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ACTIVITY RAMPS UP AT TEXAS LEGISLATURE AS THE NEW YEAR BEGINS

by Troupe Brewer and Ty Embrey

A new year is upon us and activity at the Texas Legislature is starting to heat up both on political and legislative fronts. State legislators will be campaigning throughout their legislative districts and meeting with constituents about the numerous issues facing Texans that will have to be addressed during the 2021 Regular Session of the Legislature.

With 2020 being a presidential election year, the amount of public attention focused on the election process throughout Texas and the United States will likely be at all-time high levels. The upcoming year will be incredibly busy as many legislators will be campaigning to retain their legislative positions. The Democratic and Republican political parties will hold party primary elections on Tuesday, March 3 for governmental positions all up and down the election ballot, including state legislative positions. After the primary election process is completed, everyone will turn their attention to campaigning that is part of the general election that will be held on Tuesday, November 3.

The upcoming year will also be full of legislative activity as legislators work to prepare for the 2021 Regular Session. The Legislature and its committees will hold public hearings all over the state throughout 2020 to gather information and testimony on important issues facing Texas. The legislators will use the information and knowledge they gain over the year to prepare bills to file during the Regular Session. Interim charges for the Legislature were released by the Speaker of the House and the Lieutenant Governor to their respective bodies in the fall of 2019. Highlighted below are charges to committees of particular interest to readers of *The Lone Star Current*.

In the Texas House, Speaker Bonnen provided the following charges to committees of interest:

House Natural Resources Committee ("HNRC")

The HNRC was tasked with charges that include studying the efforts of the TCEQ, the TWDB, and the PUC to incentivize, promote, and preserve regional projects to meet water supply needs; to encourage public and private investment in water infrastructure; to identify impediments or threats to regionalization; and to monitor the joint planning process for groundwater and the achievement of the desired conditions for aquifers by groundwater conservation districts. Additionally, the HNRC is charged with monitoring the implementation of legislation passed by the 86th Legislature and any associated rulemakings, specifically noting HJR 4, SB 7, and SB 8 (statewide and regional flood planning and mitigation); HB 720 (appropriations of water for recharge of aquifers and use in ASR projects); HB 721 (reports on ASR and aquifer recharge projects); HB 722 (development of brackish groundwater); and HB 807 (state and regional water planning process).

House Environmental Regulation Committee ("HERC")

The HERC was charged with investigating the delegation of state statutory authority to political subdivisions of the state for the authorization and regulation of solid waste management infrastructure and operations, and determining an effective approach to balancing the authority of the state versus local political subdivisions. Additionally, the HERC will study the regulation of commercial and residential irrigation backflow devices to determine if Texas is adequately regulating such backflow devices in the context of potential pollutant backflow into drinking water sources. The HERC was also requested to conduct oversight of all associated rulemaking and other governmental actions taken to ensure intended legislative outcome of all legislation, specifically noting HB 2771 (regarding the transfer of produced water

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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

J. Troupe Brewer, William "Cody" Faulk, and Jamie L. Mauldin have been elected Principals of the Firm effective January 1, 2020. We thank them for all of the hard work and talent they have shared with our Firm and our clients over the years, and we look forward to their continued success.

J. Troupe Brewer's practice focuses on assisting clients on a broad range of water-related issues, including permitting, water rights, water resource management and development, regulatory compliance, litigation and governmental relations.

Prior to joining the firm, Troupe served as the committee clerk for the Senate Committee on Business and Commerce during the 83rd Legislative session, and more recently worked as an attorney in the Environmental Law Division of the Texas Commission on Environmental Quality.

Troupe received his J.D. from Samford University, Cumberland School of Law, his M.S. from Samford University, Howard College of Arts and Sciences, and his B.A. from the University of North Carolina at Chapel Hill.

Jamie Mauldin's practice involves the representation of municipalities and utilities before the Public Utility Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and the State Office of Administrative Hearings.

Prior to joining the Firm, Jamie worked as an attorney in San Francisco, California representing labor interests in front of the California Public Utilities Commission.

Jamie received her J.D. from the University of Houston Law Center and her B.A. from Vanderbilt University.

William "Cody" Faulk's practice involves the representation of municipalities, utilities, and landowners before the Public Utility Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and the State Office of Administrative Hearings, including providing consulting services to firms needing aid in navigating these regulatory agencies. Cody also has extensive experience representing and defending local municipality, utility, and semi-governmental entity clients in a wide range of matters.

Cody received his J.D. from St. Mary's University School of Law and his B.A. from Southwestern University.

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THE LONE STAR CURRENT INTERVIEW

Emily Lindley, Commissioner

Texas Commission on Environmental Quality

Governor Greg Abbott appointed Emily Lindley to serve as Commissioner for the Texas Commission on Environmental Quality on August 20, 2018. Before her appointment, Commissioner Lindley served as the Chief of Staff for the Enivonmental Protection Agency Region 6. As Chief of Staff, she served as an advisor to the regional administrator who oversees Arkansas, Louisiana, New Mexico, Oklahoma, Texas, and 66 tribal nations. Prior to her service at the EPA, she worked at the TCEQ for over ten years, most recently as the Special Assistant to the Deputy Executive Director. During her tenure, she also served as a Special Assistant to the Office of Water's Deputy Director who oversees water permitting, water quality planning, and water supply related functions including Utilities and Districts for the state. In her role, she helped Texans understand the public participation process and answered questions about permitting issues. Commissioner Lindley was appointed to the Texas Environmental Flows Advisory Group by Gov. Abbott on Sept. 25, 2018. She is a member of the Austin Women's Symphony League, the Baylor Women's League of Austin, and a weekly driver for Meals on Wheels. Lindley received a Bachelor of Arts from Baylor University and completed the Governor's Executive Development Program at The University of Texas at Austin L.B.J. School of Public Affairs in 2016.

The Lone Star Current recently had the opportunity to interview Emily Lindley, 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 Commissioner at the TCEQ?

Lindley: The TCEQ is tasked with overseeing a wide variety of environmental issues in this state. Through this oversight, I strive to ensure that TCEQ abides by the applicable statutes in a uniform manner so that our rules are applied consistently and appropriately to all those regulated. Education and transparency are also very important to me. Many of the regulations we are delegated to oversee are complicated and nuanced. A priority of mine is to make sure the TCEQ does a great job of communicating effectively to the public and those doing business with us.

LSC: What do you view as the biggest challenges facing the TCEQ over the next few years?

Lindley: Social media – I see it as a blessing and a curse. Social media is a great tool TCEQ uses to its advantage and to get information out to those that want and need it quickly. For example, all of the Commissioners' Agendas are streamed and posted on YouTube for any citizen in the state of Texas to watch. The other side of the coin is that social media can be used to spread inaccurate information very quickly. When inaccurate information gets out there, it takes substantial time and effort to respond. Not to mention that once wrong information is out there, it's out there. Another challenge we face, and will continue to face, is retaining our employees. We have always had to compete with an ever-growing and ever competitive job market. However, as Texas diversifies, keeping and retaining top talent is becoming increasingly hard. I don't see that changing anytime soon.

LSC: What issues have been the most interesting that you have dealt with during your time at the TCEQ?

Lindley: In the short year-and-a-half I have been in this position, several high-profile issues have arisen that the TCEQ has had to react to. I could be naive in thinking this, but I don't think anyone could have predicted that we would have seen the number of high-profile events in 2019 that we saw (not to mention the fact that our staff was analyzing and monitoring over 840 bills during some of these events). I am very proud of how we responded to these incidences and how we continue to improve and learn from those events. Going through confirmation was also an interesting process that I didn't fully appreciate until I was before the Nominations Committee. There's a lot of self-reflection that happens when you are having to go through that!

LSC: What facet of your job do you enjoy the most?

Lindley: First, let me start by saying that I am so fortunate to have been given this opportunity by Governor Abbott. Some of my most favorite memories throughout my career have involved this agency and the people working in it. Therefore, it was a huge

honor to be considered and then confirmed as a Commissioner. Not to mention the fact that there are so many aspects of this job that I absolutely love! I have the good fortune of serving in a position where monotony does not exist. I am constantly learning. New challenges are always right around the corner and our agency is blessed with some of the nation's leading experts in their field. Whether I am faced with a unique permitting matter, a new rule, or a policy decision, there is always something new to study and learn about. I also genuinely love getting to interact and engage with employees and the various stakeholders. Lastly, I love talking TCEQ budget to anyone that will listen (which typically only lasts a few minutes, since most of those conversations end when the other person falls asleep!).

LSC: Tell us something most people would be surprised to know about you.

Lindley: I am a proud member of the Roger Federer fan club and have been for a number of years.

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

Lindley: In college, I had an internship with Hospice. I grew to love that work. If I were not in my current position, I would somehow be involved in that organization.

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Lindsay Killeen has joined the Firm's Litigation and Appellate Practice Groups as an Associate. She represents clients both in state and federal courts. She provides guidance to clients as they navigate the litigation process at both the trial and appellate levels. Lindsay is a passionate advocate both in and out of the courtroom and works hard to solve complex client problems. Lindsay received her doctor of jurisprudence from the University of Texas School of Law and her bachelor's degree from Abilene Christian University with honors.

Lauren Thomas has joined the Firm's Water and Compliance and Enforcement Practice Groups as an Associate. Her practice involves working with environmental matters at the federal, state, and local levels. As a member of the Water Practice Group, Lauren assists clients with water quality matters, water resources development, regulatory compliance, permitting, enforcement, and litigation. Lauren received her doctor of jurisprudence from the Texas A&M University School of Law and her bachelor's degree from Texas A&M University.

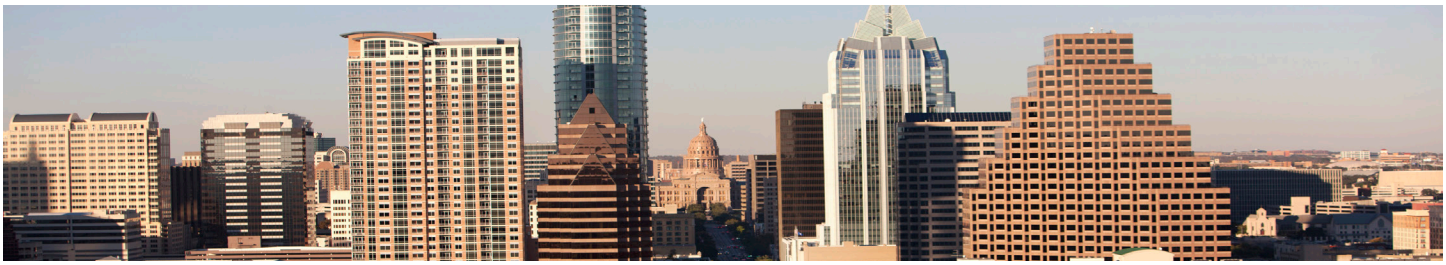
Cole Ruiz has joined the Firm's Water and Districts Practice Groups as an Associate. His practice focuses on governmental and water-related legal and policy issues, including certificates of convenience and necessity, statutory and regulatory compliance, permitting, water rights, water resource management and development, and governmental relations. Prior to joining the firm, Cole worked for the San Antonio River Authority and served as Project Manager for the South Texas Regional Water Planning Group (Region L) and the Regional Water Alliance. Cole received his doctor of jurisprudence from St. Mary's University School of Law, his master's from St. Mary's University, and his bachelor's from the University of Texas.

Sheila Gladstone will present "Employee Relations: Effective Internal Investigations" at the Texas Public Employer Relations Association (TxPELRA) Annual Civil Workshop on January 29 in San Marcos.

Emily Linn will discuss "FLSA Updates & Overtime Pay" at the Texas Association of Regional Councils on February 5 in Austin.

Lindsay Killeen will be co-presenting a "Case Law Update" at the 21st Annual Course Changing Face of Water Law on February 20 in San Antonio.

Mike Gershon will present "Water/ Wastewater CCNs (Certificates of Convenience and Necessity): Do These State-Regulated Service Areas Protect Utility Planning and Budgeting? Ensure Service to Landowners? Treat Landowners Fairly?" at the 2020 Land Use Conference, UT CLE on April 24 in Austin.



While a municipality may enact an ordinance that involves a subject covered by state law, to the extent that the ordinance conflicts with or is inconsistent with state law, the ordinance will be held to be void. Tex. Att'y Gen. Op. No. KP-0274 (2019).

Representative Morgan Meyer of the General Investigating Committee sought an opinion by the Attorney General ("AG") to determine whether state law preempts certain municipal ordinances regulating dangerous dogs.

Under the Constitution, a municipal ordinance shall not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5(a). In other words, a hierarchy of laws exists such that state, federal, and local laws may not contravene the Constitution, and local laws may not conflict with state and federal law. If a conflict exists, a court may hold the "inferior" law within the hierarchy is void.

The bulk of the analysis in a preemption case centers on what qualifies as a conflict with a superior law within the hierarchy. If an ordinance does not conflict with a superior law, but merely covers the same topic or involves the same subject matter as a superior law, the ordinance will stand. Thus, the State's mere entry "into a field of legislation . . . does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016) (quotations omitted); see also *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990) ("[T]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.").

Courts look at whether the Legislature may have intended to limit local laws. Courts require that such an "intent to impose the limitation . . . appear with 'unmistakable clarity.'" *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018). If a court cannot locate such an intent and the two laws "can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency." Id.; see *City of Richardson*, 794 S.W.2d at 19 ("A general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." (quotations omitted)).

In this case, Representative Meyer requested that the AG comment on specific ordinances regulating dangerous dogs. The AG began by analyzing the superior laws in the hierarchy with some application to this subject. Chapter 822, Subchapter D of the Texas Health and Safety Code ("Subchapter D") governs dangerous dogs. It does not specifically preempt all local regulation of dangerous dogs, but it does contain comprehensive requirements and procedures on the subject.

Subchapter D addresses the determination that a dog is dangerous and imposes requirements and corresponding time limits on an owner of a dog determined to be dangerous. It provides for the seizure and impoundment of a dangerous dog by the animal control authority when an owner fails to comply with the applicable requirements. It provides for the appeal of a determination that a dog is dangerous or a finding that the owner has not complied with the requirements of owning a dangerous dog. And it establishes offenses for an attack by a dangerous dog or for failure to comply with the requirements for owning a dangerous dog.

Thus, any local regulation providing for a rule or procedure inconsistent with those of Subchapter D on the above topics is likely void. But despite how comprehensively Subchapter D covers the topic of dangerous dogs, some local regulation is still permissible. In fact, Subchapter D specifically provides that a "municipality may place additional requirements or restrictions on dangerous dogs if the requirements or restrictions: (1) are not specific to one breed or several breeds of dogs; and (2) are more stringent than restrictions provided by this subchapter." Tex. Health & Safety Code § 822.047. Moreover, Subchapter D *compels* compliance with applicable municipal regulations, requirements, or restrictions on dangerous dogs. *Id.* § 822.042(a)(4); see *also id.* § 822.042(d) (authorizing municipality or county to prescribe fees and costs related to seizure, acceptance, impoundment, or destruction of a dangerous dog and requiring owner to pay the costs or fee).

Subchapter D does provide specific instances that it applies despite any local regulation. For example, one section provides that "notwithstanding any other law or local regulation, the court may not order the destruction of a dog during the pendency of an appeal." *Id.* § 822.042(e). And an owner has a right to appeal a dangerous dog determination "[n]otwithstanding any other law, including a municipal ordinance." *Id.* § 822.042l(b); see *also id.* § 822.0424(e) (providing for

an appeal to a county court or a county court at law "[n]otwithstanding any other law"). Considering these provisions with the key "notwithstanding" language, the AG found that the Legislature's intent was to allow additional local regulation of dangerous dogs while at the same time expressly prohibiting local regulation in any specified circumstances. Thus, each municipal ordinance must be analyzed on a case-by-case basis.

The first municipal ordinance about which Representative Meyer inquired may reduce the time permitted for an owner to comply with certain requirements imposed on owners of a dangerous dog. However, Subchapter D already provides a deadline for an owner to comply with these requirements—30 days after learning the dog is dangerous. Thus, this municipal ordinance's compliance period imposes a shorter deadline than the compliance period imposed by Subchapter D. The AG concluded that a court could not harmonize such an ordinance to give both effect, so the municipal ordinance provision fails and is preempted by Subchapter D, the superior law in the hierarchy.

The second ordinance about which Representative Meyer inquired contemplates increasing the amount required of an owner for an appeal bond. Subchapter D provides, however, that a court will set the amount of bond for an appeal. Despite this provision's coverage of the appeal process, the AG ruled that Subchapter D did not show that the Legislature intended, with unmistakable clarity, to limit other fees or costs a municipality may impose on an owner. The AG reasoned that the appeal bond is merely a condition necessary to an appeal, so the two laws may properly coexist.

Finally, Representative Meyer asked whether a municipal ordinance may authorize the director of an animal control authority to destroy a dog found at large without providing for a time period for the owner to redeem the dog or to appeal the determination. In addition to due process concerns, the AG pointed out that Subchapter D currently provides that a court may not order the destruction of a dog during the pendency of an appeal; importantly, this limitation on the court's authority to order the destruction applies "notwithstanding any other law or local regulation." *Id.* § 822.042(e). Thus, a municipal regulation providing for the destruction of a dog during this time period is clearly contrary to the statute and unenforceable.

This AG opinion is instructive to municipalities to undertake a thorough review of applicable state and federal laws before enacting an ordinance involving subject matter likely covered by such superior laws, to ensure that the proposed municipal regulation is not preempted and unenforceable.

Municipal Corner *is prepared by Jacqueline Perrin. Jacqueline is an Associate in the Firm's Districts Practice Group. If you would like additional information or have any questions related to these or other matters, please contact Jacqueline at 512.322.5839 or jperrin@lglawfirm.com.*

RAIN, RAIN, GO AWAY. THE NEW TCEQ RULES ARE HERE TO STAY.

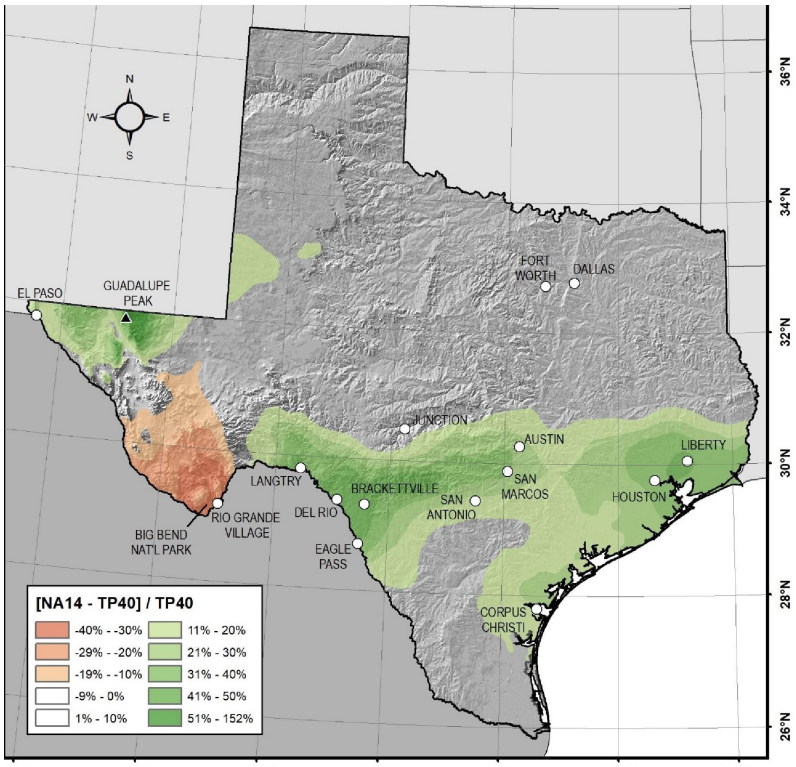
by Sam Ballard

On September 30, 2019, the Texas Commission on Environmental Quality ("TCEQ") announced that, effective on that date, applicants for permits, permit amendments, permit modifications, and registrations for municipal solid waste ("MSW") facilities must use updated precipitation data from the National Oceanic and Atmospheric Administration (the "NOAA Atlas 14") for the parts of the applications that require estimating rainfall. This change will affect facility surface water drainage reports, flood studies, designs for leachate and contaminated water management systems, and designs for freeboard. The change may also impact eligibility for arid exemptions in some areas of the state. In September 2018, NOAA released the NOAA Atlas 14 study, providing updated precipitation data in Texas. The NOAA Atlas 14 study provides precipitation frequency estimates for durations of 5 minutes through 60 days, at average recurrence intervals of 1 year through 1,000 years for the State of Texas. By definition, a precipitation frequency estimate is defined as the depth of precipitation at a specific location for a specific duration that has a certain probability of occurring in any given year. This information is used for infrastructure design and planning activities under federal, state, and local

regulations. In addition, this information is used to help delineate flood risks, manage development in floodplains, and monitor flooding threats.

According to NOAA, due to decades of additional rainfall data and improved analytical methods, the precipitation frequency estimates in the recent study are more accurate than the previously available values, which were based on data from the 1960s and 1970s. Therefore, the updated values will now supersede the previous values.

The NOAA Atlas 14 rainfall depth values may have either increased or decreased, depending on the specific location in the state. Generally, however, the updated study found increased values in parts of Texas, including larger cities, such as Austin and Houston, which will result in changes to the rainfall amounts that define 100-year flood events (a 100-year flood event has only a one percent chance of occurring in a given year). In Austin, for example, 100-year rainfall amounts for 24 hours increased as much as three inches—up to 13 inches from 10 inches—based on the study. Likewise, 100-year estimates for the Houston area increased from 13 inches to 18 inches and values previously classified as 100-year events are now more likely to occur during 25-year events, according to the study.



Texas Rain Map.jpgFigure 7.4 of the NOAA Atlas 14 study shows the percentage differences in 100-year 24-hour estimates between the NOAA Atlas 14 rainfall data and the now outdated rainfall data contained in Weather Bureau Technical Paper 40, the previous rainfall frequency guide.

In addition, TCEQ has indicated that assessment of surface water drainage (both existing and proposed) for a facility must follow the methods described in the September 2019 version of the Texas Department of Transportation ("TxDOT") Bridge Division Hydraulic Design Manual.

On September 12, 2019, TxDOT issued an updated Hydraulic Design Manual, which refers to the NOAA Atlas 14 study for its Depth-Duration-Frequency ("DDF") data. The manual also indicates that the NOAA Atlas 14 data has superseded all previous DDF data sources for Texas.

According to the Hydraulic Design Manual, TxDOT oversees drainage practices and design standards for the creation of hydraulic facilities associated with transportation projects, including open channels, bridges, culverts, storm drains, pump stations, and storm-water quantity and quality control systems. However, although the TxDOT hydrology standards were only intended to apply to transportation projects, TCEQ regulations require MSW facilities to determine "drainage characteristics" for proposed MSW sites by applying several formulas prescribed in the TxDOT manual.

For example, pursuant to 30 Texas Administrative Code § 330.305, MSW applicants are required to assess the existing and proposed drainage characteristics of a site under 200 acres using the "rational method" formula coefficients as specified in the TxDOT manual. Additional hydraulic calculations required for permit applications under Subchapter G of Chapter 330, concerning surface water drainage, are provided in section four of the TxDOT manual, including the calculation of surface flow rates and soil water retention.

According to Robert "Holly" Holder, P.E., Environmental Sector Director at Parkhill, Smith & Cooper, Inc., the new requirements will have some degree of impact on MSW facilities statewide—some increases and some decreases. However, the greatest impacts of storm intensities are located to the west of central Texas (including facilities located in Langtry, Del Rio, Eagle Pass, and Brackettville, Texas) and eastward to the state line with Louisiana, as well as in Houston, as those areas experienced the greatest percentage increase in 100-year 24-hour estimates based on Figure 7.4 of the NOAA Atlas 14 study.

Holder also indicated that the previous annual precipitation map was recently updated, now showing a slight bulge west along a line from San Marcos to Del Rio, Texas. Any arid-exempt MSW facilities in those particular parts of the state may be at risk of losing their exemption based on the new criteria. Also revised was the 30-year annual rainfall mean annual precipitation map (figure A.3-1 of the study) that shows not only this bulge, but also that the 25-inch per year line, which has been the dividing line for arid exempt sites, has moved west along with the water balance final cover line. Some counties may now be situated east of this

line, which could impact their MSW facilities. Holder also noted that TCEQ will not be requiring drainage plans to be updated at this time, but any modification or amendment request will trigger the requirement for applicants to revisit their drainage plan and include the new NOAA Atlas 14 data.

Clearly, it is essential that MSW applicants consult with their drainage engineers about potential impacts before making any permit amendments or modifications, especially if such amendments or modifications concern drainage or leachate design.

Sam Ballard is an Associate in the Firm's Air and Waste, and Compliance and Enforcement Practice Groups. If you have any questions or would like more information about this article or other matters, please contact Sam at 512.322.5825 or sballard@lglawfirm.com.

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regulatory authority from the Railroad Commission to the TCEQ in order to prepare for the delegation of the NPDES permitting by the U.S. EPA to the TCEQ for this source).

House State Affairs Committee ("HSAC")

From a substantive perspective, the HSAC was first charged to receive an update on the 2020 electric reliability forecasts and to review operational successes and issues from the summer of 2019 through invited testimony from the PUC, ERCOT and other interested parties. HSAC was also directed to study the electric market to determine potential barriers in attracting sufficient energy supply and obstacles and/or incentives for the development and deployment of new energy supply technology and peak system energy demand management technology. Next, HSAC was charged with evaluating opportunities for competitive development of energy supply microgrids and the potential for enhancing reliability by transitioning municipally owned utilities to focus on transmission and distribution functions. Last, The HSAC will examine the enhancement of retail customers' energy supply management capability through promotion of greater retail price transparency.

Aside from the aforementioned technical issues, the HSAC was also charged with studying how governmental entities use public funds for political lobbying purposes and examining and identifying what types of governmental entities use public funds for lobbying purposes. Finally, like all House Committees, the HSAC was charged with monitoring the implementation of legislation passed by the 86th Legislature and any corresponding rulemaking, specifically noting SB 475 and SB 936 (relating to the security of the state's electric grid), and SB 943, SB 944, and SB 1610 (relating to the Public Information Act and the Texas Open Meetings Act).

House Energy Resources Committee

Similar to the charge above for the House Environmental Regulation Committee, and indicative of the likelihood of several pieces of legislation during the 87th Legislature on this issue, the Energy Resources Committee was charged with evaluating the status of water recycling and reuse efforts in the oil and gas industry in Texas and elsewhere. Such evaluation will consider options for tax credits, deductions, or discounts to encourage recycling, treatment, or reuse of produced water from oil and gas production activities, and it will ultimately make recommendations on statutory or regulatory changes needed to promote recycling and reuse strategies for produced water.

Over in the Texas Senate, Lt. Governor Patrick issued charges to the following committees of relevance to the readers of *The Lone Star Current's* readers:

Senate Business and Commerce Committee ("SBCC")

The SBCC was charged with assessing the electricity market in Texas, and such assessment should include (1) an examination of changes in customer demand (such as on-site storage), distributed generation, and electric vehicles, (2) a study of the usage of "non-wires alternatives," including energy storage, and (3) an identification of barriers to the electric market at the state or local level. Additionally, this Committee was charged to make recommendations to maintain grid reliability and to encourage the continued success of the electric market, and ultimately to recommend any potential legislation to address these issues.

Joint Charges to Senate Natural Resources and Economic Development and Water and Rural Affairs Committees

These two Committees received joint charges to address the following topics: (1) future water supply (specifically, to examine current laws, processes, and water storage options and availability and make recommendations promoting the state's water supply, storage, availability, valuation, movement, and development of new sources); (2) river authority infrastructure (to examine the roles and responsibilities of river authorities in maintaining their managed assets and to evaluate the impact on the economy, water supply, and flood control due to deferred maintenance); and (3) groundwater regulatory framework (to study such framework and make recommendations to improve groundwater regulation, management, and permitting).

These Committees were also charged with monitoring the implementation of legislation passed by the 86th Legislature, as well as relevant agencies and programs under each committee's jurisdiction, and ultimately making recommendations for any additional legislation needed to improve, enhance, or complete implementation of the passed legislation. In particular, the Committees were directed to assess SBs 6, 7, 8, and 500 (all relating to disaster response and recovery, disaster funds, state-wide flood planning, and dam maintenance), SB 698 (related to expedited permitting), and SB 700 (relating to water utility ratemaking reform).

Senate Intergovernmental Relations Committee ("SIRC")

Specific to infrastructure resiliency, the SIRC was charged with examining the authority of special purpose districts to generate natural disaster resilient infrastructure, determining ways state government can work with special purpose districts to mitigate future flooding and promote more resilient infrastructure, and making recommendations on how special purpose districts may use their statutory authority to assist in mitigating damage from future natural disasters.

Clearly, while the Legislature will not be meeting in a regular or special session in 2020, it will be a busy year, nonetheless.

Troupe Brewer is a Principal in the Firm's Water, Litigation, and Districts Practice Groups and Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups. If you have any questions concerning Legislative tracking and monitoring services or legislative consulting services, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com, or Ty at 512.322.5829 or tembrey@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We are a public entity and are finding more and more that our employees are using their personal cell phones for work-related reasons. Very few employees have a work-issued cell phone but there is no denying the convenience factor that comes with being able to use your cell phone to send a quick text message. Should I be concerned about allowing employees to use their personal device for official communication?

-Texter

Dear Texter,

Good eye! You are correct that there are several concerns connected with employees' use of their own personal device at work, particularly for a public employer covered by the Public Information Act ("PIA"). This is especially true after the passage of SB 944 last year, which amended the PIA to clarify certain things related to public information on privately-owned devices.

As a general statement, just because something is on an employee's personal device does not make it irrelevant from an employment lawyer's perspective, even for private sector employers. If you are audited or otherwise subject to an investigation by a governmental agency, that agency most likely has the power to obtain records from your employees' personal devices. If you are sued, such information may often be obtained through the discovery process. This can lead to the uncomfortable situation where an employee must allow access to their personal device, even if they do not want to. For this reason, it is best to have employees avoid using their personal devices to communicate as much as possible, unless they are using the employer's email account.

This was true even before SB 944, but even more important now for public sector employers.

SB 944 is a clarification of what has already been accepted as true: that communications and other information contained on privately-owned devices are **public records if they concern public information**, and the employee does not have a personal property interest in such records.

SB 944 provides procedures for preservation of such records on personal devices that apply to both current and former government employees:

- The employee is designated a "temporary custodian" of such records and must forward or transfer the information to the entity's custodian of records to be preserved **within 10 days**.
- The document must also be preserved on the personal device if necessary to preserve the metadata and other information about the document (in other words, you can't just take a screenshot of the text and email it to the entity).
- The governmental entity has an affirmative duty to locate and gather public information held on personal devices, whether from current or former employees.

SB 944 also clarifies that the Records Retention Act covers such documents on personal devices, and destroying such documents (such as auto-deletion of a text) is a Class A misdemeanor. Although texting is ubiquitous and sometimes the most convenient form of communication, we have long advised that **all public employers require their employees to refrain from texting or creating other public documents, such as photographs or notes, only accessible on personal devices**. We have advised our public sector clients to adopt a policy on this, and now advise further strengthening those policies to account for transferring such documents to the employer if they are created. This would include communications as simple as employees texting their supervisor about tardiness; and if this happens, then the supervisor must preserve the text and transfer it to the employer's record retention system.

One caveat is that transitory messages, such as a text arranging lunch plans, are not covered under record retention laws. However, the line between transitory messages and messages relating to personnel issues is unclear, and because of this, we generally advise clients that all texts between supervisors and employees qualify as personnel records and must be retained under record retention laws. For practical reasons alone, we often use text messages to refute employees' later claims about their reasons for absence or tardiness, to demonstrate whether an

employee provided proper notice of tardiness, or to investigate inappropriate workplace communications.

The bottom line is yes, you should be concerned about employees using their personal device for official communication, and there are several steps you can take to mitigate this risk. If employees have access to work emails through their phones, then they should be encouraged or required to email when remotely communicating: this allows the messages to be automatically stored in the employer's server. Also, there are programs available that may assist with preserving text messages on personal devices that we recommend looking into, including Microsoft Teams. Use of a program like this to preserve records, along with a strong personnel policy, and providing training to all of your employees about their obligations under the law will help you reduce risk and stay in compliance.

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

IN THE COURTS

Water Cases

In Re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 17-9001L, 219 WL 6873696 (Fed. Cl. Dec. 17, 2019).

The United States Court of Federal Claims, in a post-trial decision, determined that the government was liable for takings compensation to private property owners in the Houston metropolitan area following the landfall of Hurricane Harvey ("Harvey") in August 2017.

In short, Harvey dumped 33.7 inches of rain over a four-day period across the region, flooding over 150,000 homes, including many upstream properties within the Addicks and Barker Reservoirs—located above the federally designed, built, and maintained Addicks and Barker Dams. During Harvey, the Addicks and Barker Dams collected storm water, which caused properties within the reservoir to flood from the impounded water. Therefore, the issue considered by the Court was whether the Federal Government was liable for the damages to certain properties within the Addicks and Barker Dams under the Takings Clause of the Fifth Amendment of the United States Constitution.

Naturally, the case was fact-intensive, and the Court spent much time addressing certain facts, which ultimately demonstrated the federal government's pattern of behavior, which supported a successful takings claim by the plaintiffs. Those facts considered included certain studies conducted during the first half of the twentieth century, the dams' design, certain recorded cost-benefit analyses conducted pursuant to said design, post-construction improvements and operations, and—among other things—a hydrologic study which contributed to an increased awareness of actual flood risks.

In a takings case, the plaintiff must establish (1) that he holds a property interest for purposes of the Fifth Amendment, and (2) that the governmental action at issue amounted to a compensable taking. As stated by the Court, such an inquiry is question of law based on factual underpinnings. The Court followed the United States Supreme Court precedent set in *Arkansas Game & Fish v. US* by employing the list of six factors necessary for consideration in determining whether a compensable taking has occurred. Those factors include (1) "time," (2) "intent," (3) "foreseeability," (4) "character of the land," (5) "reasonable investment-backed expectation," and (6) "severity."

Here, after finding that the plaintiffs had a compensable property interest at the time of the taking, the Court also found that through its construction, maintenance, and operation of the Addicks and Barker Dams in the *past*, *present*, *and future*—the federal government had taken permanent flowage easements on the properties (i.e., a permanent right to inundate the property with impounded flood waters).

Next, the Court found that the government's actions were substantial and frequent enough to give rise to a taking, citing the significant harm endured by the plaintiffs as a result of the government's aforesaid actions—including almost entirely preventing the normal use and enjoyment of their property. The Court also found that the federal government received a notable benefit (i.e., protection of downstream properties) at the expense of the affected upstream property owners. The Court found the federal government's actions to be both intentional and foreseeable because the flooding experienced by the upstream properties was the natural and probable consequence of the inundation pool under extreme conditions. According to the Court, to an objectively reasonable person, it was not a

matter of if flooding would occur, but a matter of when and how often. Moreover, the Court found that the property owners had reasonable investment-baked expectations regarding their properties' uses.

For these reasons, the Court held that the government's actions relating to the Addicks and Barker Dams, and the flooding of certain properties, constituted a taking of a flowage easement under the Fifth Amendment, for which the government was liable.

Salcetti v. AIG Prop. Cas. Co., No. CV H-19-1184, 2019 WL 6055232 (S. D. Tex. Nov. 15, 2019).

The facts here again emanate from Hurricane Harvey's stall and downpour over the Houston metropolitan area in 2017. Here, Salcetti's home, which was insured by an AIG homeowner's policy ("Policy"), suffered significant flood damage after the U.S. Army Corps of Engineers released water from the Addicks and Barker Reservoirs. Salcetti filed a claim with AIG to cover the damage to his home. AIG denied the claim, Salcetti sued AIG, and both parties moved for pre-trial summary judgment.

The issues considered by the Federal District Court of Houston pertained to whether certain facts claimed by either side were sufficiently supported by evidence in the record to warrant granting either party's summary judgment.

On one hand, AIG argues that it denied Salcetti's claim because the Policy excludes coverage for "any loss caused by flood, surface water… or overflow of a body of water…whether or not caused by rain." Under AIG's theory, some of the rain water fell outside the Reservoirs as surface water, while other rain water fell or drained into a series of creeks, which AIG claims feed into Buffalo Bayou and the Addicks and Barker Reservoirs. According to AIG, the Reservoirs and Buffalo Bayou are "natural watercourses" and the water from the Reservoirs, upon its release, flowed into Buffalo Bayou and immediately became Buffalo Bayou water.

On the other hand, Salcetti claims that the water in the Reservoirs was "impounded water" that, when released, did not flow into Buffalo Bayou because the bayou "was full and already outside its banks at the time of the release...." Thus, the undetermined facts on which both motions for summary judgment rely turn on whether the nature of the water that damaged Salcetti's home was impounded water or surface water. Presumably, if the water is deemed "impounded water," then Salcetti's claim is more likely to fall within the coverage of the Policy. Conversely, if the water that damaged the home is surface water, it is more likely to fall within the Policy's exclusions.

Since the evidence provided in support of the pre-trial motions did not result in an agreed stipulation of facts, the record is insufficient to support either's position. Therefore, the Court denied both motions.

In Re Schlumberger Tech. Corp., No. 11-19-00204-CV, 2019 WL 5617632 (Tex. App. - Eastland Oct. 24, 2019, no pet.).

The Court of Appeals in Eastland conditionally granted a petition for a writ of mandamus in which the trial court denied a motion to dismiss, which was entered pursuant to an executed abatement agreement. At issue here was whether the trial court abused its discretion by denying the motion to dismiss, and whether the party seeking dismissal has an adequate remedy.

In 2009, The Texas Commission on Environmental Quality ("TCEQ") tested the groundwater beneath the Cotton Flat community in Midland, Texas and found that it was contaminated with hexavalent chromium. The United States Environmental Protection Agency ("EPA") then designated the impacted area as a "Superfund Site." Over 300 individuals (collectively, the "Real Parties in Interest" or "Real Parties") sued Schlumberger Technology Corporation and Dow Chemical Company (collectively, the "Relators"), alleging they were the cause of the contamination, which caused harm to the Real Parties in Interest. The suit saw virtually no movement until late 2016, when the Real Parties served the Relators with written discovery. At that time, the Relators moved for a protective order and a Lone Pine order, which would require the Real Parties to provide certain information on each individual's alleged exposure to the contamination and specify the injuries suffered. Prior to the hearing, the parties entered an agreement under Rule 11 of the Texas Rules of Civil Procedure, whereby the Relators would agree to table the motion in favor of an administrative abatement. Under the agreement, if the EPA did not determine that the Relators were the source of the contamination before April 13, 2019 (ten years after the TCEQ found contamination), then the case would be dismissed. Pursuant to the agreement, an abatement order was entered on the terms of the underlying agreement.

The EPA did not find the Relators to be the source of the contamination before April 13, 2019, and the Relators therefore filed a motion to dismiss. The Real Parties moved to stay the Abatement Order, claiming the agreed upon abatement period was intended to provide the EPA sufficient time to make a finding by finishing its investigation and declaring a source of contamination. The EPA had made no findings. Thus, according to the Real Parties, the intent of the agreement was not met. The trial court judge agreed, and signed an order denying the dismissal motion from the Relators.

Ultimately, the Texas Court of Appeals in Eastland construed the language of the agreement and the abatement order as unambiguous and granted the writ for mandamus, directing the trial court to vacate its order and enter an order that dismisses the case.

Neches & Trinity Valleys Groundwater Conservation Dist. v. Mountain Pure TX, LLC , No. 12-19-00172-CV, 2019 WL 4462677 (Tex. App.—Tyler Sept. 18, 2019, no pet.h.).

In an interlocutory appeal, the Court of Appeals in Tyler reversed the trial court's denial of plea to the jurisdiction pursuant to the principles of governmental immunity. Here, the Neches and Trinity Valleys Groundwater Conservation District ("District") sued Mountain Pure ("Mountain,"), alleging that Mountain was drawing water from a well under its authority and that Mountain should be forced to comply with the Texas Water Code and the District's rules.

Mountain generally denied the District's allegations and filed a counterclaim, alleging that the District's attempt to enforce its rules caused Mountain to lose a lucrative contract with Ice River, who had contracted to purchase Mountain's facility. In a series of amended counterclaims, Mountain alleged that the District's acts amounted to tortious interference, and a general taking. The trial court denied the District's plea to the jurisdiction, and the District filed an interlocutory appeal.

The Texas Court of Appeals noted that while the Texas Constitution waives sovereign immunity with regard to inverse condemnation, such claims must be properly pleaded in a takings claim. Otherwise, the District retains immunity, and a court must sustain a properly raised plea to the jurisdiction.

In determining whether a government-imposed restriction constitutes a regulatory taking by unreasonably interfering with the landowner's rights to use and enjoy his property (i.e. inverse condemnation), the court must consider (1) the economic impact of the regulation and (2) the extent to which the regulation interferes with distinct investment-backed expectations.

The issue of whether the District's rules apply had not yet been addressed by the trial court, and therefore the District's rules had not yet been enforced. Since the loss of anticipated gains or future profits is not generally considered in the application of inverse condemnation claims, and Mountain failed to show how the application of the District's rules would interfere with its operation if they were to apply, the court found the District's plea to the jurisdiction to be proper.

Thus, the appeals court held that the trial court erred in denying the District's plea to the jurisdiction, and remanded for further proceedings.

Harris County v. S.K. and Bros., Inc., No. 14-17-00984-CV, 2019 WL 5704244 (Tex. App.—Houston [14th. Dist.] Nov. 5, 2019, no pet. h.).

In 2011, Harris County ("County") filed suit against S.K. and Brothers, a dry cleaners owner, and other owners in the shopping center where the dry cleaners is located (collectively "Defendants"), alleging that the dry cleaners had contaminated the underlying groundwater with perchloroethylene ("PCE") and had failed to timely submit certain Annual Waste Summaries, and that the Defendants had taken no actions to mitigate the contamination. The County's allegations also claimed that the Defendants failed to file an application with the Texas Commission on Environmental Quality ("TCEQ") Dry Cleaner Remediation Program under the Texas Health and Safety Code ("THSC"). The County, who also joined TCEQ as a statutorily indispensable party, sought civil penalties and injunctive relief under the Texas Water Code ("TWC"), the THSC, and various rules and regulations enacted pursuant to those statutes.

After a mistrial, the court assessed sanctions against the Defendants, additional discovery, and environmental testing. Defendants entered a plea to the jurisdiction, claiming neither Harris County nor TCEQ have standing because the Dry Cleaner Remediation Program provides the exclusive remedy for addressing environmental issues related to retail dry cleaners. The trial court granted the plea and dismissed the case.

On appeal, the Houston Court of Appeals considered the meaning THSC § 374.002 (regarding conflicts of law with Chapter 361 of the THSC) and whether such law precludes certain actions brought under the TWC.

The appellate court held that THSC § 374.002 does not preempt all other environmental enforcement laws because it expressly states that the Dry Cleaner Environmental Response statute prevails over other law only to the extent Chapter 374 "is inconsistent or in conflict with" that other law. Nothing in the language limits the authority of local governments to pursue enforcement actions against a retail dry cleaners outside the framework of Chapter 374. Thus, the County and TCEQ properly brought actions under TWC § 7.351, which expressly authorizes local governments to file civil suits seeking civil penalties and injunctive relief against those who are responsible for unauthorized discharges of municipal and industrial waste into or adjacent to any water in the state.

Thus, the trial court erred when it granted the plea to the jurisdiction, and the Court of Appeals reversed the trial court's order granting the plea to the jurisdiction and dismissing County's and TCEQ's causes of action, and remanded the case for further proceedings.

Litigation Cases

Town of Shady Shores v. Swanson, No. 18-0413, 2019 WL 6794327 (Tex. Dec. 13, 2019).

The Texas Supreme Court held in *Town of Shady Shores v. Swanson* that (1) a no-evidence motion for summary judgement could be used to defeat jurisdiction on the basis of governmental immunity and (2) the Texas Open meetings Act's ("TOMA") clear and unambiguous waiver of immunity did not extend to suits for declaratory relief.

The underlying controversy in *Swanson* stemmed from an employment dispute between the Town of Shady Shores ("Town") and its former secretary, Swanson, after the Town's council voted to terminate Swanson's employment in executive session at an open meeting. Among other motions, the Town brought no-evidence motions for summary judgement, arguing the Town was entitled to governmental immunity on particular claims. The trial court denied the Town's traditional and no-evidence motions for summary judgment, and the Town appealed.

The appellate court reasoned that allowing a jurisdictional challenge on immunity grounds via a no-evidence motion would improperly shift the initial burden of the governmental entity to "negate the existence of jurisdictional facts before a plaintiff has any burden to produce evidence raising a fact question on

jurisdiction" by requiring a plaintiff to "marshal evidence showing jurisdiction" before the governmental entity has produced evidence negating it.

Then, the Texas Supreme Court rejected that view, reasoning that a no-evidence summary judgment motion may be used to defeat jurisdiction on the basis of governmental immunity because such motion has the procedural safeguards of (1) a non-movant is required only to produce more than a scintilla to create a genuine issue of material fact and (2) that no-evidence motions are permissible only after adequate time for discovery.

In addition, the Court held that TOMA does not waive governmental immunity for declaratory judgment claims. The Court reasoned that the specific statutory language of TOMA that a suit "by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation" constituted a clear and unambiguous waiver of immunity for, and only for, suits seeking injunctive and mandamus relief. The Court also found compelling that the legislature had authorized a suit for declaratory judgment against the government in other statutes and had not done so for TOMA.

Texas Supreme Court to take up scope of Expedited Declaratory Judgments Act

The Texas Supreme Court granted review in *Cities of Conroe, Magnolia, & Splendora v. Paxton* on October 4, 2019. In that case, a conservation and reclamation district brought an action under Expedited Declaratory Judgments Act ("EDJA") seeking declarations regarding legality and validity of its contracts with the Cities that generate the revenues that are pledged to repay SJRA's bonds.

As a matter of first impression, the court of appeals held that the EDJA does not include an implied exclusion of claims that would implicate interests having due process protection. Thus, SJRA could adjudicate the question of the contract's validity in an EDJA suit despite the EDJA's truncated procedures.

The Texas Supreme Court held oral argument on the case on January 9, 2020. Questioning from Justice Busby focused on the notice aspects of the EDJA and how they relate to a suit seeking to adjudicate the validity of a contract between identifiable parties (as opposed to questions like rates and expenditures that affect the public as a whole). Meanwhile, Justices Guzman and Boyd focused their questioning on what aspects of contract formation and validity were subject to the EDJA under the statute's language. The opinion in this case is expected in May.

Wasson Interests, Ltd. v. City of Jacksonville, Texas, 12-13-00262-CV, 2019 WL 7373851 (Tex. App.—Tyler Dec. 31, 2019, no pet. h.).

In *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 433 (Tex. 2016), the Texas Supreme Court held that, with regard to the City of Jacksonville's (the "City") sovereign immunity, the proprietary-governmental dichotomy applies to breach of contract suits against a municipality. Further, in *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018), the Court held that the City was acting in its proprietary capacity when it leased out lots of land to private citizens for residential development. After remand from the Texas Supreme Court a second time, in *Wasson Interests, Ltd. v. City of Jacksonville*, No. 12-13-00262-CV, 2019 Tex. App. LEXIS 11264 (Tex. App.—Tyler Dec. 31, 2019), the court of appeals held that even though the private lessees of the lots had breached their lease and the City had rightfully evicted them, the lessees were entitled to equitable reimbursement.

The controversy in this case stems from City-owned lots surrounding Lake Jacksonville. The City leased these lots - most of them for ninety-nine year terms - for private residential development. Wasson Interests, Ltd. ("WIL") leased two lots surrounding Lake Jackson. Both leases incorporated the Lake Jacksonville Rules and Regulations, along with relevant city ordinances. Lake Jacksonville evicted WIL for violating a regulation forbidding short-term rentals.

Because the City could be sued and was acting in its proprietary function when it leased out the lots in question, the suit for breach of contract could ensue. The court of appeals held that, though WIL was in breach of the contract, they were entitled to equitable reimbursement from the City because "the very purpose of the lease was to authorize the lessee to construct private residences on the lots." WIL, with the City's knowledge and approval, made significant improvements to the leased land. Thus, the court concluded, the City would be unjustly enriched if allowed to retain the full value of the improvements.

Air and Waste Cases

Gao v. Blue Ridge Landfill TX, L.P., No. 19-40062, 783 Fed. Appx. 409 (5th Cir. Oct. 30, 2019).

On October 30, 2019, the United States Court of Appeals - Fifth Circuit in *Gao v. Blue Ridge Landfill TX, L.P.* affirmed the district court's decision that homeowners who moved near a preexisting landfill were subject to a two-year statute of limitations to bring suit based on odors emanating from the landfill. The appellate court's holding, which relied on Texas state law, suggests that nuisance claims must be brought quickly, and that even a change in operations or increase in odor complaints may be insufficient to reset the clock on the viability of nuisance claims.

The court in that case held that the odor from the Blue Ridge Landfill was a permanent nuisance, which accrues when the injury first occurs, whereas a temporary nuisance accrues upon each injury. With a permanent nuisance, a plaintiff has only two years to file suit under the statute of limitations, whereas with a temporary nuisance, the clock resets each time the nuisance occurs (i.e., each time an odor issue arises).

State of California v. EPA, 385 F. Supp. 3d 903 (N.D. Cal. May 2019).

On December 17, 2019, a California U.S. District Court rejected the EPA's request to postpone a court-mandated deadline of November 6, 2019 for the U.S. Environmental Protection Agency ("EPA") to promulgate a federal plan for states that have not approved a plan to comply with the EPA's 2016 Emissions Guidelines ("Guidelines"). The Guidelines are aimed at air emissions from existing landfills.

The EPA sought to delay the deadline to provide plan until August, 2021. However, the court denied the EPA's request, reasoning that the Agency will not face a substantial burden as it has already promulgated and received comments on the proposed federal plan. The Agency filed an appeal of this decision on December 10, 2019. As a result, the EPA must either issue the final plan now or wait for the Ninth Circuit Court of Appeals to render its opinion in the appeal.

"In the Courts" *is prepared by Lauren Thomas, an Associate in the Firm's Water Practice Group; Lindsay Killeen, an Associate in the Firm's Litigation Practice Group; and Samuel Ballard, an Associate in the Firm's Air and Waste Practice Group. If you would like additional information, please contact Lauren at 512.322.5856 or lthomas@lglawfirm.com, Lindsay at 512.322.5891 or lkilleen@lglawfirm.com, or Sam at 512.322.5825 or sballard@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA Releases Guidance on Air Quality Monitoring. On December 3, 2019, the EPA released new guidance updating prior guidance from 1980 regarding air quality monitoring of industrial plants engaged in expansions and/or new construction.

The 1980 guidance did not require air quality monitoring where an actual, physical barrier, such as a fence, existed between the industrial plant and the public. Such barriers help define "ambient air" where pollution could be measured, meaning outdoor areas where the public had access. This revised guidance now goes one step further by only requiring air quality monitoring from industrial facilities which the public can access.

EPA Rescinds Risk Management Program Rule. On December 19, 2019, the EPA released its final rule amendments to the Accidental Release Prevention Requirements under the Clean Air Risk Management Program ("RMP Rule"), which seek to rescind many prior RMP Rule amendments made during the Obama Administration and to delay the effective dates for some provisions that are not proposed to be deleted.

According to the final rule amendments, the EPA will rescind the following requirements (among others): (1) all requirements relating to third-party compliance audits; (2) requirements for safer technology and alternatives analyses for facilities with Program 3 regulated processes; (3) requirements to include findings from incident investigations in hazard reviews; (4) requirements to include in incident investigations a root cause analysis and a schedule for completion of actions on recommendations within 12 months; and (5) requirements to include process supervisors in required training programs.

EPA Finalizes Rule Classifying Aerosol Cans as Universal Waste. On December 9, 2019, the EPA issued a final rule adding aerosol cans to the list of hazardous waste substances regulated under the universal waste program of the Federal Resource Conservation and Recovery Act ("RCRA"). The rule will take effect on February 7, 2020 and will affect those who generate, transport, treat, recycle, or dispose of aerosol cans. EPA estimates that as many as 25,000 industrial facilities in 20 different industries could be affected.

Aerosol cans have historically been classified as hazardous waste because of their ignitability and thus are often subject to stringent regulations related to handling, transportation, and disposal. Under this new rule, aerosol cans will now be subject to less stringent regulation under the universal waste program.

The rule is intended to ease regulatory burdens on retail stores and others that discard hazardous waste aerosol cans by providing an optional pathway for streamlined waste management. However, because this rule will be less stringent than the current federal program, states are not required to adopt these regulations.

EPA Proposes Rule to Streamline Procedures for Permit Appeals. On December 3, 2019, the EPA issued a proposed procedural rule intended to streamline and modernize part of the Agency's permitting process by creating a new, time-limited alternative dispute resolution ("ADR") process as a precondition to judicial review.

Under this proposal, the parties in the ADR process may agree by unanimous consent to either extend the ADR process or proceed with an appeal before the Environmental Appeals Board ("EAB"). If the parties do not agree to proceed with either the ADR process or an EAB appeal,

then the permit would become final and could be challenged in federal court.

The EPA also proposes to (i) amend the current appeal process to clarify the scope and standard of EAB review, (ii) remove a provision authorizing participation in appeals by amicus curiae, and (iii) eliminate the EAB's authority to review regional permit decisions on its own initiative, even absent an appeal. To promote internal efficiencies, the EPA also proposes to establish a 60-day deadline for the EAB to issue a final decision once an appeal has been fully briefed and argued and to limit the length of EAB opinions to only as long as necessary to address the issues raised in an appeal; EPA also proposes to limit the availability of extensions to file briefs.

In addition, EPA proposes to set twelve-year terms for EAB Judges and also proposes a new process to identify which EAB opinions will be considered precedential. Finally, the EPA is proposing a new mechanism by which the Administrator can issue a dispositive legal interpretation in any matter pending before the EAB.

The proposed rule would apply to permits issued by or on behalf of the EPA under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resources Conservation and Recovery Act. The comment period closed on January 2, 2020.

EPA Issues Interim Recommendations to Address PFAS in Groundwater. In April 2019, the EPA released its draft Interim Recommendations for Addressing Groundwater Contaminated with Perfluorooctanoic Acid ("PFOA") and/or Perfluorooctane Sulfonate ("PFOS"), which are two of the primary substances that fall under the larger category of per- and polyfluoroalkyl substances (collectively, "PFAS").
In December 2019, the EPA issued the final Interim Recommendations after receiving nearly 400 comments. The Interim Recommendations set 70 parts per trillion ("ppt") as the preliminary remediation goal for groundwater for PFOA and PFOS, combined with a screening level of 40 ppt to determine if PFOA or PFOS are present at a site. The Interim Recommendations are a significant component of the PFAS Action Plan, which was discussed in further detail in the April edition of *The Lone Star Current*. Also, these recommendations can serve as a tool for assessing toxicity information, laboratory and analytical methods, and exposure models, among other research efforts, to improve knowledge about PFAS.

EPA takes Procedural Step towards PFAS Regulation. On December 4, 2019, the EPA signed an Advanced Notice of Proposed Rulemaking ("ANPR") regarding (1) adding per- and polyfluoroalkyl substances ("PFAS") compounds to the Toxic Release Inventory ("TRI"), (2) requiring PFAS release reporting under the Emergency Planning and Community Right to Know Act ("EPCRA"), and (3) requiring release reporting under the Pollution Prevention Act of 1990. PFAS are a group of man-made chemicals. Scientific evidence suggests these chemicals are persistent in the environment, meaning that they accumulate over time. Although scientists still disagree as to the effects of PFAS in humans, a body of evidence suggests that PFAS exposure can lead to adverse health effects, such as cancer and thyroid hormone disruption. Through the ANPR, EPA sought public comment regarding (1) which, if any, PFAS should be evaluated for listing, (2) how to list them, and (3) what would be appropriate thresholds for the PFAS, given their presence and their potential for bioaccumulation. For more information, visit: https://www.federalregister.gov/documents/2019/12/04/2019-26034/addition-of-certain-per--and-polyfluoroalkyl-substances-community-right-to-know-toxic-chemical.

EPA Office of the Inspector General ("OIG") Issues Report Critiquing EPA's Hurricane Harvey Response in Regards to Toxic Air Monitoring. On December 16, 2019, the EPA OIG, the office responsible for conducting independent audits, investigations, and evaluations of the EPA, released a report entitled, "EPA Needs to Improve its Emergency Planning to Better Address Air Quality Concerns in Future Disasters." This report was released after the OIG conducted a year-long examination of air quality monitoring activities done by the Texas Commission on Environmental Quality in the Houston area in the year after Harvey made landfall. The report states that the EPA did not have air quality monitoring procedures in place to assess the impact of toxic emission incidents that occurred after a storm made landfall on August 17, 2017. Further, the report finds that EPA was not able to adequately inform the public about storm-related toxic pollutants from industrial sites. Ultimately, the report recommends that EPA develop guidance for emergency air monitoring and address the availability and use of remote and portable air quality monitoring methods. Additionally, the report recommends the EPA develop a plan for providing the public with access to air monitoring data. To see the full report, visit: https://www.epa.gov/sites/production/files/2019-12/documents/_epaoig_20191216-20-p-0062.pdf

United States Senate

The United States Senate Confirms Dan Brouillette as the New Secretary of the U.S. Department of Energy. On December 2, 2019, the United States Senate confirmed Dan Brouillette as the 15th Secretary of the U.S. Department of Energy. Secretary Brouillette will be filling the vacancy left by former Energy Secretary and former Texas Governor Rick Perry. Governor Perry resigned from his post as Secretary of the Department of Energy in October 2019. Secretary Brouillette is a U.S. Army veteran from San Antonio, Texas, and he has a background that includes both public and private experience. Secretary Brouillette previously served as the Chief of Staff to the U.S. House of Representatives Committee on Energy and Commerce as the Assistant Secretary of Energy for Congressional and Intergovernmental Affairs, and as a member of the Louisiana State Mineral and Energy Board. Secretary Brouillette also worked in the private sector as the Senior Vice President and head of public policy for the United Services Automobile Association ("USAA") and the Vice President of Ford Motor Company. For more information about Secretary Brouillette, visit https://www.energy.gov/contributors/dan-brouillette.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Is Currently Proposing to Renew and Amend the Multi-Sector General Permit (No. TXR050000) and the Hydrostatic Test

Water General Permit (No. TXG670000), and Is Developing a New Water Treatment Plant General Permit (No. TXG640000). The Multi-Sector General Permit authorizes certain industrial activities to discharge stormwater. The Hydrostatic Test Water General Permit authorizes the discharge of water from (1) new vessels; (2) vessels that contain raw water, potable water, or elemental gases; and (3) vessels that contain petroleum substances. The comment period for the Hydrostatic Test Water General Permit closed on December 3, 2019, and the Commission is expected to take action on the permit on March 4, 2020. Finally, the new Water Treatment Plant General Permit would authorize the discharge of wastewater generated as a result of conventional water treatment at water facilities into or adjacent to water in the state. The changes to these permits is a result of House Bill 2771. For more information about the permits, visit: https://www.tceq.texas.gov/permitting/wastewater/general/index.html.

Texas Water Development Board ("TWDB")

As a Result of the Passage of Proposition 2, the TWDB was Granted the Authority to Issue up to $200 Million in Bonds for Economically Distressed Areas to Develop Water Supply and Sewer Services. On November 5, 2019, Proposition 2 passed in Texas with 65.62% of the vote. Proposition 2 was legislatively referred to the ballot after winning the majority in both the Texas House and Senate. Proposition 2 allows the TWDB to issue general obligation bonds on an ongoing basis to Texas's Economically Distressed Area Program. ("EDAP"). TWDB has the authority to issue up to $200 million in bonds. For more information, visit: https://ballotpedia.org/Texas_Proposition_2,_Water_Development_Board_Bonds_Amendment_(2019).

Public Utility Commission of Texas ("PUC")

Proposal for Decision Issued in CenterPoint Rate Case. As previously reported, CenterPoint Energy Houston Electric, LLC filed an application to increase system-wide transmission and distribution rates in April of 2019 (Docket No. 49421). On September 16, 2019, the Administrative Law Judges ("ALJs") issued their proposal for decision ("PFD") in this matter. Specifically, the ALJs recommended an overall increase of $2,644,193, or 0.11%, over CenterPoint's present base revenues. Additionally, they recommended a 9.42% return on equity. This recommendation is substantially lower than the 10.4% requested by CenterPoint.

At their November open meeting, the Public Utility Commission ("PUC") Commissioners began to consider the Administrative Law Judges' Proposal for Decision; however, they did not reach a conclusion and decided to continue the discussion until the December open meeting. On December 12, 2019, one day before the December 13 open meeting, CenterPoint requested that the PUC defer consideration of this Docket until the January open meeting. At the December 13 meeting, the PUC approved the request to defer consideration and encouraged the parties to try to reach an agreement independently on the issue. The parties have since reached an agreement in principle that would resolve the case on mutually satisfactory terms.

At the PUC's January 16, 2020 open meeting, CenterPoint explained that the parties were actively working to settle the remaining items and finalize the documents. CenterPoint stated that the parties intended to present an agreement to the PUC for its approval before the next open meeting on January 31, 2020. Because of the similarity of issues in the CenterPoint and AEP's rate cases, the PUC explained that it intends to decide both cases in the same open meeting.

Subsequently, on January 23, 2020, the parties filed their settlement agreement in the docket. The PUC will now determine whether to adopt the parties' settlement, likely at the next open meeting. We will provide updates as this case is determined and finalized.

AEP Texas, Inc. Rate Case. On May 1, 2019, AEP Texas Inc. filed an application to increase its rates by $56 million per year (Docket No. 49494). Additionally, AEP Texas is seeking to consolidate the rate of its TCC and TNC divisions under the name "AEP Texas." AEP asserts that it is entitled to a $59.1 million (approximately 6.5%) increase in the retail transmission and distribution rates, and a decrease of $3.16 million (approximately 0.7%) in wholesale transmission cost of service. As a basis for its request, AEP Texas cites growth in the Rio Grande Valley, Laredo, Permian Basin, and Cline areas due to an increase in oil field activity. AEP Texas similarly cited growth in port areas attributable to new liquefied natural gas ("LNG") facilities.

The State Office of Administrative Hearings ALJs issued their PFD, recommending an overall rate **decrease** of $59,741,451, or 4.49% below the present base revenues. The PFD also proposes a return on equity of 9.4% and a capital structure of 45% common equity and 55% long-term debt. In contrast, AEP Texas requested an increase of $35.14 million, a return on equity of 10.5%, and a capital structure of 45% common equity and 55% long-term debt.

The Parties filed Exceptions to the PFD on December 6, 2019 and Replies to Exceptions on December 20, 2019. The PUC will now determine whether to adopt the ALJ's PFD at an open meeting. We will provide updates as this case is determined and finalized in 2020.

Oncor Sale of South Texas Assets Receives Public Utility Commission Approval. On March 29, 2019, Oncor and AEP Texas (together, Joint Applicants) filed a Joint Application for the PUC to approve the transfer of Oncor's McAllen and Mission area distribution assets, service areas, and associated retail electric delivery customers to AEP Texas Inc. (Docket No. 49402). The assets being sold are the same assets that were sold to Oncor from Sharyland Utilities, L.P. and Sharyland Distribution and Transmission Services, L.L.C. in October 2017. Approximately 3,000 customers will be affected by the transfer.

On August 7, 2019, the parties filed a Stipulation and Settlement Agreement resolving all issues in the matter. The settlement agreement provides many benefits for customers not included in the Joint Applicants' original filing, including provisions that ensure:

1) AEP Texas will provide a one-time bill credit in the amount of $90,000 that will be equally allocated to each transition end-use customer within three months of the transition;

2) The Joint Applicants shall work with the Retail Electric Providers ("REPs") to adequately train their service and call center representatives to properly address customer inquiries received during the transition;

3) The REP of record for each transition customer shall distribute a document that includes updated contact information for AEP Texas and the Joint Applicants shall post easily accessible and understandable information on their websites about the transaction; and

4) The Joint Applicants shall engage with the intervenors to plan and coordinate the transition.

At the PUC's November 14, 2019 Open Meeting, the Commissioners approved the agreement and issued an Order consistent with their memos. Their memos made minor, clerical changes to the Findings of Fact and Ordering paragraphs in order to mirror the intentions of the parties.

Sun Jupiter's Purchase of EPE. El Paso Electric Company ("EPE"), Sun Jupiter Holdings LLC ("Sun Jupiter"), and IIF US Holding 2 LP ("IIF US 2") (together, the "Joint Applicants") filed a Joint Report and Application for PUC approval of Sun Jupiter's purchase of EPE (Docket No. 49849).

EPE, Sun Jupiter, and Sun Merger Sub ("Merger Sub") executed an agreement, under which, Merger Sub would merge into EPE, with EPE continuing as the surviving entity. IIF US 2 will provide Sun Jupiter the equity necessary to purchase EPE and support the regulatory commitments described in the Application. The proposed transaction essentially results in Sun Jupiter directly replacing EPE's public shareholders at closing, with IIF US 2 as the indirect sole shareholder of EPE.

A Hearing on the Merits was initially scheduled to take place on November 20-22, 2019. However, prior to the hearing, the ALJ granted a series of continuances, giving the parties the opportunity to settle. On December 18th, the Joint Applicants filed a non-unanimous stipulation. Two parties, Dr. Richard Bonart and the Rate 41 Group, did not join the stipulation. On December 30, Rate 41 Group and Dr. Bonart filed supplemental direct testimony and requested a hearing.

All parties participated in a hearing held on January 7-8, 2020. At the conclusion of the hearing, Counsel for the PUC raised several issues and sought clarifications regarding the Stipulation as well as the Proposed Order and Delegation of Authority (both attached to the Stipulation). The Joint Applicants, speaking for all of the signatories to the stipulation, filed a response to these issues, which included a revised Proposed Order. Any final order approving the Stipulation will control and the provisions contained therein cannot be modified without Commission approval. Accordingly, the Joint Applicants committed to provide an updated Delegation of Authority as a compliance filing reflecting any revisions and the Commission's final order.

At the January 16, 2020 open meeting, the Commissioners discussed an issue with the parties' revised Proposed Order regarding the initial terms of disinterested directors. The Commissioners wanted to clarify the wording to ensure that no more than two disinterested directors' terms would expire in the same year. The PUC adopted the parties' stipulation and revised Proposed Order consistent with the PUC's discussion regarding the terms of disinterested directors. We will provide updates on this case as it progresses.

Railroad Commission of Texas ("RCT")

CenterPoint Gas Beaumont/East Texas Rate Case. On November 14, 2019, CenterPoint Energy Entex and CenterPoint Energy Texas Gas (collectively, "CenterPoint") filed its Statement of Intent to Change Rates with the RCT and with all municipalities exercising original jurisdiction within its Beaumont/East Texas division service area (Gas Utility Docket No. 10920). CenterPoint seeks to increase its system-wide distribution rates by $6.8 million per year, which amounts to an increase of 9.4%. The East Texas Coalition of Cities and the Alliance of CenterPoint Municipalities– Beaumont/East Texas, along with other interested parties, have intervened and have begun sending discovery requests to CenterPoint. The parties conducted a preliminary hearing on December 6, 2019, which set the procedural schedule for the case. CenterPoint had originally set its effective date for December 19, but agreed to a 30-day extension, making the new effective date January 18, 2020. A hearing on the Merits is set for March 4-5, 2020. We will provide updates on this case as it proceeds.

CenterPoint South Texas Issues Refund Related to Tax Cut (RRC Docket No. 10219). On November 15, 2019, CenterPoint filed its Statement of Intent in Gas Utilities with the RCT, proposing to decrease its gas rates in all municipalities exercising original jurisdiction within its South Texas Division (Gas Utility Docket No. 10928). In its filing, CenterPoint is seeking to decrease rates by $628,466 to take into account the reduction in federal taxes it pays due to the Tax Cuts and Jobs Act of 2017. The Steering Committee for Cities Served by CenterPoint South Texas engaged a consultant at no charge and conducted discovery requests in order to confirm CenterPoint's calculations. In the discovery responses, CenterPoint discovered a small error in its calculations, which increased the total refund by $4,290. Accordingly, CenterPoint amended its requested total rate decrease to $632,756. The impact to each city is the same, regardless of whether the city takes action.

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