vassar

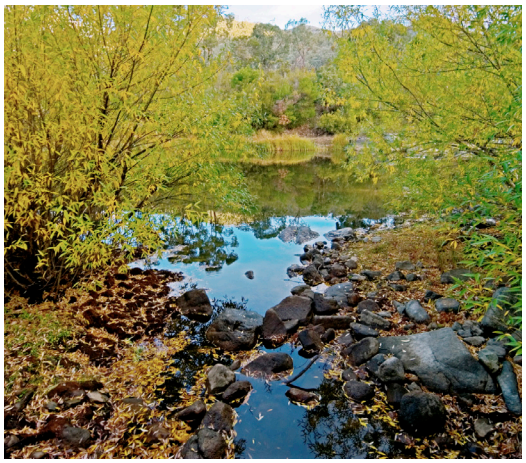
Countless endeavors focus on the importance of building the right team and doing so in recognition of the team members' combined strengths. And key to building a team is determining how members can mesh their collective talents together to help achieve a clearly identified team goal. In the arena of water supply planning, choosing the right team is every bit as important. Certain challenges demand the right combination of talent and expertise, as water suppliers face regulatory hurdles, political pressures, permitting obligations, protestants seeking to derail a project, all sometimes accompanied by daunting technical issues. In the first year of our water supply planning articles, we highlighted the value of a water audit for identifying both water supply challenges and opportunities. We then focused upon exempt interbasin transfers, the Four Corners doctrine, and reuse planning as tools that can be used to extend water supplies without the need to develop a new water supply. In this article, we outline the importance of developing a team to address known water supply challenges, the means to develop such a team, and the benefits of this kind of collaborative, team approach. As 2017

progresses, we will continue to examine strategies that water suppliers may find attractive, with the right team in place.

An old adage states: if one does not know where he is going, any road will get him there. Accordingly, a water supply "destination" should be clear before drawing up a road map and developing a team. A common mistake in addressing water supply needs is to pursue a permitting or technical "fix" without thoroughly assessing the full implications of the issue or developing the desired goal. Is obtaining a water rights permit the desired end point, or is providing water to new customers the goal? Is a robust conservation program the real target, or is it merely an intermediate step toward a goal while more efficiently stretching existing supplies? Taking the time to develop the ultimate objective can help inform decisions as to the right team and the right path to reach it.

Building a successful team also requires an eye for addressing the chasm that may exist between one's current challenge and the ultimate goal. Given the complexities of water projects in Texas, "cookie cutter" approaches or quick fixes can often leave a water supplier vulnerable. Although a state-driven regulatory approach may provide a familiar answer for certain projects, federal regulatory issues should also be explored or considered before forging ahead. And just because an approach has been used successfully in the past does not mean it is the right tool for a current challenge, as the facts may be different or the landscape may have changed. Accordingly, the right team will be equipped with backgrounds that can inform implementation strategies and effectively evaluate potential threats and practical alternatives to recommended approaches. These considerations demand an early due diligence process to identify clear goals and search for team members who can recognize challenges and offer a menu of solutions to address them.

A successful team in the water planning arena often begins with the selection of a project manager, whether the manager is "in-house" or an outside consultant to the water supplier. Having someone who knows or can help identify the ultimate goal, and who possesses experience in the arena, is critical to building an effective team. That manager, in concert with the supplier, can help identify the process by which the team is formed and the manner in which the team functions. Depending on the project, team members may come in a variety of shapes and sizes and possess different skill sets. Of course,



many water supply issues involve highly technical subjects that require the services of competent engineering firms for both design and consulting. The Senate Bill 1 Regional Water Planning process suggests the inclusion of team members who have familiarity with projects in a particular regional planning area, if not also state-wide. As noted above, the overlay of federal and state regulatory issues may involve the use of legal counsel to help navigate red tape and identify and affect solutions through advocacy and familiarity with the law and the regulatory landscape within which a project might be pursued. Depending upon the issues at hand, the political landscape that may envelop a project, and the public perception of a project, a governmental or public relations approach may be needed to help articulate a project's core purpose and its associated "messages" to a variety of constituencies: ratepayers, citizens, regulators, lawmakers, and other political subdivisions, to name just a few. Other team candidates may vary depending upon the project, the related issues and project goals; however, many projects will require a package of team members that stretch across disciplines in order to appropriately address particular needs and challenges.

Perhaps most importantly, selected team members must be collaborative in order to advance the supplier's interests and forge ahead toward the established goal. The best team is one where the supplier's ultimate goal is embraced by members whose specific offerings combine to improve and refine the team's product. And because water projects often take considerable time and resources, a water supplier will be best served by a team with some measure of depth.

While the first four articles in this series addressed important front-end tasks and water supply tools that can pay dividends in assessing and efficiently utilizing a water supplier's current portfolio of rights, our next article will focus on accounting issues and challenges. In that article, we will explore mechanisms in which water suppliers can best manage their supply portfolios in a way that is consistent with Texas Commission on Environmental Quality requirements, and in a manner that anticipates times of drought to meet customers' needs now and in the future. As highlighted above, having the right team in place to navigate both technical and regulatory hurdles can also be critically important when reviewing and implementing accounting practices.

Martin Rochelle is the chair of the firm's Water Practice Group and his practice focuses on the development and implementation of sound water policy at the Texas Capitol and in representing clients in water quality, water supply, and water reuse matters before state and federal administrative agencies. Nathan Vassar is an Attorney in the firm's Water Practice Group and his 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 development of a strong water supply team or the use of water supply planning tools, please contact Martin at 512.322-5810 or mrochelle@lglawfirm.com, or Nathan at 512.322-5867 or nvassar@lglawfirm.com.

[1]This article is the fifth in an ongoing series of water supply planning and implementation articles to be published in *The Lone Star Current* that address simple, smart ideas for consideration and use by water suppliers in their comprehensive water supply planning efforts.

WAGE AND HOUR 101: WHAT'S THE DIFFERENCE BETWEEN OVERTIME, COMPENSATORY TIME, AND FLEX TIME?

by Sheila B. Gladstone and Lauren R. Munselle

General Overtime Rule

Generally, the Fair Labor Standards Act ("FLSA") requires employers to pay covered, non-exempt employees at a premium rate of one and one-half times their regular rate for all time worked in excess of forty hours during any given workweek. A workweek is a fixed and regularly recurring period of seven consecutive 24-hour periods. For most full-time employees, those who are paid hourly at just one rate, the regular rate is their hourly wage. For non-exempt employees paid on a salary or by the job, regular rate is determined by dividing the employee's total remuneration for employment in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. Extra compensation specifically designated as overtime need not be included in the hourly rate.

Compensatory Time Off for Public Sector Employers

Depending on the number of employees and the amount of work to be done, it can cost an employer a lot to comply with the FLSA. To address concerns regarding the high cost of compliance for public sector employers with limited budgets, the legislature created the option for public sector employers to offer compensatory time off ("comp time") in lieu of monetary payment for hours worked over 40 in a workweek. Private employers are not permitted to offer comp time off in lieu of monetary payment for overtime hours worked.

For non-exempt employees, comp time must be awarded at 1.5 hours for each hour of overtime worked. For example, if an employee works 4 hours of overtime in a workweek, the employee earns 6 hours of comp time. If an employer decides to provide its exempt employees with comp time, the rate of comp time accrual can be greater or less than one and one half times the amount of overtime worked, because the employer is not actually required to compensate exempt employees for hours worked over 40.

If an employer intends to compensate non-exempt employees with comp time, the employer must reach an agreement with the employee before overtime work is performed. Courts have found that employer-issued manuals and memoranda to employees clearly stating a comp time policy are sufficient to constitute an agreement to award comp time, even where the policy is adopted unilaterally, without objection. Employees' continuing to work under such a policy is considered agreement.

There is also a cap on the amount of comp time that may be accrued. Employees who are engaged in public safety, emergency response, or seasonal activities may not accrue more than 480 hours. All other employees may accrue no more than 240 such hours. After the limit is reached, overtime must be paid monetarily.

The employer must also allow the employee to use accrued comp time within a "reasonable period" after making a request if the use does not "unduly disrupt" the operations of the agency.

Comp Time Q&A

Employer Q: We are terminating an employee who has 40 hours of unused comp time accrued. What happens to this employee's unused comp time?

A: You must cash out the employee's 40 hours of unused comp time at the higher of the employee's final rate of pay or the average regular rate of pay earned by the employee during the last three years of employment. This is true regardless of the reason for termination.

Employer Q: To avoid so many hours of unused comp time at the time of an employee's separation, with its unexpected, unbudgeted cash pay-out, can I require that employees use up accrued comp time before using any other accrued leave?

A: Yes, you may compel employees to use up their comp time before using any other accrued leave.

Employer Q: To manage the amount of comp time that an employee may accrue, can I set the cap lower than 240 hours?

A: Yes, you can set the cap as low as you'd like. Just keep in mind that, if the employee reaches your cap in unused comp time, you will need to compensate the employee with monetary compensation at a rate of 1.5 times his or her regular rate of pay for any additional overtime worked after that cap is reached. A low cap policy should be accompanied by a requirement that accrued comp time be taken soon after it is earned. The employer may also "force" the use of comp time by scheduling unrequested time off at times convenient to the employer.

Flex Time Available to Both Private and Public Sector Employees.

Whether paying for overtime worked with monetary compensation or comp time, both public and private sector employers may use flex time to manage overtime. Flex time is a way to adjust an employee's hours per day to prevent the employee from exceeding forty hours in a single workweek. For example, if an employee works 2 additional hours to assist with a project on Wednesday, you might elect to allow (or require) that employee to report for work 2 hours late on Thursday so that the employee doesn't work more than 40 hours in that workweek. Employers may limit or use flex time in a way that is most beneficial to the workplace needs.

Remember, though, that time cannot be flexed over more than one workweek (even if it is in the same two-week pay period), or it goes into overtime premium status. For example, if an employee works 42 hours in week one, and 38 hours in week two, the employee will have earned overtime at time and one-half even though the hours did not exceed 80 in the pay period.

Sheila Gladstone is Chair of the Firm's Employment Law Practice Group and Lauren Munselle 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 Lauren Munselle at 512.322.5889 or lmunselle@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We are considered a public sector entity, and we have 36 employees. We are trying to figure out if we are covered by the Family and Medical Leave Act (FMLA), which has a 50-employee threshold. The problem is, a consultant told us that all governmental employers are covered by FMLA no matter how few employees it has. Do we offer FMLA to our employees or not?

Signed,
Confused

Dear Confused,

You are not the only one confused by seemingly contradictory provisions in the federal FMLA and its regulations. As you know, the FMLA requires employers to provide protected extended time off for certain family and medical events, including the serious health condition of the employee or immediate family member, the birth or placement of a child with the employee, or a family member being called to active military duty. For private sector employers, only those employing 50 or more employees are covered by the FMLA. But there is another provision stating that public agencies are not subject to the 50-employee requirement and are covered under the FMLA regardless of number of employees.

Here's the trick, though. Being a covered employer is meaningless if its employees are not eligible for FMLA benefits. To be entitled to take leave under the FMLA, the employees of the public employer must meet all of the FMLA's eligibility requirements including that they work at a worksite with at least 50 employees in a 75-mile radius. This means that a small public employer, such as yours, is a covered entity with no eligible employees. Practically, this means your agency must put up the required poster, but need not offer FMLA benefits to any of your employees. The regulations were revised in 2009 to clarify that, unlike the posting requirement, no FMLA policy is needed for covered employers who have no eligible employees.

So the short answer is no, your public agency does not have to offer FMLA benefits to your employees because they are not eligible under FMLA. You must put up the federal poster, but you do not have to include an FMLA policy in your handbook. This does not mean you shouldn't offer paid and unpaid leave benefits for employees with serious or urgent family and medical issues – although not legally required, doing so is a best practice for governmental employers. Just don't say you are doing it pursuant to the FMLA, which is a complex federal law that has more technicalities than you should have to deal with. Referencing FMLA as if your employees were eligible not only could create legal complications for the agency, but also could mislead the employees about what their rights are.

"Ask Sheila" *is prepared by Sheila Gladstone, the Chair of the 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.*

Water Cases

Petition, Nat'l Assn. of Manuf. v. Dep't of Def., No. 16-299 (U.S.).

Since the Sixth Circuit determined that it had jurisdiction to hear challenges to the final Clean Water Rule on Feb. 22, 2016, litigants have filed a number of suits. The National Association of Manufacturers has petitioned the Supreme Court of the United States for a *writ of certiorari* on the grounds that the Sixth Circuit produced "three separate and incommensurate opinions addressing whether it has jurisdiction to consider the rule challenges." It contends the Sixth Circuit erred in giving itself legal jurisdiction. The Sixth Circuit held that it has jurisdiction because 33 U.S.C. § 1369(b)(1) allows appeals-court reviews for seven specific Clean Water Act activities, including approvals and denials of effluent limits and discharge permits. The National Association of Manufacturers' petition alleged these seven categories should be reviewed at the district court level, in accordance with the Administrative Procedure Act. It remains to be seen whether the Supreme Court will accept the petition to hear the case. (For details on the Feb. 22, 2016 Sixth Circuit ruling, see the In the Courts section in the April 2016 edition of *The Lone Star Current*).

Nat. Resources Def. Coun. v. Cty. of Los Angeles Flood Control Dist., No. 15-55562 (9th Cir., Oct. 2016).

On October 13, 2016, the United States ("U.S.") Ninth Circuit Court of Appeals unanimously authorized a court-ordered injunction for a permit violation even though the permit had been replaced by another permit with less stringent requirements. Beginning in 2008, the Natural Resources Defense Council ("NRDC") filed suit against the County of Los Angeles Flood Control District ("District"), alleging that it was discharging polluted stormwater in violation of the terms of its National Pollutant Discharge Elimination System ("NPDES") permit. The Court held that the District violated its permit as a matter of law because the pollutant levels exceeded the limitations in the original permit. The District later received a new NPDES permit with the same limitations, though the new petition employed the use of total maximum daily loads ("TMDLs"), sowing confusion as to specific limitations. TMDLs are a measure of the maximum quantity of a pollutant that can be sustained by a water body that is already impaired and are used to calculate effluent limitations specific to the already-polluted area, which represented a sharp departure from the original permit's use of a contaminant limit that could not be exceeded.

The Court held that the plaintiffs' claims for injunctive relief were not moot because the District defendant is still subject to water contaminant limitations that were "substantially the same as the limitations in the 2001 Permit." The Court made clear that a new permit does not render a case for injunctive relief moot, and disagreed with the defendant's assertion that a relaxation in NPDES permit standards necessarily moots the case. The court determined that defendants could still violate water limitations in the future, so injunctive relief could be afforded.

Chamber of Commerce of the United States, et al. v. United States Envtl. Prot. Agency, et al., No. 16-5038 (10th Cir.).

The U.S. Court of Appeals for the Tenth Circuit is also grappling with litigation surrounding the interpretation of the Waters of the United States ("WOTUS") Rule. Beginning in April 2016, the U.S. Chamber of Commerce, along with the National Federation of Independent Business, Portland Cement Association, State Chamber of Oklahoma, and Tulsa Regional Chamber, filed an appeal challenging the WOTUS Rule, which, they argue, broadened the definition of "Waters of the United States." After opening and reply briefs were filed, oral argument was heard on November 17, 2016. The U.S. position is that the Tenth Circuit should follow the lead of a district court in Minnesota and dismiss the business organizations' WOTUS Rule appeal as duplicative of the merits in the case pending in the Sixth Circuit, while the business organizations say the district court adopted a "flawed rationale" from the Sixth Circuit ruling. (For details on the Feb. 22, 2016 Sixth Circuit ruling, see the In the Courts section in the April 2016 edition of *The Lone Star Current*). We will continue to monitor this case and provide an update in a future newsletter.

State of Georgia, et al. v. Regina McCarthy, et al., No. 15-14035-EE (11th Cir.).

On August 16, 2016, the U.S. Court of Appeals for the Eleventh Circuit formally deferred to the Sixth Circuit on its interpretation of the WOTUS Rule. The ruling likely ends legal uncertainties over jurisdiction and avoids the possibility of conflicting federal decisions over the rule's legality, though an adverse ruling by the Tenth Circuit in favor of its own interpretation may serve to muddy the waters even more.

Gulf Restoration Network v. Jackson, No. 12-677, slip op. (E.D. La., Dec. 15, 2016).

On December 15, 2016, a U.S. district court granted EPA's Motion for Summary Judgment on remand from the U.S. Court of Appeals

for the Fifth Circuit. Environmental advocacy groups sued the Environmental Protection Agency ("EPA") in 2012 because EPA declined to make a necessity determination on the need for numeric nutrient criteria ("NNC") for the Mississippi River Basin ("MRB") and the northern Gulf of Mexico. EPA, however, maintained that states should collaborate with EPA in addressing nutrient issues without establishing NNC. In 2013, consistent with the environmental groups' position, the District Court found that EPA had an obligation to address the issue of necessity of NNC, but that EPA could consider non-technical factors (i.e., cost, feasibility, and the administrative burden) of setting NNC for many states in making a determination of necessity. On appeal, the Fifth Circuit reversed that decision, holding instead that the EPA could decline to make a finding of necessity if it provided a reasonable basis grounded in statute for not making such a finding. Thus, the Fifth Circuit's determination centered on agency discretion. On remand, applying the Fifth Circuit test, the district court found that EPA's justification for declining to make a necessity determination was sufficiently grounded in statute. This decision is part of a growing trend of cases attempting to challenge EPA failures to undertake "non-discretionary" duties to regulate in which courts have generally deferred to the agency's decision not to act.

R.E. Janes Gravel Co., v. Texas Comm'n on Envtl. Quality, No. 14-15-0031-CV (Tex. App.—Houston [14th Dist.] Dec. 15, 2016).

For decades, the City of Lubbock had an existing secondary use permit that allowed it to reuse imported surface water-based effluent for irrigation and steam electric cooling. In 2003, Lubbock applied to TCEQ for a bed and banks authorization to convey and divert its effluent discharges for beneficial reuse. After the TCEQ approved the permit, R.E. Janes Gravel Company ("Janes") appealed the decision. The district court affirmed the TCEQ's decision and Janes then appealed to the Texas Fourteenth Court of Appeals. Janes argued that the TCEQ had not adequately evaluated whether the amended permit, which allowed Lubbock to use a portion of the Brazos River to convey the wastewater downstream to a diversion point, would harm the water rights of other holders. Part of Jane's rationale was that the City began discharging before the City obtained a Texas Water Code ("TWC") § 11.042(c) permit, which triggered TWC § 11.046(c). Janes argued that the City abandoned its rights in its discharges because it began discharging without first obtaining TWC § 11.042(c) authorization. On December 15, 2016, the Fourteenth Court of Appeals affirmed the district court's decision, holding there was no harm to other water rights holders because there was no increase in the amount of water the City would divert under the amended permit.

Electric Case

City of Richardson v. Oncor Elec. Delivery Co., LLC, No. 15-1008 (Tex. pet. filed Apr. 4, 2016).

Since 2011, the City of Richardson ("City") has been embroiled in litigation with Oncor Electric Delivery Company, LLC ("Oncor") over who is responsible for the costs of relocating Oncor's electric equipment in the City's public alleys for the purpose of widening the alleys. The latest decision in this dispute, issued in August of last year by the Fifth Circuit Court of Appeals in Dallas, found in favor of Oncor by holding that Oncor's tariff, which requires the requestor to pay for the cost of relocation, controls and that the City is an entity requesting relocation that must pay the associated costs. The Court concluded that the tariff's provision requiring an entity requesting relocation to pay the associated costs is a pro-forma tariff provision that, pursuant to the Texas Administrative Code, must be included in every electric utility provider's tariff and may not be modified by a city. On September 2, 2016, the City appealed the Court's decision to the Texas Supreme Court. The Court has still not announced whether it will hear the relocation case, but it has requested merit briefing from the parties. Richardson's brief was due for filing on December 19, 2016, and Oncor's is due January 9, 2017.

Governmental Immunity Cases

Byrdson Services, LLC v. South East Texas Regional Planning Commission, No. 15-0158, 2016 WL 7421392, at *1 (Tex. 2016).

In this case, the Texas Supreme Court examined the applicability of the waiver of immunity found in the Local Government Contract Claims Act found in Chapter 271, Subchapter I of the Local Government Code to cases in which a governmental entity subcontracts for the performance of some of its governmental obligations. The Court effectively held that the subcontractor's performance of work that relieved the governmental entity of its obligation to provide services to the public was itself a "service" so as to bring the contract within the scope of contracts covered by the Act's waiver of immunity.

In the wake of Hurricane Ike in 2008, the State of Texas contracted with the South East Texas Regional Planning Commission to utilize certain grant funds to provide disaster relief and housing-restoration services; the contract expressly allowed the Commission to subcontract the repair work. To fulfill its contractual obligation to the State, the Commission entered into multiple subcontracts with Byrdson Services, LLC to provide homeowner-repair services in the area. When a dispute arose about the quality of Byrdson's work, the Commission withheld payment to Byrdson, and Byrdson then filed suit against the Commission, alleging that the Commission's immunity was waived by the Act. In support of its plea to the jurisdiction asserting that the Act's waiver did not apply, the Commission argued that the homeowners in the area were the true beneficiaries of Byrdson's services, and thus the contracts did not state essential terms "for providing goods and services to the local governmental entity." The Supreme Court disagreed, holding that by subcontracting with Byrdson, the Commission "thereby relieved itself of contractual obligations it had under its contract with the State. For this reason the Byrdson Agreements provided real and direct services to the Planning Commission that bring the agreements within Chapter 271." In reaching its decision, the Court reiterated and applied the principle from its decision in *Kirby Lake Development, Ltd. v. Clear Lake Water Authority* that the term "services" in Chapter 271 "includes generally any act performed for the benefit of another." Thus, regardless of who might be the ultimate beneficiary of services provided under a contract with a local government entity,

the performance of services that the local government entity was otherwise obligated to perform itself is a sufficient "benefit" to the local government entity to constitute a "service" under the Act.

The Port of Houston Auth. of Harris Cty. v. Zachry Constr. Corp., No. 14-10-00708-CV, 2016 WL 7323304 at *1 (Tex.App.—Houston [14th Dist.] 2016).

This case name may be familiar to readers who follow immunity law. The Texas Supreme Court previously issued a sweeping opinion in *Zachry Constr. Corp.v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98 (Tex. 2014), which addressed in great detail the scope of the Local Government Contract Claims Act found in Chapter 271, Subchapter I of the Local Government Code. After the Court held that the Port Authority was not immune from Zachry's delay of damages claims and that such claims were permitted under Texas contract law, the case was remanded for further proceedings. At the initial trial, Zachry had been awarded damages for "pass-through" claims (i.e., as the general contractor, Zachry pursued claims for payment that Zachry still owed to a subcontractor due to the Port Authority's breach of its contract with Zachry). This new opinion arises from the Port Authority's challenge to several remaining issues with the trial court's judgment after remand, including the award of damages for Zachry's pass-through claim.

The Port Authority argued that the Chapter 271 waiver did not apply to Zachry's pass-through claim because the Port Authority "has immunity for breach of a contract to which [the Port] is not a party." In support of that argument, the Port Authority noted that the Supreme Court had previously stated in *Interstate Contracting Corp. v. City of Dallas*, which was decided prior to the enactment of Chapter 271, that "immunity may bar a pass-through claim against the government." The Supreme Court first disagreed with the Port Authority's assertion, noting that the Interstate Contracting court specifically chose not to address the issue of governmental immunity. The Court then stated that the question had already been thoroughly analyzed and addressed by the San Antonio Court of Appeals in *City of San Antonio v. Valemas, Inc.*, which ultimately held that governmental immunity did not bar the pass-through claims of a subcontractor. The Court went on to note the prevalence of subcontracts in construction projects and reasoned that placing subcontract claims outside of the Chapter 271 waiver would "subject subcontractors to the same risk of non-redressable breach the statute sought to eliminate . . . ." Thus, the Court agreed with the *Valemas* court's rationale and held that "governmental immunity does not bar the pass-through claim at issue here." To the extent that question was open in the wake of Interstate Contracting, it is open no longer.

Wasson Interests, Ltd. v. City of Jacksonville, No. 12-13-00262-CV, 2016 WL 7187491 at *1 (Tex.App.—Tyler 2016).

This case name also may be familiar to readers interested in immunity law; last year, the Supreme Court decided in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016) that the proprietary function/governmental function distinction applied in the contract context, and thus municipalities have no immunity from contract suits when the contract arises out of the city's proprietary functions. Having decided that legal question, the case was remanded for consideration of whether the City's termination of Wasson's lease of real property on the City's water reservoir was a governmental or proprietary function.

The City owns and operates a water supply reservoir, Lake Jacksonville, and applied its zoning ordinance to lots around the reservoir. Wasson occupied the property pursuant to a lease with the City and performed certain subleasing activities that the City contended were impermissible under both the zoning ordinance and the lease. Based on that contention, the City issued an eviction notice to Wasson. Wasson sued the City seeking several types of relief, including injunctive and declaratory relief. In response, the City claimed that it had governmental immunity with respect to Wasson's claims. In order to determine whether the City was immune to suit, the court had to determine whether the City's enforcement of its zoning ordinance and lease terms as applied to lots around the City's reservoir was a governmental or proprietary function.

As guided by the Supreme Court in its *Wasson Interests* opinion, the Tyler court looked to the Texas Tort Claims Act, which defines specific functions as proprietary or governmental. The court noted that if an action is classified as "governmental" by the Tort Claims Act, the court has no discretion to declare the action proprietary, and went on to acknowledge that "reservoirs," "waterworks," and "water and sewer service" are expressly designated as governmental functions in the Tort Claims Act. And, even though the act of leasing certain lots on the reservoir for a profit may have been proprietary in nature, the court held that the "introduction of a proprietary element to an activity designated by the legislature as governmental does not serve to alter its classification." In fact, the court went on to acknowledge that, in cases of mixed functions, the rule is that if any component of a function is governmental, then the entire function is considered governmental. The court finally held that (1) the act of enforcing a zoning regulation was an exercise of the City's police power and a governmental function, and (2) if a lease is on real property that is used for a governmental purpose, the lease becomes part of that governmental function. Because the City's enforcement of its ordinance and termination of the lease in connection with that enforcement was part of the City's governmental function to maintain a health and safety water supply for its citizens and preserve property values of the lake lots, the City was therefore immune from suit.

Air and Waste Cases

City of Los Angeles v. County of Kern et al., No. 242057 (Superior Court of the State of California, County of Tulare, Dec. 2016).

On November 28, 2016, a California superior court issued a decision supporting the land application of biosolids. The ruling struck down a local voter initiative passed in 2006 that banned land application of biosolids to farmland in Kern County, California, due to fear of its adverse effects to water quality in the area. The City of Los Angeles owns a 4,700-acre farm in Kern County, where it has been using biosolids for the last twenty years. The court

ruled that the voter initiative "is invalid and void for all purposes, for the dual reasons that it exceeds Kern's police power authority and is preempted by state law." Advocates of the ruling see it as the first case to establish strong legal precedent to protect biosolids land application against bans across the country.

Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., 90 Mass. App. Ct. 444, 60 N.E.3d 380, 381 (2016).

A group of students at Harvard University, the Harvard Climate Justice Coalition ("HCJC"), filed suit against Harvard seeking to require Harvard to divest its investments in fossil fuel companies. HCJC argued, in its first count, that those investments contribute to climate change, which constitutes mismanagement of the charitable funds in the university's endowment because it adversely impacts their education and in the future will adversely impact the university's physical campus. In its second count, HCJC proposed a new tort (a new cause of action), which it asserted as the right of future generations to be free of what they called "intentional investment in abnormally dangerous activities." The lower court dismissed the suit, and HCJC appealed. With respect to the first count, the Court of Appeals held that HCJC did not have standing to challenge a charity's management of funds because, under Massachusetts law, only the Attorney General and parties that have been given a personal right in the management of the funds are authorized to bring such a suit, and HCJC had not been given a personal right of management or administration in Harvard's endowment. With respect to the second count, the Court of Appeals repeated the lower court's conclusion that HCJC "had not provided any recognized legal principle in support of their unilateral assertion to represent the interests of future generations."

In the Courts *is prepared by Jeff Reed in the Firm's Air and Waste Practice Group, José de la Fuente in the Firm's Litigation 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, Joe at 512.322.5849 or jdelafuente@lglawfirm.com, Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA Report: Hydraulic Fracturing Can Harm Drinking Water. On December 13, 2016, the EPA released the final version of its hydraulic fracturing ("fracking") study: *Hydraulic Fracturing for Oil and Gas: Impacts form the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Final Report).* The Final Report breaks with the draft issued in 2015, which reported that fracking does not result in "widespread, systematic impacts on drinking water." The Final Report concludes that fracking can impact drinking water resources in certain situations. Based on the various stages of fracking activity, the EPA determined that impacts from fracking is greatest when: there are limited or declining groundwater resources; spills are present on the surface during the handling of chemicals or produced water; fluids are injected into wells that are inadequately maintained; fluids are injected directly into groundwater; fluids are discharged into surface water; and fluids are disposed of in unlined pits that contaminate groundwater. It is anticipated that this report will be used by federal, state, and local officials in the future to understand how to best protect water resources, while encouraging business. The final report is available at https://www.epa.gov/hfstudy.

EPA Phase II Stormwater Final Rule Published. The EPA published the Final Municipal Separate Storm Sewer System ("MS4") General Permit Remand Rule on November 16, 2016, in response to the 9th Circuit's decision in *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003). The court remanded the Phase II rule's provisions for small MS4 general permits because they lacked procedures for permitting authority review and public notice and the opportunity to request a hearing on Notices of Intent for authorization to discharge under a general permit. The final rule establishes two alternative approaches a National Pollution Discharge Elimination System ("NPDES") permitting authority can use to issue and administer small MS4 general permits. Both approaches seek to meet the "MS4 permit standard," which is to "reduce the discharge of pollutants from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." The "Comprehensive General Permit" contains all requirements, and no additional requirements are established after the issuance of the permit, while the "Two-Step General Permit" allows the permitting authority to establish some requirements in the general permit and other requirements applicable to individual MS4s through a second proposal and public comment process.

EPA Releases Effluent Limitations Guidelines and Standards for Dental Offices. On December 15, 2016, the EPA finalized a technology-based pretreatment standard under the Clean Water Act ("CWA") to reduce discharges of mercury and other metals from dental offices into publicly owned treatment works ("POTWs"). Dental offices are a leading contributor of mercury to the environment because of metals present in amalgam used for fillings. The rule requires dental offices to use amalgam separators—an affordable technology to separate mercury before it is discharged into the POTW, and from which mercury may be recycled—and two best management practices recommended by the American Dental Association. The rule creates a new category of industrial users, known as dental industrial users ('DIUs"). DIUs are not subject to the typical oversight and reporting requirements in the EPA's general pretreatment regulations in 40 Code of Federal Regulations Chapter 403. Rather, DIUs will be subject to streamlined reporting directly to the applicable Control Authority on an annual basis. EPA believes compliance by offices, including large institutions like dental schools and clinics, will reduce the discharge of metals by at least 10.2 tons per year. The rule is effective 30 days after the date of publication in the Federal Register. New sources must comply as of the effective date. Existing sources will need to comply within three years after the effective date of the rule.

EPA Releases Draft Guidance for Voluntary Stormwater Planning. In October, the EPA released a draft guidance document, *Community Solutions for Stormwater Management: A Guide for Voluntary Long-Term Planning*, to assist state and local governments in the development and improvement of stormwater plants and implementation on the ground. The document describes how long-term stormwater plans "can support community efforts to prioritize and implement effective stormwater management practices." This can be accomplished by: (1) a long-term approach to planning that integrates selected projects; (2) managing stormwater in the areas it mostly falls in; (3) implementation of green infrastructure to attain improved air and water quality; and (4) the voluntary approach to long-term planning subsumes many of the compliance standards within the CWA. The EPA's goal in developing this guidance is to encourage communities to voluntarily manage stormwater in a cost-effective, sustainable manner.

EPA Publishes Final Contaminant List under Safe Drinking Water Act; EPA Seeks Guidance on Emerging Contaminant Process. On November 17, 2016, the EPA published notice of a final list of contaminants that, prior to publication, were not subject to any national primary drinking water regulation (*Drinking Water Contaminant Candidate List 4-Final*, 81 Fed. Reg. 81099 (Nov. 17, 2016)). The list – the Fourth Contaminant Candidate List (CCL 4) – contains contaminants known or anticipated to occur in public water systems and may require regulation under the Safe Drinking Water Act ("SDWA"). Specifically, the list includes 97 chemicals or chemical groups and 12 microbial contaminants. Under the SDWA, the EPA is required to publish the candidate contaminant list every five years to identify contaminants it considers as posing a risk for drinking water. As a result of being listed, Section 1445(a)(2) of the SDWA requires EPA to promulgate regulations to monitor these currently unregulated contaminants. The list is then used to make a regulatory determination on whether or not to regulate at least five contaminants from the CCL with national primary drinking water regulations. If EPA determines that any of the listed contaminants should be regulated under the SDWA, the agency will have 24 months to publish a proposed maximum contaminant level goal.

Simultaneously with publication of the CCL 4, EPA asked its advisors for assistance in improving the process for the regulation of contaminants under the SDWA due to state and municipal concern about the way contaminant risks are currently communicated. EPA officials asked a panel at the National Drinking Water Advisory Council ("NDWAC") meeting held on December 6-7 to form a committee to improve how the agency addresses emerging contaminants, including the issuance of non-binding health advisories ("HAs") that are sometimes used as default cleanup levels when the EPA has not set baseline standards. Many municipalities hope that increased use of HAs will shorten the amount of time required to communicate potential dangers to local governments. (For additional details about the Fourth Unregulated Contaminant Monitoring Rule published in the Federal Register on November 17, see the Agency Highlights section in the October 2016 edition of *The Lone Star Current*).

Trump Nominates Scott Pruitt as EPA Administrator. President-elect Donald Trump nominated Scott Pruitt, the attorney general of the state of Oklahoma, to head the EPA. Attorney General Pruitt's stated goals are to "run this agency in a way that fosters both responsible protection of the environment and freedom for American businesses." Though it is not clear how Attorney General Pruitt intends to accomplish these goals, Mr. Trump was quoted as saying Pruitt "will reverse this trend [referencing taxpayer money being spent on an "anti-energy agenda"] and restore the EPA's essential mission of keeping our air and our water clean and safe." Attorney General Pruitt is known for his strong legal opposition to the current EPA climate and air regulations, as well as his involvement in legal challenges to the EPA's pending WOTUS Rule.

United States Army Corps of Engineers ("USACE")

U.S. Army Corps of Engineers Regulatory Guidance Letter on Jurisdictional Determinations. The USACE released a regulatory guidance letter in October of 2016 regarding jurisdictional determinations in response to *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807 (2016). In that case, the Supreme Court held that approved jurisdictional determinations ("AJDs") are subject to judicial review, with much of the Court highlighting the availability of AJDs as an important part of fostering predictability for landowners. An AJD is "an official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdiction aquatic resources on a parcel. "The purpose of the letter was to encourage discussion between USACE and parties interested in the Corps views on jurisdiction to ensure a common understanding between parties in regard to the Clean Water Act ("CWA") and Rivers

and Harbors Act. The letter also describes when an AJD is not needed, particularly in the case of a preliminary jurisdictional determination ("PJD") or no JD at all. A PJD may be requested to move ahead to obtain USACE permit authorization when the requestor determines that it is in its interest to do so, while no JD is required when it is not requested or when the activity is not a regulated activity under Section 404(f) of the CWA.

United States Fish and Wildlife Service ("FWS")

Fish and Wildlife Service Natural Resources Mitigation Policy. On November 21, 2016, FWS announced revisions to its Mitigation Policy, which "has guided Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants and their habitats since 1981." The goal of the revised policy is a landscape-scale approach to achieve "a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions." Some critics are concerned that this new policy will increase costs, delay projects, and discourage investment, while others believe this policy is in line with past precedent, like EPA and USACE mitigation policies with regard to the CWA. Proponents of the policy are quick to point out that the FWS guidance will not affect EPA and USACE because they have their own guidance, though the FWS's policy does affect how it approaches its Endangered Species Act ("ESA") role in the CWA permitting process.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Rulemaking on Graywater and Alternative On-Site Water. On December 07, 2016, the TCEQ adopted a new rule to implement House Bill ("HB") 1902, passed during the 2015 legislative session. The rule amends 30 Texas Administrative Code Chapters 210 and 285 to, among other things, move all graywater reuse to Chapter 210; authorize reuse of alternative onsite water in on-site sewage facilities ("OSSFs"); authorize the reuse of 400 gallons per day or more of graywater and alternative onsite water; add toilet and urinal flushing as an authorized use of graywater and alternative onsite water; establish uses of and treatment standards for alternative onsite water similar to graywater; allow for the reduction in the required size of the OSSF drainfield if used in conjunction with a reuse system; and incorporate nationally recognized treatment levels for total suspended solids and *E. coli* for graywater and alternative onsite water when used for toilet and urinal flushing. HB 1902, and this rule adopted pursuant to 1902, were enacted to lessen Texas' demand for freshwater resources by allowing expanded uses of graywater and other recycled water. As of the date of publication, the adopted rule has not yet been published in the *Texas Register*. The rule is expected to be effective 20 days from publication in the *Texas Register*.

TCEQ revises Affirmative Defense Rule. On November 2, 2016, the Texas Commission on Environmental Quality ("TCEQ") approved changes to the affirmative defense available in 30 Texas Administrative Code ("TAC") Chapter 101 for unauthorized emissions that occur during a startup, shutdown, or malfunction and meet the specific criteria listed in 30 TAC §101.222. TCEQ made these changes in response to EPA's directive that requires states to remove this type of affirmative defense from their rules. TCEQ filed suit against EPA and initiated this rule change to address the allegations by EPA that led to the directive. Specifically, TCEQ has added rule language stating that (1) the affirmative defense is not intended to limit a federal court's jurisdiction or discretion to determine an appropriate remedy in an enforcement action, and (2) TCEQ will delay the applicability of the change until there is a final and non-appealable court decision upholding the EPA's position on the affirmative defense.

TCEQ Issues New Chromium Risk Finding Using Data Under EPA Review. The TCEQ published a report in September detailing the risks associated with oral ingestion of hexavalent chromium ("Cr6"). The report provides a risk estimate for Cr6, stating that 0.0031 milligrams per kilogram bodyweight per day is the maximum amount that can be ingested. This number was generated through a combination of using "a rare use of a reference dose ("RfD"), the maximum amount of a substance not anticipated to cause adverse effects," and using industry-financed research into how Cr6 could cause cancer when ingested. Though not based on TCEQ's estimates, an environmental organization, the Environmental Working Group, estimates that unsafe levels of Cr6 are present in more than 200 million Americans' tap water today.

ALJ sets burden of proof in contested case hearing. Ordinarily, an applicant for a permit bears the burden of proof on all issues in a contested case hearing. In the case of Beneficial Land Management, L.L.C.'s ("BLM's") application for a land application permit, an administrative law judge ("ALJ") has determined that the Executive Director will bear the burden of proof on some issues. BLM had been

land-applying domestic sludge pursuant to a permit issued by the TCEQ. The TCEQ discovered that grease and grit trap wastes were being mixed with the sludge, and BLM entered into a compliance agreement with the TCEQ. BLM later submitted a renewal application for the land application permit. During the review process, the TCEQ raised this issue of the grease and grit trap wastes, and, in order to resolve the issue, BLM requested that an experimental use authorization be included in the permit. TCEQ issued a draft permit that included the experimental use authorization but also included study requirements and a one-year expiration date for the authorization. BLM objected, and the TCEQ removed the experimental use authorization, and instead included a provision explicitly prohibiting land application of grit trap or grease trap waste. BLM requested a contested case hearing on its own draft permit. The ALJ noted that, under TCEQ's rules, the "burden of proof is on the moving party." But, while the moving party is normally the applicant (since the applicant is seeking a permit), the ALJ determined that in this case, the TCEQ was the moving party with respect to the prohibition on grit trap or grease trap waste because the language that the applicant is contesting is not in the permit that BLM is seeking to renew. The ALJ noted that the parties will need to address in the hearing whether the change to the permit "amounts to a clarification of existing law or rule, a correction, an amendment, an additional or more stringent requirement, or something else."

Texas Comptroller

Texas Comptroller Launches Financial Disclosure Portal. In 2015, the Texas Legislature passed House Bill 1378, requiring counties, municipalities, special districts, and other certain political subdivisions of the state to annually compile and disclose financial information, including debt obligation and credit ratings. Effective January 1, 2016, political subdivisions have been required to continuously post the financial disclosures on their website until the next report is prepared. Alternatively, certain political subdivisions can provide the required information to the Comptroller, who is then required to continuously post the information on the Comptroller's website. Up until recently, however, the Comptroller did not maintain an online filing system for the financial disclosures and would not accept paper copies. The financial disclosure portal is now available at https://www.comptroller.texas.gov/transparency/local/hb1378/apply.php.

Public Utility Commission ("PUC")

Atmos West Texas Files Rate Review Mechanism. Atmos West Texas Division made its third filing under the Rate Review Mechanism ("RRM") tariff on December 1, 2016. The RRM is a systematic process collaboratively developed by Atmos and the West Texas Cities coalition, specifying how rates will be set over a specified period of time. The process benefits ratepayers by avoiding litigation and providing for transparent review of the utility's expenses and investment. In this RRM filing, the Atmos West Texas is asking for an increase of about $2.75, or 6.49% overall, to the average residential customer. Atmos West Texas and the West Texas Cities coalition will now work on an agreement to have final rates implemented prior to March 15, 2017.

Docket 46238, *Joint Report and Application of Oncor Electric Delivery Company and NextEra Energy for Regulatory Approvals Pursuant to PURA §§14.101, 39.262 and 39.915*. NextEra Energy Inc. ("NextEra") has finally filed its application with the PUC for approval to purchase Oncor Electric Delivery Company LLC ("Oncor"). The long-awaited application was filed on November 1, 2016 and sets forth the terms of NextEra's $18 billion proposal to acquire Energy Future Holdings' ("EFH") 80% share of Oncor.

Meanwhile, NextEra also announced two other deals that would give the company complete ownership of Oncor. One deal, worth about $2.4 billion, involves a NextEra affiliate merging with Texas Transmission Holdings Corp. and acquiring its 20% interest in Oncor. The other deal is an agreement for NextEra to buy Oncor Management Investment LLC's 0.22% interest in Oncor for about $27 million.

NextEra had expressed interest in taking over Oncor since parent-company EFH announced it was selling the utility as part of its bankruptcy exit plan. Oncor was previously set to be purchased by Ray L. Hunt, but the sale fell through after the PUC imposed additional conditions that made the deal less attractive to Hunt's investors. NextEra's plan for Oncor is much less complicated than the real estate investment trust ("REIT") Hunt proposed, but will nevertheless face scrutiny during the PUC approval process. The Commission has expressed concern about the impact on ratepayers of moving Oncor's ownership outside of Texas (NextEra is based in Florida), as well as a $275 million termination fee that Oncor's owners would have to pay NextEra if the deal falls through. Additionally, Commissioner Anderson filed a memo stating that the Commission should consider whether any tax savings derived from NextEra's structure or tax filings should be shared with ratepayers. Anderson explained that tax issues were "hotly contested" in the Hunt approval process and that "NextEra is not proposing a REIT, but, because of federal credits, NextEra pays little, if any, federal income tax."

Several parties have intervened in the proceeding, including the Steering Committee of Cities Served by Oncor, and are currently conducting discovery on Oncor and NextEra. Instead of referring the case to the State Office of Administrative Hearings ("SOAH"), as is typical, the Commission will hear the case itself with a hearing on the merits slated for February 2017.

Project No. 46046, *Report on Alternative Ratemaking Mechanisms (PURA § 36.210(h-1))*. Last session, the Legislature adopted Senate Bill 774 requiring the PUC to analyze alternative ratemaking mechanisms used in other states and to provide a report with its findings to the legislature by January 15, 2017. In response, the PUC opened Project No. 46046 to study and consider alternative ratemaking mechanisms and hired a consultant to issue a report on mechanisms that would improve efficiency and utility oversight and ensure electric rates are just and reasonable.

The report was issued in June and received an underwhelming response

from stakeholders, including the Steering Committee of Cities Served by Oncor ("Cities") and the Office of Public Utility Counsel, who commented that the report offers little support for making broad changes to Texas' electric utility ratemaking process. The Commission considered the report and its impending Legislative recommendation at its Open Meeting on December 1, 2016, with each Commissioner agreeing that the recommendations should say something more than that the ratemaking process is fine as it is now. The Commissioners suggested that the greatest need for reform is with non-ERCOT utilities and that the Commission should ask the Legislature for more specific authorization to make adjustments to non-ERCOT utility rate cases. Commission Staff prepared a Legislative recommendation reflecting this discussion that the Commission then adopted at its December 16th Open Meeting. Specifically, the Commission recommends that the Legislature provide the PUC express authority to use certain ratemaking mechanisms, allow the continued use of periodic rate adjustments, and authorize the Commission to require periodic rate cases for certain utilities when deemed appropriate.

Project 46393, *Rulemaking Proceeding to Amend Substantive Rule §25.192, Relating to Transmission Service Rates*. The Commission opened this rulemaking project to amend the rules regulating transmission service rates. Several utilities in recent years have reported what the PUC Staff believes is an unreasonably high return on equity for transmission investments. Further, the PUC has found that non-Investor Owned Utilities ("IOU") entities may go long periods of time between filing a comprehensive rate proceeding. Staff intends for this rulemaking to address these issues.

Staff issued a strawman proposal in this proceeding on November 8, 2016, with numerous amendments and additions to the Commission rules regulating transmission service rates. The proposed amendments and additions would affect both IOU and non-IOU utility operations. Staff then held a workshop on November 16th, where a large number of stakeholders, including both IOUs and non-IOUs, participated and gave feedback on the proposal. Initial comments on the strawman proposal were due December 7th with reply comments due December 21st. A proposal for publication is expected to be issued in February 2017.

Docket No. 45175, *Appeal of Brazos Electric Power Coopeartive, 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*. In September, a hearing on the merits took place at the State Office of Administrative Hearings ("SOAH") in the land use dispute between the City of the Colony ("The Colony") and Brazos Electric Power Cooperative ("Brazos Electric") and Denton County Electric Cooperative ("Denton Electric"). The dispute arose when Brazos Electric condemned a piece of property and then applied to the Colony for approval of standard use permits so the utility could build a substation. The Colony's zoning ordinance prohibits certain land use activities in the property's zone, including substation use, and denied Brazos Electric's applications.

SOAH issued a Proposal for Decision ("PFD") in early December 2016, concluding that The Colony's ordinance and denial of the special use permit violates § 41.005 of the Public Utility Regulatory Act, which prohibits a municipality from regulating an electric cooperative's rates, operations, or services except to the extent necessary to protect health, safety, or welfare. The parties filed exceptions to the PFD in late December and the Commission is scheduled to make its final decision at its January 26, 2017 Open Meeting.

Railroad Commission of Texas ("RRC")

Railroad Commission Sunset Review Update. In early November 2016, the Sunset Advisory Commission voted on its final recommendations for reforms to the Texas Railroad Commission ("RRC"). The proposed reforms will become the basis for "Sunset" legislation to be taken up during the 85th Texas Legislature in 2017.

Texas House and Senate lawmakers on the Sunset Advisory Commission accepted a number of Sunset staff recommendations, but removed those pertaining to gas utility ratemaking. Each of the rejected recommendations had been endorsed by city and consumer groups. The rejected reforms included a proposal to change the agency's name to one that better reflects its responsibilities, a proposal to transfer administrative law cases currently handled by RRC staff to SOAH, and a proposal to transfer gas utility cases to the PUC.

The reforms the Sunset Advisory Commission adopted included recommendations designed to improve the monitoring of the oil and gas industry, to authorize the creation of pipeline permit fees, and to direct the RRC to incorporate findings from a seismic monitoring program into its disposal well guidelines.

Wayne Christian Wins Railroad Commissioner Election. Republican Wayne Christian won the 2016 race for Texas Railroad Commissioner. The former state Representative earned more than 53 percent of the votes, beating Democrat Grady Yarbrough. Christian will take the place of Commissioner David Porter and join Chairman Christie Craddick and Commissioner Ryan Sitton on the three-member Commission.

Christian is currently a financial planner in Center, Texas and was previously in the Legislature for 14 years where he served on the House Energy Committee. During his campaign, Christian said he would not advocate for any major reforms to the RRC during the legislative session and would take a pro-industry position.

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.*

Lloyd Gosselink
ATTORNEYS AT LAW

816 Congress Avenue
Suite 1900
Austin, Texas 78701