Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 23, NO. 2 APRIL 2018

THE LONE STAR CURRENT

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

THE TEXAS SUPREME COURT ISSUES A UNANIMOUS DECISION IN FAVOR OF LLOYD GOSSELINK'S CLIENT, URI, INC., IN DISPUTE WITH KLEBERG COUNTY

by Duncan C. Norton and Tricia M. Jackson

Recently, Lloyd Gosselink's Air and Waste Practice Group had the privilege of representing URI Inc. ("URI"), in the 13th Court of Appeals and then the Texas Supreme Court in a dispute over the interpretation of a settlement agreement entered into between URI and Kleberg County ("County"). The settlement agreement was negotiated in the context of a Texas Commission on Environmental Quality ("TCEQ") permitting contested case hearing related to URI's uranium mining operations in Kleberg County. The TCEQ granted the County party status in the administrative hearing, which focused on whether, and under what conditions, URI would be allowed to solution mine uranium in a new production area at its Kingsville Dome facility. The settlement agreement was a complex multi-faceted document that contained many technical components for URI to abide by in exchange for Kleberg County's withdrawal of opposition to the new mining permit.

A few years after the settlement, Kleberg County alleged that URI had breached several agreement terms, and both parties sought relief in district court. The trial court decision was a confusing mish-mash of findings and legal conclusions, but at least in part, the trial court found that URI had breached one particular provision of the agreement. The provision in question was a requirement that URI restore the groundwater in an earlier mining area back to pre-mining conditions prior to any new mining, if the pre-mining conditions were such that any well in the earlier production area was of suitable quality for use as a source of drinking water, livestock watering, or irrigation. If a well was not suitable for any use, it was not required to be restored.

URI utilized two pre-mining data sets (from 1985 and 1987) to support its position that the well was not suitable for any pre-mining use. The County claimed that the 1987 data could not be used to determine suitability because only the 1985 data was known and available to the County when it entered into the agreement, and the 1985 data showed that the well water was suitable for irrigation. The agreement did not specify a particular dataset, it only required that URI would make a determination and certify back to the County whether any wells were suitable, and include the data used to make the determination.

The 13th Court of Appeals ruled that only the 1985 data set could be used. In explaining its ruling, the 13th Court stated that the "surrounding circumstances" could be looked at to interpret the language of the agreement, even if the agreement had been deemed "unambiguous" by both parties and the trial court. The 13th Court said that since the County only knew about the 1985 data, that was the only data that could be used to determine the pre-mining condition of the well in question. According to the 13th Court, the "surrounding circumstances" showed that was the intent of the parties at the time the agreement was signed.

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

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

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

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

FIRM NEWS

Michael Gershon will present "Understanding and Protecting Your Interest in Groundwater" at the Big Bend Conservation Alliance Annual Texas Water Seminar on April 21 in Marfa.

Ashley Thomas will discuss "Medical Leave and Accommodation Issues" at the Texas Business Conference on April 20 in The Woodlands.

José de la Fuente will present "How High's the Water? Public Entity Flood Litigation and Liability in Texas" at the Texas City Attorneys Association Summer Conference on June 15 at Lost Pines.

David Klein will discuss "Complying with the Texas Open Meetings Act and Public Information Act" at the Capital Area Suburban Exchange's 2018 Summer Water Conference on June 15 in South Padre Island.

Tricia Jackson will present "A Legal Analysis: Permitting Solar Energy on Landfills" the Air & Waste Management Association's Central Texas Chapter Meeting on June 21st in Austin.

Stefanie P. Albright and **Lauren E. Sprouse** have been named to the 2018 Texas Rising Stars list. The Rising Stars list is compiled by Super Lawyers, a rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. Attorneys designated as Rising Stars are up-and-coming attorneys who are 40 years old or younger or who have been in practice for 10 years or less. Super Lawyers selects attorneys using a patent multi-phase selection process that includes independent research, peer nominations, and peer evaluations. Only 2.5% of attorneys in Texas receive this distinction, so this is quite an honor for these attorneys and our Firm. We are proud of Stefanie and Lauren for this outstanding achievement.

Keep Austin Beautiful
Enthusiastic members of the Firm and their families participated in Keep Austin Beautiful's Annual Clean Sweep on April 14, 2018.

THE LONE STAR CURRENT INTERVIEW

DeAnn Walker, Chair

Public Utility Commission

DeAnn Walker was appointed by Governor Abbott in September 2017 to serve as Chair of the Public Utility Commission until September 2021. Previously, she served as the Senior Policy Advisor to Governor Abbott on matters related to regulated industries. Chairman Walker began her career in the electric industry at the Commission in 1988 serving first as Associate General Counsel and, later, as an Administrative Law Judge. Before joining the Governor's staff, she served as Associate General Counsel and Director of Regulatory Affairs at CenterPoint Energy. Chairman Walker is an ex-officio member of the Board of Directors of the Electric Reliability Council of Texas and the Texas Reliability Entity. She is a member of the Regional State Committee for the Southwest Power Pool, and she serves as the State Liaison Officer to the Nuclear Regulatory Commission for the Governor. Chairman Walker received her undergraduate degree in accounting from Southern Methodist University and her Juris Doctor from South Texas College of Law.

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

Lone Star Current: What do you believe are the most important aspects of your position as Chairman at the PUC?

Walker: Given the volume and complexity of issues we address, it might surprise people to know I not only insist on reading all of the documents filed on an issue, I also seek out other relevant information. These issues and the people they affect deserve a great amount of study and thought, so I spend the time and effort necessary to make the best decision that I can. I also want the employees of the Commission to know they are valued and heard. I sincerely appreciate the work they perform every day for the Commission and the people of Texas as part of a truly remarkable team.

Lone Star Current: What do you view as the biggest challenges facing the PUC over the next few years?

Walker: Over the next few years, the biggest challenge is maintaining resource adequacy for the Electric Reliability Council of Texas ("ERCOT") electric market. Our state has not seen reserve margins this slim in many years. However, I am convinced the ERCOT market is the right approach to managing our grid and that the Texas economy will continue to flourish as a result. I believe all market participants will continue working together to keep the lights on and ensure that Texas continues to be the best State in which to live and do business. It will require a team effort, and I am confident that all involved will rise to the occasion. The Commission is also working to fully address the unique demands of the water industry. While the initial transfer of the water responsibilities from the Texas Commission on Environmental Quality to the Commission is complete, we are still pursuing complete integration of the issues. Texans deserve transparency and efficiency when it comes to processes for the water companies and their customers. Finding the resources to effectively address these issues is a challenge, but one that I intend to accomplish.

Lone Star Current: What issues have been most interesting that you have dealt with during your time at the PUC?

Walker: I have yet to encounter a dull moment at the Commission. Each and every open meeting brings a new set of issues that are both interesting and challenging. It has been a privilege to be involved in decisions on the following issues: transfer of distribution customers and facilities from Sharyland Utilities to Oncor; the interpretation of new legislation related to network nodes to encourage the deployment of 5G technology; the sale of Oncor to Sempra to end a lengthy bankruptcy; maintaining the Commission's jurisdiction over ERCOT; and the integration of Lubbock Power and Light into ERCOT.

Lone Star Current: What facet of your job do you enjoy most?

Walker: I truly love my job, from the simplest details to the biggest decisions. Even on the hardest day, I enjoy the challenges that I face and the people who face them with me. I am humbled and honored by the opportunity to serve the great state of Texas in this position.

Lone Star Current: Tell us something most people would be surprised to know about you.

Walker: I attend 6:30 AM Mass every day.

Lone Star Current: If you weren't serving in your current position, and it was possible to pursue any trade or profession, what would it be?

Walker: At this point in my career and life, I cannot imagine myself in any other role. I have worked my entire career for an opportunity to serve in this position. I am blessed and honored that Governor Abbott has entrusted to me such tremendous privilege and responsibility.

The West Travis County PUA has statutory authority to contract with private entities seeking water services under terms its board of directors deems appropriate and that are within the agency's permissible scope of authority, but whether specific contractual provisions are within this authority and further the PUA's statutory purposes is a fact-based determination beyond the scope of an attorney general opinion. Tex. Att'y Gen. Op. KP-0178 (2018).

The Texas Attorney General ("AG") was asked whether the West Travis County Public Utility Agency (the "PUA") has the authority to impose impervious cover requirements as a contractual condition to receive water service on certain customers, such as new customers outside the service area boundaries of the PUA's certificate of convenience and necessity. The AG noted that these customers are not owed a duty by the PUA to provide service, and that the PUA has discretion to provide such service to those outside of its service boundaries. The AG then turned to the PUA's enabling statute, Chapter 572 of the Texas Local Government Code, to assess whether the PUA has the authority to require customers to comply with impervious cover limits as a contractual condition to receiving water service.

The AG first provides an overview of the authority of public utility agencies in general, noting that while the PUA was created by other public entities, the PUA itself is its own separate political subdivision of the state. Public utility agencies are created to "plan, finance, construct, own, operate, or maintain" water and wastewater facilities. Tex. Local Gov't Code § 572.051(3). To accomplish those purposes, the PUA (like any statutorily-authorized political body) may exercise only those powers conferred to it by the Legislature and, by implication, those powers "reasonably necessary to carry out the express responsibilities given to it by the Legislature." See *Texas Coast Utils. Coal. v. R.R. Comm'n of Tex.*, 423 S.W.3d 355, 359 (Tex. 2014). The AG notes that while it was created by other political entities, the PUA does not inherit any of the authorities of its creating bodies.

Under Chapter 572, the PUA is given the authority to "adopt rules to govern the operation of the agency and its employees, facilities, and service" and "perform any act necessary to the full exercise of the agency's powers." Tex. Local Gov't Code § 572.058(b)(l), (4). Additionally, the PUA has all other powers "that are related to [water and wastewater] facilities and that are provided by law to a municipality that owns a facility," save for the authority to impose taxes. Id. § 572.052(d). Chapter 552 governs municipally-owned utilities and confers the authority to "regulate the system in a manner that protects the interests of the municipality." Id. § 552.00l(b). The AG concludes that the PUA therefore also has the authority to regulate its own water utility system in a manner that "protects its interests." See id. §§ 552.00l(b), 572.052(d).

Specific to contracting authority, Chapter 572 expressly provides that the PUA may contract with private entities for water services "under terms the [PUA]'s board of directors considers appropriate," and Chapter 552 confers similar authority on municipally-owned utilities to "contract with persons outside its boundaries to permit them to connect with [the water utility system] on terms the municipality considers to be in its best interest." See id. §§ 572.060(2) and 552.001. Thus, for private entities seeking water service, the PUA's Board of Directors has discretion in determining the contractual conditions upon which it will extend service. See id. §§ 552.00l(c), 572.052(d), 572.060(2).

Concluding its analysis, the AG turned to the specific contractual requirements imposed by the PUA regarding impervious cover. The AG stated that the key determination in analyzing contractual provisions revolves around whether the requirements further the PUA's stated goals. If they do, then a Texas court would likely conclude that the PUA is within its statutory authority to impose these conditions. However, the AG concluded that such a determination involves a disputed factual analysis and is thus beyond the scope of the opinion process. The AG did note that factors that could be considered in making this determination could include where the PUA obtains its water and whether the proposed developments subject to the impervious cover requirements are within an aquifer recharge zone.

A Texas city is authorized to let its local Chamber of Commerce use the city's employees, equipment, supplies, facilities, and/or property for events organized by the Chamber so long as the city ensures the use of resources is done to accomplish a public purpose, the city retains adequate control over the use of resources to ensure use for a public purpose, and the city ensures that it receives a benefit in return. Tex. Att'y Gen. Op. KP-0181 (2018).

The AG was asked whether the City of Petersburg (the "City") has the authority as a Type-A general-law municipality to use city resources for various purposes in connection with events sponsored by the City's Chamber of Commerce (the "Chamber"). The Chamber is a nonprofit organization that promotes activities

and events within the City. In connection with these events, the Chamber asks the City for the use of its employees, equipment, and supplies, as well as facilities and property. The AG was asked by the City whether it is authorized under Article III, Section 52(a) of the Texas Constitution to allow the use of its employees, equipment and supplies, and facilities and property for this private purpose.

The AG first cited to Art. III, Sec. 52(a), which provides that the City is not authorized to "lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." Tex. Const. Art. III § 52(a). The AG noted that Texas Courts have held that spending public funds for a "legitimate public purpose" with a clear "public benefit" is not an unconstitutional grant of public funds as discussed in Art. III § 52(a). See *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). Further, an expenditure to directly accomplish a legitimate public purpose is constitutional even though it may incidentally benefit a private interest. See id.

Next, the AG noted that the Texas Supreme Court previously established a three-part test to determine whether an expenditure of public funds or use of other public resources satisfies Art. III § 52(a). Under that test, the public entity making the expenditure or authorizing the use of its other resources must: (1) ensure that the transfer is to "accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit." *Texas Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002).

Regarding the first element of the test, the AG cited a Texas Court of Appeals decision, which provides that to the extent a municipal expenditure or use of resources serves one of the municipality's powers or functions, it serves the public purpose of the municipality. See S*tate ex rel. Grimes Cty. Taxpayers Ass'n v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 265 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism'd). The AG also notes the statutory provisions regarding municipal purpose, providing that all municipalities may govern "for the good government, peace, or order of the municipality or for the trade and commerce of the municipality." Tex. Local Gov't Code § 51.001(1). The AG concluded that community events such as the ones put on by the Chamber may arguably serve the public purpose of improving the trade and commerce of the City.

As to elements two and three of the test, the AG cited to a previous Opinion from 2016 and states that a public entity may retain public control over the use of its resources by entering into an agreement or contract that imposes an obligation on the recipient to perform a function benefitting the public. See Tex. Att'y Gen. Op. No. KP-0104 (2016) at 2. The same contract can also serve to satisfy the third prong by imposing safeguards to ensure the public entity receives a return benefit. See id.

The AG ended its Opinion by stating it cannot conclude, as a matter of law, that the use of City employees, equipment and supplies, and facilities, and property by the Chamber for the community events is unconstitutional. Yet, the AG notes generally that if the use of city resources for the Chamber's events serves a public purpose of the City, then Article III, Section 52(a) authorizes the use of resources in this way.

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.*

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URI appealed to the Texas Supreme Court, claiming that the 13th Court committed legal error by going beyond the actual language in the agreement to discern its meaning. The Texas Supreme Court granted review of this case because it presented contract interpretation issues that were significant to the jurisprudence of the State of Texas. The Opinion delivered by Justice Guzman opens by quoting Oliver Wendell Holmes, and proceeds by offering a detailed analysis of the parol evidence rule and the use of extrinsic evidence to inform, rather than vary or contradict, the terms of an unambiguous contract.

On October 12, 2017, Lloyd Gosselink attorney, Duncan Norton, presented oral argument at the Supreme Court on behalf of URI. The Texas Supreme Court agreed with URI's legal interpretation that Texas law prohibits using evidence from beyond the four corners of an unambiguous written agreement to interpret its terms. Because both the 1985 and the 1987 data sets were valid pre-mining data, URI's use of both sets to determine the pre-mining characteristics of the well was within the actual terms of the contract; therefore, both data sets should be used. URI did not breach its agreement by doing so.

In its "reverse and render" decision, the Supreme Court overturned both lower courts and denied Kleberg County any form of relief. This victory resulted from the hard work of many attorneys and staff in Lloyd Gosselink's Air & Waste and Litigation practice groups, and it reflects the firm's mission to provide exceptional service and maximum value to our clients.

Click here to view the complete decision.

Duncan Norton is the Chair of the Firm's Air and Waste Practice Group and Tricia Jackson is an Associate in the Air and Waste Practice Group. Duncan presented oral argument on this case, but the victory resulted from the hard work of many attorneys and staff at the Firm. If you have any questions related to this article or other air and waste matters, please contact Duncan at 512.322.5854 or dnorton@lglawfirm.com, or Tricia at 512.322.5825 or tjackson@lglawfirm.com.

WATER SUPPLY PLANNING: FEDERAL ISSUES PREVIEW*

by Nathan E. Vassar

Although water suppliers operate primarily within the realm of state and local laws and regulations, a critical component for many water projects and strategies involves federal issues. Over the course of the next several articles in this water supply planning series, we will explore the overlay of federal involvement in water supply planning, obstacles to anticipate, as well as opportunities to address federal concerns. We will focus on certain agencies and their processes, highlighting issues that can arise at various stages of suppliers' plans and projects.

At the outset of this federal focus, however, it is important to revisit an earlier topic, as the selection of the right team is fundamental to navigate a complex web of federal statutes, regulations, and the myriad agencies that enforce and implement them. Building the right team for water supply projects will sometimes require the involvement of those who specialize in certain areas, such as endangered/threatened species issues, jurisdictional determinations, and Clean Water Act section 404 permit applications, among others. For example, knowing the differences between certain water availability modeling tools at the state and federal levels can be important in order to demonstrate the firm nature of a supply, when analyzing projected demands. Furthermore, as with any regulatory process, team members who know the decision-makers at certain agencies can make a difference in addressing challenges as they may arise. An articulate and knowledgeable lobby component may also be valuable in conveying messages to elected officials (and others), as needed during the course of a certain project. Of course, it is completely possible that the team assembled for state permitting issues is also perfectly equipped to handle federal matters as well, but it can be important to do early due diligence as to specialized needs in the federal arena to avoid facing surprises later on.

As we will explore in later detail throughout the series, unique federal issues have a way of slowing down a project if one is not prepared on the front end. The overlay of a designated critical habitat for some species can require surveying, impacts analyses, and ultimately may cause a re-routing or re-design decision. Depending upon archeological findings within a project's footprint, both state and federal statutes may be triggered with respect to historical preservation, and possibly consultation with those whose heritage is connected to the site(s). In addition, the nexus between water rights issues and water quality cannot be ignored, as we analyzed several months ago in an earlier article.

As is often the case, technical considerations so often include connections to legal requirements, including notice issues, case law updates concerning jurisdictional boundaries (among others), and implications of transferring water across basins. By way of example, recent federal jurisprudence makes clear that interbasin transfers do not trigger the need for a federal discharge permit (however state law impacts the priority dates of such water once moved to the new basin).

Many organizations exist across Texas with a significant federal focus and committees, including those at TWCA, WEAT, TACWA, and NACWA, for example. Engagement in those organizations can help identify appropriate team members, as well as maintaining and updating suppliers' own knowledge of key federal issues that may have an impact upon projects.

In the coming articles, we will hone in on specific federal areas, exploring the ways in which water suppliers can best anticipate and address applicable requirements, while (ideally) avoiding surprises as they manage, stretch, and extend critical water supplies.

Nathan Vassar is a Principal in Lloyd Gosselink Rochelle & Townsend's Water Practice Group. Nathan's practice focuses on representing clients in regulatory compliance, water resources development, and water quality matters. Nathan regularly appears before state and federal administrative agencies with respect to such matters. For questions related to water supply issues, federal requirements, or the use of water supply planning tools, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com.

*This article is the ninth 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.

RICHARDSON PREVAILS OVER ELECTRIC UTILITY AT TEXAS SUPREME COURT

by Jamie L. Mauldin

In a big win for Texas cities, the Texas Supreme Court ruled in February that electric utilities must bear the cost of relocating their utility equipment from public rights-of-way when required to do so for municipal work projects.[1]

Municipal groups and the state's largest electric utility had been at odds over this potentially expensive issue for years. At the heart of the issue is a dispute between Oncor and the City of Richardson (the "City"). In 2010, the City elected to begin reconstruction of some of its public alleys with the expectation that Oncor would move its utility poles, at its sole cost, to make way for work crews.

Oncor, like other electric utilities across Texas, typically pays for the relocation of its poles and other equipment during such work projects. In this instance, the obligation for Oncor to do so also was agreed upon in its franchise agreement with the City (the agreement that authorizes the utility to operate within the City's corporate limits). But despite the clear language of the franchise agreement and common practice, Oncor refused to pay.

At about the same time that the utility and City were fighting over the issue, Oncor separately reached an unrelated electric rate settlement with the Steering Committee of Cities Served by Oncor, a city coalition that also included the City. A rate tariff adopted as part of that settlement included boilerplate language that Oncor said bolstered its position in the relocation dispute.

In 2012, the City sued Oncor, accusing the utility of breaching its franchise agreement for refusing to pay for the utility infrastructure relocation costs. The City argued, amongst other things, that the boilerplate language in the tariff was subordinate to both the franchise agreement and to common law. The Steering Committee of Cities Served by Oncor submitted supporting briefs, noting that the boilerplate language cited by Oncor was never at issue in the rate settlement. The City won a summary judgment at the Dallas County District Court in 2014; lost on appeal; but ultimately prevailed at the Texas Supreme Court. "As a home-rule city, Richardson has exclusive control over its public rights-of-way and has authority to manage the terms of use of those rights-of-way," the high court stated in its Opinion.

The costs associated with relocating an electric utility's infrastructure has always been a key issue for cities in negotiating franchise agreements with an electric utility. The *Richardson* decision strengthens the ability of cities to obtain payment for utility relocation in their rights-of-way. The specifics for payment of the relocation costs available to cities is dependent on specific terms of franchise agreement, and determining how the *Richardson* decision might affect utility relocations would require a review of each city's individual franchise agreement. Nonetheless, the *Richardson* decision is undoubtedly a positive development for cities, and it strengthens cities' authority to manage the terms of public rights-of-way.

Jamie Mauldin is an Associate in the Firm's Energy and Utility Practice Group, where her practice focuses on a wide range of utility regulatory and ratemaking matters. If you have questions related to this article or other matters, please contact Jamie at 512.322.5890 or jmauldin@lglawfirm.com.

[1]*City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252 (Tex. 2018).

CHINA'S WASTE BAN MAKES WAVES

by Tricia M. Jackson and Jeffrey S. Reed

In July, 2017, China issued a notification to the World Trade Organization ("WTO") that it would be banning the importation of nearly all types of foreign recyclable waste into the country, including mixed paper, mixed plastics, and textiles, by the end of 2017. The Chinese Government's Ministry of Environmental Protection ("MEP") originally set the maximum contamination rate of the recyclables at 0.3%—one-third of 1% contamination. Then, in an updated notification to the WTO, China proposed a 0.5% contamination rate and a March 1, 2018 effective date. Because average inbound recycling loads have a contamination rate of 16% or higher, recycling industry leaders, such as the U.S. Institute of Scrap Recycling Industries, have commented that China's new contamination limit is not possible to achieve, and effectively results in a ban on the importation of all recyclable materials into China. Local U.S. governments, corporations, and waste organizations have been actively responding either with their own inquiries regarding the details of the ban, or by implementing policies in order to mitigate the buildup of recyclable waste across the country.

SWANA Issues Statement to WTO

On August 31, 2017, the Solid Waste Association of North America ("SWANA") issued a statement in response to China's notifications to the WTO. The statement addressed the significant impact that China's unilateral decision will have on the United States' solid waste and recycling industries. The organization expressed its concern, noting that local governments in the U.S. are responsible for implementing waste control plans, and that they will not be in a position to conduct the proper permitting and construction of facilities

to accommodate the surplus of recyclable waste within a reasonable time after the ban takes effect. SWANA specifically outlined the need for a longer transition period, and suggested a more carefully crafted phase out to allow for the market to adjust to the new policy. On December 15, 2017, SWANA's Core Advocacy group submitted a second round of comments regarding the proposed ban to the WTO addressing the need for an internationally recognized standard for contamination of imported waste. The comments also urged that such a standard should take effect no earlier than January 1, 2022.

Local Response to the Ban

Due to the amount of non-recyclable material mixed into the recycling normally earmarked for China, few U.S. companies are willing to purchase it. Consequently, local governments are being forced to reevaluate their recycling systems and further educate their citizens on how to best conduct their individual recycling regimen. Many cities and states have been issuing their own statements and policies to address China's waste importation ban. In September 2017, the City of Madison, Wisconsin issued a notice on its website that due to the waste ban enacted by China, there is no end market to accept its recyclable materials, and, "therefore the [recycling] program must be suspended." The City instead encouraged citizens to donate their reusable items, like appliances and electronics, to thrift stores, or to try to sell them on social media in an attempt to keep the items from ending up in a landfill.

In October 2017, the Oregon Department of Environmental Quality issued a statement that it would be working with local governments, waste collectors, recycling processors, and industry representatives to "make long-term changes to [their] recycling systems," so that they can operate efficiently within the new market environment. That statement occurred after Oregon regulators received requests from more than a dozen companies wanting to throw recyclable materials into landfills. Also during October 2017, the California Department of Resources and Recovery ("CalRecycle") issued a document discussing the possible implementation of mandatory packaging management rules to meet the state's goal of 75% diversion of waste materials by 2020. According to CalRecycle, over 60% of California's bin recycling goes to China, and the statewide goal, coupled with the waste importation ban, has created a push to gather more innovative and effective solutions for achieving California's waste control and recycling objectives.

Corporate Response to the Ban

Due to the surplus of available recyclable materials resulting from China's waste ban, the price of recyclable commodities, like mixed paper, has gone down. U.S. corporations that utilize recyclable materials are using the market disruption as an opportunity to acquire cheap raw materials to incorporate into new products. Pratt Industries, which uses 100% recycled materials and supplies cardboard boxes to Amazon, is taking advantage of the lower prices and surplus to purchase more raw materials to be incorporated into its products. Likewise, in October 2017, Target Corp., Proctor & Gamble Co., Keurig Green Mountain Inc., Campbell Soup Co., Coca-Cola Company's North American business, and other companies pledged to require their corporate suppliers of industrial plastic items to use more "post-consumer" materials.

Another corporate issue is the prospect of Chinese freightliners returning back from the U.S. empty instead of filled with recyclables. There has historically been a trade deficit between the United States and China. Currently, Chinese companies deploy ships that import electronics, footwear, toys, and other manufactured goods into the U.S., and then return to China with recyclables to be sold to manufacturers. Because there is almost nothing else to transport from the U.S. back to China, shipping companies offer major discounts on their return runs, which benefits the U.S. recycling industry immensely. Upon implementation of the ban, neither this form of cheap transportation nor the traditional end market for the waste will be available. Therefore, U.S. companies will either need to negotiate transportation elsewhere or coordinate for the disposal of thousands of tons of recyclable materials here in the U.S. – a tough situation both environmentally and economically.

The other alternative is domestic innovation within the waste disposal industry. Columbia Pulp, a recycling company located in Washington State, plans to build and operate a facility that recycles agricultural waste, like straw, into paper. This process would not only create a use for typically discarded materials, but it would also disrupt the demand for wood from forests. In addition, magnetic technology and infrared waste sorting systems are the new wave of recycling, as they are more accurate and efficient than human sorting. The recyclables industry will need more corporate innovative solutions like these in order to keep the industry from backsliding upon implementation of the waste ban.

Bottom Line

The last thing that anyone wants is for massive amounts of recyclable materials to end up in landfills across the United States. Much of the success of any recycling program stems from people's enthusiasm to recycle in the first place, and the revelation that those efforts are going to waste—literally and figuratively—could mean that less people will be willing to go through the trouble of sorting their trash from their recyclables. While it is unclear exactly how the Chinese waste importation ban will play out in the long term, it is abundantly clear that governments, companies, and even individual households will need to be poised to respond in a way that will make the United States' waste and recyclables industry less susceptible to unpredictable foreign policies in the future.

Tricia Jackson is an Associate in the Air and Waste Practice Group and Jeff Reed is a Principal in the Firm's Air and Waste Practice Group. If you have any questions related to this article or other air and waste matters, please contact Tricia at 512.322.5825 or tjackson@lglawfirm.com, or Jeff at 512.322.5835 or jreed@lglawfirm.com.

TEXAS' ELECTRIC GRID OPERATOR PREDICTS RECORD-BREAKING USAGE THIS SUMMER

by Jamie L. Mauldin

Texas' electricity grid operator expects that customers will have to voluntarily reduce power consumption this summer in order to keep electricity flowing through the grid. On March 1, the Electric Reliability Council of Texas ("ERCOT") released its Seasonal Assessment of Resource Adequacy ("SARA") report for the upcoming spring season and preliminary assessment for the summer. The report predicts record-breaking peak usage this summer. ERCOT anticipates voluntary load reductions and an increase in power sold in the market in response to higher prices during peak demand. ERCOT estimates that it will have just enough power to meet electricity demand this summer. But Texas' summer power reserves are at their lowest in more than a decade, a shortage that is expected also to drive up wholesale electricity prices.

ERCOT's guidelines call for the grid's generating capacity to exceed demand by at least 13.75%. The excess generating capacity is called the reserve margin. Last December, ERCOT released a report projecting only a 9.3% planning reserve margin for summer 2018. This reserve margin is below both the 13.75% preferred reserve margin and economically optimal level of 10.2%. ERCOT expects a 7,200 megawatt decrease in overall generation capacity for the summer, primarily due to recent announced plant retirements and project delays. System-wide peak demand is expected to grow by an average of 1.7% annually over the next ten years, driven by the strong Texas economy.

The Public Utility Commission of Texas ("Commission") has issued a press release stating that it intends to monitor the forecast for electricity supply and demand, but that the ERCOT market is designed to maintain the reliability of the system. The Commission also noted that the market structure provides powerful incentives for customers to reduce their consumption in response to prices. Finally, the Commission restated its dedication to ensuring that market rules support investment necessary for the state's growing population.

ERCOT's President and CEO, Bill Magness, stated, "at ERCOT, our focus this summer will be on performance. We expect everyone involved in the electric business in ERCOT, including ERCOT as the grid operator, along with the generation and transmission owners, retail marketers and those involved in demand will be focused on maximizing performance as well."

The final summer SARA report will be released in May and will likely reflect the expected summer conditions.

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ASK SHEILA

Dear Sheila:

We have an employee who was diagnosed with severe and chronic depression. His psychiatrist has certified he has a serious health condition under the Family and Medical Leave Act ("FMLA"). Many mornings he is unable to come to work on time, or misses work altogether. This employee is on a work crew that cannot leave each morning until everyone is there. Although we can accommodate his absences, we need to know if he is coming in or just running late. The employee often fails to call in timely, claiming it is his depression that makes him unable to call in timely. Can we discipline and eventually terminate him for violating our call-in procedures? I was told that because the employee's absences are protected, we can't touch him.

Sincerely,
Need to Know

Dear Need to Know,

Although it is true that the FMLA entitles the employee to miss work for his serious health condition, even in small increments, the FMLA does not give him the right to fail to follow your call-in procedures. Employees on incremental and unscheduled FMLA leave, meaning the doctor has not certified an absence for a specific period of time, must follow the same call-in procedures as everyone else, and may be disciplined, including discharge, for failing to do so.

The key to avoiding liability is consistent application of the policy: if coworkers are allowed to arrive late or not come in at all without calling in consistently, then you will have trouble disciplining an employee in protected status for the same action. You would need to show that other employees had been written

up or terminated for not calling in timely to defend an FMLA discrimination or retaliation action.

Be aware that if a doctor has certified scheduled, predictable absences, such as dialysis three mornings a week, the employer may not require a call-in for each scheduled absence. Similarly, if a doctor certifies that the employee must be out for a block of time, like four weeks to recover from surgery, the employer may not require the employee to call in daily or weekly, unless the absence will extend beyond the certification, or if the return date is not definite. For example, if the certification states that the employee will be out for at least two weeks, and perhaps longer, the employer could require a status call at the two-week mark.

A reminder on FMLA basics – employees are not eligible for FMLA benefits unless 1) they work in a location with at least 50 employees in a 75-mile radius, and 2) the employee has worked for the same employer for a total of at least 12 months (even if not consecutive) and has actually worked at least 1250 hours in the 12-month period preceding the leave.

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

IN THE COURTS

Water Cases

Texas v. New Mexico, No. 141, Orig. (U.S. Mar. 5, 2018).

The State of Texas's original action in the United States Supreme Court alleges that the State of New Mexico has violated the Rio Grande Compact (the "Compact"), under which New Mexico is required to deliver a specified annual amount of Rio Grande River water to Texas at the Elephant Butte Reservoir ("Elephant Butte"). Elephant Butte, however, is located about 100 miles north of the Texas-New Mexico border and is part of the federal Rio Grande Reclamation Project (the "Reclamation Project"), which plays a central role in the United States' obligation to supply water to Mexico under a 1906 treaty. Texas' complaint alleges that New Mexico has violated the Compact by allowing users downstream of Elephant Butte but north of the Texas border to intercept water before it can reach the state line. Specifically, Texas contends that New Mexico has adversely affected the delivery of water intended for use in Texas not only by allowing excess diversion of surface water, but also by authorizing the extraction of underground water hydrologically connected to the Rio Grande. The United States was permitted to intervene in 2014, filing a complaint with allegations parallel to that of Texas. The Court then appointed a Special Master who received briefing, heard argument in August 2015, and issued a First Interim Report (the "Report") in February 2017. The Court agreed to hear exceptions to the Report, and on October 10, 2017, denied New Mexico's Motion to Dismiss Texas' complaint and set for oral argument the issue of whether the United States could pursue claims for Compact violations or merely those arising under the 1906 treaty with Mexico. Oral argument took place on January 8, 2018, and on March 5, 2018, the Court, using its unique authority to mold original actions, held that the United States may pursue the Compact-related claims of its complaint. Not only had New Mexico conceded that the federal government plays a vital role in the Compact's operation, but the Court found that the Compact is "inextricably intertwined" with the federal Reclamation Project; proper operation of the Compact affects the United States' ability to meet treaty obligations to Mexico; and the United States is seeking "substantially the same relief" as Texas in Texas' existing action. Clarifying that this case had not presented the question of whether the U.S. could initiate litigation under the Compact or expand the scope of the existing controversy, Justice Gorsuch, for a unanimous Court, remanded the case to the Special Master for further proceedings on the merits.

Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S.Ct. 617 (2018).

In a unanimous decision released on January 22, 2018, the Supreme Court of the United States held that litigation challenging the 2015 rule defining "waters of the United States" under the Clean Water Act ("CWA") (the "WOTUS Rule") must be filed in federal district courts rather than federal courts of appeal. Contending that the 2015 WOTUS Rule improperly expanded federal jurisdiction under the CWA, Texas filed challenges in both the United States District Court for the Southern District of Texas, Galveston

Division, and in the United States Court of Appeals for the Fifth Circuit. *Texas v. Envtl. Prot. Agency*, 2018 WL 1061810 (S.D.Tex.); *Texas v. Envtl. Prot. Agency*, No. 15-60492 (5th Cir. 2015). While the Texas case filed in district court was abated pending the determination of proper jurisdiction for appeal of the WOTUS Rule, the Fifth Circuit case was moved to the Sixth Circuit and consolidated with a multitude of WOTUS Rule challenges filed in other circuits. In re *U.S. Dept. of Def.* & *U.S. Envtl. Prot. Agency, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016). The Sixth Circuit issued a nationwide stay of the WOTUS Rule as well as a divided opinion holding that review of the WOTUS Rule belonged in federal appellate courts. The Sixth Circuit's opinion was appealed to the U.S. Supreme Court, which granted *certiorari* and, on October 11, 2017, heard oral argument. The Court's January 22nd ruling that the circuit courts lacked appropriate judicial jurisdiction to review challenges to the 2015 WOTUS Rule invalidated the Sixth Circuit's stay and returned the WOTUS Rule to active status. However, during the course of the appeal, the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("USACE") proposed a rule to add an "applicability date" to the 2015 WOTUS Rule of "two years from the date of a final action" on the WOTUS Rule. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 25, 5200-01 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

That rule became final on February 6, 2018, extending the effective date of the 2015 WOTUS Rule to February 6, 2020 and maintaining the status quo under *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) until that date (or sooner if a new definition of "waters of the United States" is promulgated by EPA and USACE). The agencies have undertaken a two-step process to rescind and replace the 2015 WOTUS Rule. In Fall 2017, public meetings were held to hear stakeholders' recommendations regarding revision of the definition of "Waters of the United States." The EPA also initiated a "Federalism consultation," which required the agencies to conduct pre-rule-proposal discussions with state and local governments. Currently, the agencies are considering the comments received through these processes before submitting a proposed rule (step two). Once published in the Federal Register, the public will have an opportunity to provide comments to the proposed rule.

Hawai'i Wildlife Fund v. Cty. of Maui, 881 F.3d 754 (9th Cir. 2018).

On February 1, 2018, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. District Court for Hawaii that the County of Maui violated the Clean Water Act ("CWA") by indirectly discharging pollutants (in the form of treated effluent) into the Pacific Ocean through groundwater. The County has long discharged treated effluent from its Lahaina Wastewater Reclamation Facility, the principle municipal wastewater treatment plant for West Maui, into state-permitted wastewater disposal wells as its primary means of effluent disposal. Here, neither party disputed that some of the treated effluent reached the Pacific Ocean, a "navigable water" under the CWA, nor that the disposal wells were "point sources" for CWA purposes. The County, however, argued that the point source itself must convey pollutants into a navigable water in order to trigger the CWA's permitting requirements. Disagreeing, the Court of Appeals held that the indirect discharge from a point source was sufficient for CWA liability to attach. In other words, the discharges were unauthorized because under the CWA, the County is prohibited from disposing of pollutants into the Pacific Ocean without an NPDES permit. Under the facts, "groundwater play[ed] a role in delivering the pollutants from the wells to the navigable water." As a result, CWA liability attached because "the pollutants [were] fairly traceable from the point source to a navigable water such that the discharge [was] the functional equivalent of a discharge into the navigable water."

The significant ramifications of this decision for CWA permitting and enforcement is illustrated by the EPA's February 20, 2018 request for comments regarding the CWA's coverage of "discharges of pollutants" via a direct hydrologic connection to surface water. Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 34,7126 (Feb. 20, 2018) (to be codified at 40 C.F.R. pt. 122). Comments regarding previous EPA statements about the CWA and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation must be received on or before May 21, 2018. Comments may be submitted to Docket ID No. EPA-HQ-OW-2018-0063, at http://www.regulations.gov.

Ctr. for Regulatory Reasonableness v. Envtl. Prot. Agency, 849 F.3d 453 (D.C. Cir. 2017), cert. denied, -- U.S. --, No. 17-334 (Feb. 20, 2018).

On February 20, 2018, the United States Supreme Court declined to review a decision by the U.S. Circuit Court of Appeals for the D.C. Circuit related to blending and bypasses under the CWA. This case revolves around policy letters issued by the EPA in 2011 explaining EPA's policy with respect to techniques used by publicly owned water treatment facilities to manage peak wet weather flows when wastewater treatment facilities might otherwise become overwhelmed and inundated with wastewater entering the system. Blending is a process in which a portion of wastewater flows are diverted around segments of the wastewater treatment process and later combined—or blended/mixed—with the treated wastewater. The recombined wastewater, which is supposed to meet effluent limits, is then discharged. EPA's bypass rule at 40 C.F.R. § 122.41(m) prohibits bypasses of wastewater treatment around secondary biological treatment within utilities except where necessary for essential maintenance to assure efficient operation. Moreover, pursuant to 40 C.F.R. § 131.13, states "may, at their discretion, include mixing zone policies in their state water quality standards." In the 2011 letters, however, the EPA indicated its "long-

standing policy" that mixing zones in waters designated for primary contact recreation should not be permitted. In response to the policy letters, the Iowa League of Cities (the "League") sued in the Eighth Circuit challenging EPA's efforts to regulate blending by applying secondary treatment limits internal to the treatment plant. See *Iowa League of Cities v. Envtl. Prot. Agency*, 711 F.3d 844 (8th Cir. 2013). The League prevailed, but the EPA indicated it would not acquiesce in or follow the Eighth Circuit's decision outside of that circuit, which prompted the Center for Regulatory Reasonableness (the "Center") to sue the EPA in the D.C. Circuit. The Center alleged that the non-acquiescence statement itself constituted a rule promulgated without proper notice and comment and in excess of the EPA's statutory authority. The D.C. Circuit, however, ruled against the Center, finding that the federal district courts have jurisdiction to review final agency actions unless a statutory provision provides for direct review in a court of appeals. Thus, the Supreme Court's recent denial to grant *certiorari* allows the ruling of the D.C. Circuit to stand. However, due to the procedural nature of the D.C. Circuit's holding, future application of the *Iowa League of Cities* decision and the EPA's regulation of blending outside of the Eighth Circuit remains to be seen.

Catskill Mountains Ch. of Trout Unlimited, Inc. v. Envtl. Prot. Agency, 846 F.3d 492 (2nd Cir. 2017) ("Catskills III"), cert. denied, Riverkeeper, Inc. v. Envtl. Prot. Agency, -- U.S.--, No. 17-446 (Feb. 26, 2018).

On February 26, 2018, the U.S. Supreme Court declined to take up a case challenging the EPA 2008 rule exempting water transfers from coverage under the CWA National Pollutant Discharge Elimination System ("NPDES") permitting program. The rule, commonly referred to as the "Water Transfers Rule," was designed to allow the transfer of water between water bodies without the regulatory burden of obtaining a discharge permit. This codification triggered a litany of legal actions challenging EPA's 2008 Water Transfers Rule, as well as the EPA's interpretation of how the CWA's NPDES permitting program is applied to water transfers. Despite its earlier decisions determining that the water transfers were subject to the NPDES permitting program, the Second Circuit reversed the district court's ruling that vacated the 2008 Water Transfers Rule. This time, the Second Circuit upheld the 2008 Water Transfers Rule as a valid exercise of deference to agency expertise embodied in a rule, thereby reinstating the rule. Challengers petitioned the Supreme Court, but the Court declined to take up the case, thus allowing the Second Circuit's reinstatement of the rule to stand.

Green Valley Special Util. Dist. v. Walker, AU-17-CA-00819-SS, 2018 WL 814245 (W.D. Tex. Feb. 9, 2018).

In 2016, both the Guadalupe Valley Development Corporation ("GVDC") and the City of Schertz (the "City") filed applications with the Public Utility Commission of Texas ("PUC") to decertify certain portions of Green Valley Special Utility District's ("Green Valley") sewer certificate of convenience and necessity. In response, Green Valley argued that as the holder of a federal loan under 7 U.S.C. § 1926(b), to find its water system, its sewer CCN service area was protected during the term of the loan. The PUC nevertheless granted GVDC's application pursuant to Texas Water Code ("TWC") § 13.254(a-5) and (a-6) – which specifically states that the PUC "may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program." In addressing the City's application, the PUC decided it lacked authority to consider whether § 1926(b) preempted the application under TWC § 13.255(b)-(c). As a result, Green Valley brought this action against the PUC Commissioners, GVDC and the City (the "Defendants") in federal District Court, alleging that the PUC's authority to decertify land from its sewer CCN was limited by the fact that § 1926(b) preempts portions of TWC §§ 13.254 and 13.255. The Defendants moved to dismiss, among other things, on the basis that Green Valley had failed to state a claim upon which relief could be granted. However, following a hearing held on January 23, 2018, all such motions were denied by the Austin Division of the United States District Court for the Western District of Texas on February 9, 2018.

Air Cases

***In re United States*, No. 17-71692, 884 F.3d 830 (9th Cir. 2018).**

On March 7, 2018, the Ninth Circuit denied the United States' petition for a writ of mandamus to stay proceedings on the pending climate change lawsuit brought in *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017). In district court, the plaintiffs argued that the entirety of the U.S. government's actions and inactions regarding climate change in recent decades has violated their constitutional right to a stable future climate, and has contributed to a concrete, personalized, and fairly traceable injury that is redressable by the court. In response, the United States filed a petition for a writ of mandamus. A writ of mandamus is an order from a court ordering an inferior governmental official to properly fulfill his or her official duties or to correct an abuse of discretion. The United States claimed that immediate relief is necessary to protect the government from a significant intrusion on the separation of powers and requested that the Ninth Circuit direct the Oregon District Court to dismiss the case. The Ninth Circuit reasoned that the United States had not satisfied any of the four Bauman factors in order to meet the high burden for mandamus relief. The four factors are: (1) whether the petitioner has no other means to obtain the desired relief, (2) whether the petitioner will be damaged in a way not correctable on appeal, (3) whether the district court's order manifests a persistent disregard for the federal rules, and (4) whether the district court's order raises new and important problems or issues of first impression. The Ninth Circuit denied the writ, holding that the mandamus petition was premature because the district court had not yet issued a discovery order that the United States could argue was overly burdensome. The Ninth Circuit also held that mandamus relief was inappropriate at such an early stage in the litigation, but

that the defendants could seek mandamus relief if they become aggrieved by a future discovery order.

S. Coast Air Quality Mgmt. Dist. v. Envtl. Prot. Agency, 882 F.3d 1138 (D.C. Cir. 2018).

On February 16, 2018, the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") vacated an Obama-era rule interpreting attainment achievement under the National Ambient Air Quality Standards ("NAAQS"). The final rule, implemented on March 6, 2015 (80 Fed. Reg. 12264), waived statutory attainment deadlines associated with the 1997 NAAQS standards for ozone without ensuring that adequate anti-backsliding provisions were also introduced. The final rule also waived the 1997 NAAQS requirement to reclassify areas that do not meet the deadlines as nonattainment areas for ozone. The D.C. Circuit reasoned that the Clean Air Act ("CAA") unambiguously requires a nonattainment area to demonstrate progress in reducing emissions from within the nonattainment area itself. The D.C. Circuit's unanimous holding vacated the provisions of the EPA's final rule that removed the statutory attainment deadline and the 1997 NAAQS reclassification requirement, because the court determined that these provisions relaxed the controls applicable to nonattainment areas in contravention of the anti-backsliding requirement in the CAA.

In the Courts *is prepared by Maris Chambers in the Firm's Districts and Water Practice Groups and Tricia Jackson in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Maris at 521.322.5804 or mchambers@lglawfirm.com, or Tricia at 512.322.5825 or tjackson@lglawfirm.com.*

AGENCY HIGHLIGHTS

The White House

On February 12, 2018, the White House released its "Legislative Outline for Rebuilding Infrastructure in America" (the "Outline"), which is the Trump Administration's framework for maintaining and rebuilding the Country's overall infrastructure. The Outline addresses not only traditional infrastructure, like roads, bridges and airports, but also drinking and wastewater systems, waterways and water resources. Under the Outline's proposed $100 billion "Incentives Program," states and localities would receive incentives in the form of federal grants to support wide-ranging infrastructure projects. Water-related improvements addressing flood control, water supply, drinking water, wastewater and stormwater would all be eligible for federal support under the proposed Incentives Program. The Outline also describes a $50 billion "Rural Infrastructure Program," with eligible asset classes including drinking water, wastewater and stormwater facilities, as well as flood risk management and water supply infrastructure. A proposed $20 billion "Transformative Projects Program" would support more risky, ambitious and exploratory infrastructure projects (including those related to clean water and drinking water) that offer a larger reward profile. The Outline also proposes expansion of Water Infrastructure Finance and Innovation Act funding for the Environmental Protection Agency as well as greater water-related eligibility for Private Activity Bonds. The Outline, with its water infrastructure section beginning on page 27, may be accessed at https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf.

Environmental Protection Agency ("EPA")

EPA issues memorandum withdrawing the "once in, always in" policy for major sources. On January 25, 2018, the EPA issued a Memorandum regarding Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act ("CAA"). The new policy allows a major source subject to maximum achievable control technology ("MACT") standards to be reclassified as an area source upon a showing that the source's potential to emit hazardous air pollutants is below the major source thresholds of 10 tons per year of any single hazardous air pollutant, or 25 tons per year of any combination of hazardous air pollutants. Area sources are subject to less stringent emissions requirements and are not required to install MACT. The new policy is a departure from the previous "once in, always in" policy, in which facilities that were major sources of hazardous air pollutants on the first substantive compliance date of an applicable MACT standard were required to "permanently" comply with those standards, even if the facility later lowered its potential to emit hazardous air pollutants below the major source thresholds. The new guidance allows sources that lower their potential to emit hazardous air pollutants below major source thresholds to no

longer be subject to MACT standards upon a showing that the facility qualifies as (and will remain) an area source.

EPA issues memorandum allowing consideration of emissions decreases in Step 1 of pre-construction permitting assessments. On March 13, 2018, the EPA issued a memorandum establishing new guidance as to how the agency will assess emissions in pre-construction permitting proposals. Previously, Step 1 of the pre-construction permitting process required a determination of whether the specific project would result in a significant increase in emissions without considering whether emissions would decrease for other components of the project. Step 2, in determining whether the project will result in a net emissions increase, allows for the consideration of any increase or decrease in actual emissions from the source that are contemporaneous with the specific project. The new guidance asserts that during Step 1, the value of both emissions increases and decreases from a proposed project will be considered in EPA's New Source Review ("NSR") process for major modification applicability. The agency refers to this process as "project emissions accounting." Under the new guidance, if a facility is able to show in Step 1 that the sum of emissions increases of a particular nonattainment pollutant for all aspects of the project is *de minimis* (or insignificant), and in Step 2 that the net increase of all emissions of nonattainment pollutants for the facility is also *de minimis*, then the facility is not required to obtain an NSR permit prior to construction. The memorandum also indicates that the new approach only applies to existing facilities.

EPA issues final rule classifying nonattainment areas using the 2015 NAAQS standards, 83 Fed. Reg. 10376. On March 9, 2018, the EPA published its final rule establishing air quality thresholds that designate areas as nonattainment under the 2015 National Ambient Air Quality Standards ("NAAQS") standards for ozone. Entities that may be affected by this final rule include state, local, and tribal governments and air pollution control agencies responsible for the attainment of ozone standards, as well as owners and operators of regulated sources of volatile organic compound ("VOC") and nitrogen oxide ("NOx") emissions. The rule sets the ozone NAAQS standard at 70 parts per billion ("ppb")—down 5ppbs from the 1997 standards laid out by the Bush Administration. Areas that do not meet this standard will be designated as nonattainment areas, subjecting VOCs and NOx emitting facilities located in these areas to more stringent regulatory standards. The final rule is effective on May 8, 2018.

EPA proposes rule to add aerosol cans to the Universal Waste Program, 83 Fed. Reg. 11654 (March 16, 2016). On March 16, 2018, the EPA published a proposed rule that adds hazardous waste aerosol cans to the Universal Waste Program under the federal Resource Conservation and Recovery Act ("RCRA"). The existing rules allow empty cans to be disposed in normal trash so long as the cans qualify as an "empty container" under 40 CFR § 261.7. However, partially empty aerosol cans fall under the more stringent rules for hazardous waste due to their potential ignitability, corrosiveness, and toxicity. The proposed rule would allow all "discarded, intact, non-empty" aerosol cans to be transported to facilities that handle universal wastes, and would require less recordkeeping and training associated with the disposal of aerosol cans as hazardous waste. The proposed rule excludes from coverage under the Universal Waste Program aerosol cans that show evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions. Through this exclusion, the EPA intends for hazardous waste aerosol cans that are not fully intact to remain subject to the existing hazardous waste standards. The deadline for submission of comments on the proposed rule is May 15, 2018.

EPA publishes new rule reducing air pollution monitoring requirements for pressure relief devices on waste containers, 83 Fed. Reg. 3986 (January 29, 2018). On January 29, 2018, the EPA published a final rule reducing continuous monitoring requirements for pressure relief devices on waste containers. The rule eliminates the requirement for waste storage and processing facilities to monitor air pollution on waste containers. Particularly,

the new rule removes the additional monitoring requirements established by the 2015 amendments to the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for Off-Site Waste and Recovery Operations ("OSWRO"). The EPA's position is that the 2015 changes were "not necessary" and the new rule "does not substantially change the level of environmental protection provided under the OSWRO NESHAP." The EPA predicts that the new rule will create $4.2 million per year in equivalent annualized cost savings, and reduce the capital costs related to compliance within the industry by $28 million dollars. The rule became effective January 29, 2018.

Federal Communication Commission ("FCC")

FCC approves funding for rural broadband infrastructure development. On March 23, 2018, the FCC issued a global order in WC Docket Nos. 10-90, 14-58, and 07-135, and CC Docket No. 01-92, approving an additional $500 million for rural broadband infrastructure development. This funding is intended to close the digital divide through actions and proposals designed to stimulate broadband deployment in rural areas. In the Order, the FCC takes several steps to increase broadband deployment in rural areas. First, to maximize available funding for broadband networks, they codified existing rules that protect the high-cost universal service support program from waste, fraud, and abuse by explicitly prohibiting the use of federal high-cost support for expenses that are not used for the provision, maintenance, and upgrading of facilities and services for which the high-cost support is intended. The FCC also adopts additional compliance obligations that will assist in determining whether high-cost recipients comply with the requirement to spend high-cost funds only on eligible expenses. Additionally, for rate-of-return carriers, the FCC adopted a presumption against recovery through interstate rates for specific types of expenses not used and useful in the ordinary course and identified other expenses that they presume are not used and useful unless customary for similarly situated companies. Second, in exchange for increased broadband deployment obligations, the FCC will offer additional high-cost support to those rate-of-return carriers that previously accepted model-based support. Next, to ensure stability in the contribution factor pending ongoing implementation of various high-cost reforms, they directed the Universal Service Administrative Company to continue forecasting a uniform quarterly amount of high-cost demand pending further FCC action. The FCC is also seeking comment on other reforms, including, for example, exploring the need for caps on capital and operating expenses, using an auction process to address substantial competitive overlaps, and other options for simplifying the legacy rate-of-return mechanism.

Texas Commission on Environmental Quality ("TCEQ")

The TCEQ announced the retirement of Executive Director Richard Hyde on February 14, 2018. Since then, the Commissioners have been working to identify Hyde's successor. While Hyde had planned to step down as Executive Director ("ED") at the end of March, he will remain at the TCEQ through the month of April in order to facilitate a smooth transition. Hyde has served as the TCEQ's ED since January 2014. Prior to that, he served in multiple leadership roles throughout the Agency, including the role of Deputy ED. His 25-plus- year career in state government began as a permit writer at the Texas Air Control Board, one of the TCEQ's predecessor agencies. In the interim, Stephanie Bergeron Perdue, former Special Counsel to the ED, is serving as Acting ED. She has appointed John Racanelli, Deputy Director for the Office of Administrative Services, to serve as her Acting Deputy ED effective April 5, 2018.

The TCEQ has renewed the stormwater Construction General Permit (TXR150000) ("CGP") with an effective date of March 5, 2018. In general, the federal National Pollutant Discharge Elimination System ("NPDES") stormwater program requires permits for discharges from construction activities that disturb one or more acres, and for discharges from smaller sites that are part of a larger common plan of development or sale. Depending on the location of the construction site, either the state or EPA will administer the permit. In Texas, the state administers the construction general permit ("CGP"). Operators of construction sites authorized under the CGP are required to implement stormwater controls and develop a Stormwater Pollution Prevention Plan to minimize the amount of sediment and other pollutants associated with construction sites from being discharged in stormwater runoff. The previous CGP expired on March 5, 2018. However, TCEQ has renewed and EPA has approved the CGP, which went into effect on March 5, 2018. Operators of existing sites must reapply to continue any authorizations permitted under the previous CGP. In order to do so, renewal applicants must submit, as applicable, a Notice of Intent ("NOI") or a Low Rainfall Erosivity Waiver ("LREW") form to the TCEQ by June 5, 2018. Effective September 1, 2018, applicants must submit the NOI or LREW forms using TCEQ's online e-permitting system or request and obtain an electronic reporting waiver.

TCEQ repealed the basin permitting rule. Effective March 29, 2018, the Texas Commission on Environmental Quality ("TCEQ") has adopted rules implementing House Bill ("HB") 3618, 85th Texas Legislature (2017), which repealed a section of the Texas Water Code ("TWC") requiring all Texas Pollutant Discharge Elimination System ("TPDES") permits within a single watershed to contain the same expiration date, which is commonly known as basin permitting. The bill also removed language coordinating submittal of summary reports by river authorities with existing basin permitting rules previously required under the TWC. As adopted, the rulemaking affects three sections of the Texas Administrative Code ("TAC"): (1) 30 TAC § 305.71; (2) 30 TAC § 220.4; and (3) 30 TAC § 220.6. The repeal of 30 TAC § 305.71 allows wastewater discharge permits to be issued for five-year terms, consistent with state and federal rules relating to TPDES permitting. Under the basin permitting program, numerous TPDES permits were previously required to be issued for terms between two and four years in order to synchronize the basin permitting cycle, despite the fact that five-year terms are the standard permit term. The amendments to 30 TAC § 220.4 and

§ 220.6 are clean-up provisions to remove cross-references to the basin permitting program that coordinate submittal of summary reports under the Clean Rivers Program with the basin permitting cycles.

The TCEQ adopted updated Texas Surface Water Quality Standards. Rule Project No. 2016-002-307-OW, addressing the Texas Surface Water Quality Standards ("TSWQS"), became effective March 1, 2018. This rule revises the TSWQS to incorporate additions and revisions to statewide toxic criteria for the protection of aquatic life and human health, incorporating new data on toxicity effects and new EPA procedures; numerous additions and revisions to the uses, criteria, and descriptions of individual water bodies based on new data and results of recent use-attainability analyses ("UAAs"); additions and revisions to site-specific toxic criteria to incorporate local water quality data into criteria for water bodies; and numerous additions of site-specific recreational uses for selected water bodies as a result of recent recreational UAAs. Substantive changes and clarifications have been made to all sections of the TSWQS, except 30 TAC §§ 307.1, 307.4, 307.5 and 307.8.

Public Utility Commission ("PUC")

The PUC of Texas has Appointed John Paul Urban as its New Executive Director. Prior to joining the PUC, Mr. Urban was most recently employed by NRG Energy. From 2011 to 2014, he served as the PUC's director of governmental relations. Prior to that, Mr. Urban was Chief of Staff for Representative Wayne Smith (R-Baytown). Mr. Urban replaces Brian Lloyd, who, after serving in the role of Executive Director for seven years, resigned on March 1, 2017. The PUC announced Mr. Urban's selection at its March 19, 2018 open meeting.

PUC Commissioner Brandy Marty Marquez Resigns. On March 8, 2018, the PUC announced that Commissioner Brandy Marty Marquez will officially resign from her position effective April 2, 2018. Marquez's prior public service included several key roles, including Chief of Staff to Governor Rick Perry during the 83rd Legislative Session. Her previous leadership roles in the Governor's Office include Deputy Chief of Staff, Director of the Budget, Planning and Policy Division, and Deputy Legislative Director. Marquez was also Policy Director for Perry's successful 2010 gubernatorial primary campaign. At the Commission, Marquez served on the Texas Reliability Entity, where she focused on vital issues ranging from cyber security to regional standards and enforcement issues. She also sat on the Nuclear Waste Storage Coalition, which focuses on finding a solution to our nuclear waste storage issues across the country. The Governor has yet to announce her replacement.

Docket No. 47675, *Joint Report and Application of Oncor Electric Delivery Company LLC and Sempra Energy for Regulatory Approvals Pursuant to PURA §§ 14.101, 39.262, and 39.915*. On March 8, 2018, the PUC unanimously approved a Stipulation that would authorize Sempra Energy's proposed acquisition of Energy Future Holdings, Corp.'s approximately 80.03% indirect interest in Oncor. An initial non-unanimous settlement agreement signed by Oncor, Sempra Energy, Commission Staff, the Office of Public Utility Counsel, the Steering Committee of Cities Served by Oncor ("Cities"), and the Texas Industrial Energy Consumers was filed on December 15, 2017. Revised versions of the settlement agreement were filed on January 5, 2018, where the Alliance for Retail Markets and the Texas Energy Association for Marketers joined as additional signatories, and on January 23, 2018, where Golden Spread Electric Cooperative and Nucor Steel Texas joined as signatories. While the January 23 revision to the revised settlement agreement was initially opposed by the Energy Freedom Coalition of America and the Texas Legal Services Center, those two parties later withdrew their opposition and signed the January 23 settlement agreement without amendment. The Energy Freedom Coalition of America joined as a signatory to that agreement on January 29, 2018, and the Texas Legal Services Center joined as a signatory on February 5, 2018. With the addition of these two parties, all parties to this proceeding signed the settlement agreement. The January 23, 2018 settlement agreement was the final version filed with the Commission and formed the basis for the PUC's Order.

Oncor and Sempra Energy made numerous regulatory commitments related to the proposed transaction in the joint report and application and in their direct testimonies. Those commitments include, after closing and thereafter, Oncor Electric Delivery Holdings Company LLC (Oncor Holdings) and Oncor will have separate boards of directors that will not include any employees of Sempra Energy's competitive affiliates in Texas, any members from the boards of directors of Sempra Energy's competitive affiliates in Texas, or any individuals with direct responsibility for the management or strategies of such competitive affiliates. Additionally, a majority of the Oncor Holdings board members and Oncor's board members will qualify as independent in all material respects in accordance with the rules and regulations of the New York Stock Exchange. The Oncor board, composed of a majority of disinterested directors, will also have the sole right to determine dividends or other distributions, except for contractual tax payments. Numerous other regulatory commitments were entered into.

Docket No. 47472, *Commission Staff's Petition to Determine Requirements for Smart Meter Texas*. In August 2017, the PUC opened a proceeding to determine the new requirements for Smart Meter Texas ("SMT") 2.0. SMT 1.0 is an interoperable, web-based information system that stores electric usage data and provides access to advanced meter usage data for premises served by advanced meters for customers, Retail Electric Providers ("REPs"), and authorized third parties. SMT is operated by several transmission and distribution utilities ("TDU") (Oncor, CenterPoint Energy Houston Electric, LLC ("CenterPoint Energy"), American Electric Power ("AEP"), and Texas New Mexico Power Company) that have entered into a Joint Development and Operations Agreement ("JDOA"), which provides for the joint ownership, development, operation, and maintenance of SMT. SMT was created in 2008 to provide a standard web portal and data repository for meter usage data regardless of utility service

territory, consistent with the requirements of the Public Utility Regulatory Act and the PUC's substantive rules. SMT provides a single point of access for customers without the need to develop individual TDU web portals.

However, participation in SMT 1.0 is very low. There are 100,695 residential accounts, representing approximately 1.4% of active meters in SMT. There are approximately 5,260 small business accounts, representing approximately 0.007% of active meters in SMT. And the costs to deploy the program have been significant. Through the end of 2016, Oncor and CenterPoint Energy areas alone have paid over $96 million for SMT costs. This new proceeding was opened to determine which requirements should be revised, deleted, or kept as the Joint TDUs bid out a new contract for SMT 2.0. Several parties intervened and filed testimony.

Parties spent two days in hearings litigating the proceeding. After the hearing, parties filed a Joint Motion requesting the admission of a Stipulation, which included SMT 2.0 Business Requirements; all parties except one signed the Stipulation. On March 14, 2018, the State Office of Administrative Hearings ("SOAH") issued a proposal for decision for the one remaining issue, which addresses the maximum length of time that a Residential or Small Commercial Customer could grant a Competitive Service Provider ("CSP") access to the customer's SMT data before the customer would be required to affirmatively renew the grant of access to the CSP. SOAH has recommended the adoption of a 12-month limit as opposed to a 36-month limit. The proposal for decision is set to be considered by the PUC at its April 12, 2018 Open Meeting.

Docket 47576, *Application of the City of Lubbock Through Lubbock Power and Light for Authority to Connect a Portion of its System with ERCOT*. At the March 8, 2018 Open Meeting, the PUC signed the Order approving the City of Lubbock's application. This Order addresses the application of the City of Lubbock, by and through Lubbock Power & Light (LP&L), for authority to connect a portion of its system with the Electric Reliability Council of Texas ("ERCOT"). Commission Staff, Office of Public Utility Counsel, Texas Industrial Energy Consumers, Southwestern Public Service Company, and Alliance for Retail Markets filed an unopposed stipulation in this proceeding, resolving all issues. ERCOT, AEP Texas, CPS Energy, Texas Energy Association for Marketers, Sharyland Utilities, Lone Star Transmission, FGE Power, Wind Energy Transmission Texas, Cross Texas Transmission, Oncor Electric Delivery Company, Golden Spread Electric Cooperative, and Southwest Power Pool are the remaining parties in this proceeding and do not join in the stipulation but do not oppose it. LP&L will now have to coordinate with Sharyland as to the construction of the transmission facilities necessary to connect LP&L to ERCOT, and proceed with obtaining all necessary regulatory approvals to do so.

Railroad Commission of Texas ("RRC")

GUD No. 10669, Statement of Intent of CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas to Increase Rates in the South Texas Division. On November 16, 2017, CenterPoint Energy Entex and CenterPoint Energy Texas Gas ("CenterPoint") filed a Statement of Intent to change gas rates in its South Texas service territory. Within its South Texas Division, CenterPoint provides service to 142,288 customers (132, 129 residential customers). CenterPoint is requesting a rate increase of $540,000, which is a 1.0% increase in revenues, excluding gas costs. CenterPoint is also asking for a $0.39 surcharge related to Hurricane Harvey. Together, these increases will raise the average residential bill by $1.13.

Two different coalitions of cities have intervened, along with RRC Staff. The first Prehearing Conference was held December 7, 2017. This matter is currently abated in order for settlement negotiations to occur.

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