Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 25, NO. 2 APRIL 2020

THE LONE STAR CURRENT

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

WHAT JUST HAPPENED AND WHAT'S NEXT

by Lauren J. Kalisek

The last few weeks have been intense. It has been a whiplash experience common to folks throughout the state, the nation, and even the globe as we've moved from our normal lives to ones changed significantly by health and safety measures needed to stem the tide of a deadly virus. Events have moved quickly from the World Health Organization's initial declaration on January 30, 2020 of a global public health emergency to its March 11, 2020 confirmation of COVID-19 as a pandemic.

At our office, we developed a remote work plan in late February/early March and implemented it fully by mid-March. We also began to respond to questions from clients about their own planning during this time. We monitored guidance being issued by the White House, local school closings, local stay at home orders, and the series of executive orders from our Governor. And we wondered how all of this would play out as businesses closed, events were canceled, courts and state and federal agencies implemented their own remote work plans, and Congress debated new legislation to provide economic relief.

What we know so far is described in more detail in the articles of our April newsletter. The work of our state agencies continues without interruption with new initiatives developed to address COVID-19 challenges within their jurisdictions. Interim work by legislative committees has been impacted by the need to postpone hearings. Federal and state courts and administrative law judges remain active holding hearings remotely and continuing to issue orders and rulings. Congress passed significant federal legislation in the form of the Families First and CARES Acts in an effort to support workers and businesses impacted by the crisis.

So what comes next? For the immediate future, as we remain hunkered down during social distancing, our focus turns to supporting our clients' efforts to stay fully informed about all of these measures at local, state and federal levels to address the crisis. It will be important to follow and understand guidance, rulemakings and procedures that have been, and will be, rolled out. Our legal team is committed to helping our clients not miss a beat with ongoing and new priorities. And in some respects regular business continues as we plan for a return to normal life. Although we don't know yet precisely when that will be, we know it will occur. Until then, we at Lloyd Gosselink wish all of our clients, friends and colleagues good health and good cheer as we move through this unprecedented time together.

Lauren Kalisek is the Managing Director and leads our Firm's Districts Practice Group. Lauren focuses on providing counsel to cities, river authorities, water districts, and other local governmental organizations. If you would like additional information or have questions related to this article or other matters, please contact Lauren at 512.322.5847 or lkalisek@lglawfirm.com.

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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.

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AIR AND WASTE: COVID - 19 UPDATE

Air and Waste Practice Group

by Samuel L. Ballard

In the midst of the COVID-19 outbreak, the Firm's Air and Waste Practice Group is still conducting business as usual, albeit remotely, as are many of the group's clients. While the Firm's Air and Waste clients continue to conduct their business and address regulatory compliance issues in this pressing time, it is important to be aware of recent decisions taken by the State Office of Administrative Hearings ("SOAH"), the TCEQ, and the EPA in response to COVID-19.

First, SOAH recently issued an emergency order suspending all non-emergency live, in-person hearings and mediations until April 30, 2020. Parties to general docket contested case hearings and mediations that are currently scheduled to take place live, in-person on or before April 30, 2020 will be contacted by SOAH directly and given the opportunity to either conduct the proceedings telephonically or request a continuance at a later date.

TCEQ has also recently taken action to lessen the burden on regulated entities during the COVID-19 outbreak by releasing guidance on submitting enforcement discretion requests. On March 18, 2020, TCEQ released guidance directing regulated entities to submit enforcement discretion requests if they are unable to comply with environmental regulations due to their workforce being reduced by COVID-19. Requests should include the following: (1) a concise statement supporting request for enforcement discretion; (2) the anticipated duration of need for enforcement discretion; and (3) the citation of the rule/permit provision for which enforcement discretion is requested. Regulated entities must also maintain records sufficient to document activities related to noncompliance under enforcement discretion, including details of the regulated entity's best efforts to comply. The Firm has already successfully obtained several regulatory extensions on behalf of its clients pursuant to enforcement discretion requests.

In addition, the EPA issued similar guidance on March 26, 2020 related to its enforcement discretion measures. The guidance retroactively applies to any COVID-19 related compliance issues beginning on March 13, 2020 and contains essentially the same enforcement discretion request criteria as the TCEQ guidance. With respect to administrative settlement agreements and consent decrees, the guidance indicates that if parties are unable to meet an enforceable obligation, the parties should utilize the notice procedures in the agreement, including any force majeure notice provision, as applicable.

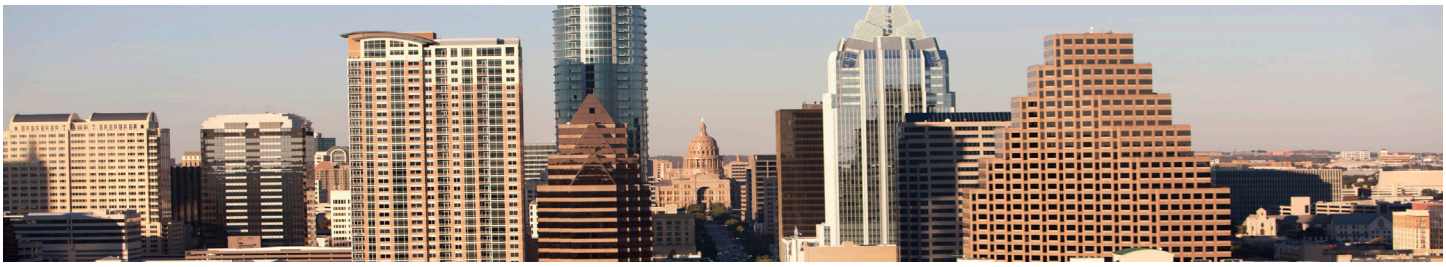
Of note, the EPA guidance does not apply to criminal violations or activities that are carried out under Superfund or the Resource Conservation and Recovery Act (the EPA plans to address those matters in separate guidance). Furthermore, the guidance does not apply to preventing and reporting accidental releases. Clients should submit enforcement discretion requests to the Office of Enforcement and Compliance Assurance and the regional EPA office with jurisdiction over the regulated activity.

Given that enforcement consequences in these situations can vary significantly, regulated entities should work with the Firm to evaluate the situation to determine whether noncompliance has occurred at the state or federal level. If so, the requesting entity would need to prepare a submission that accurately identifies:

- the potential noncompliance;
- how the noncompliance is related to COVID-19;
- what actions the entity has taken to attempt to comply;
- how long the noncompliance is anticipated to continue; and
- what actions the entity will take to minimize the impact of the noncompliance.

Air and Waste: COVID - 19 continued on page 4

MUNICIPAL CORNER



Municipal hotel occupancy tax revenue may be used to repair a visitor information center owned and operated by a chamber of commerce if expenditures directly enhance and promote tourism and the convention and hotel industry as required by Tax Code section 351.101. Tex. Att'y Gen. Op. KP-0281 (2020).

The Honorable Laurie K. English, District Attorney ("DA") for the 112th Judicial District, requested an opinion by the Attorney General ("AG") to determine whether, under Tax Code § 351.101, a city council can provide tax revenue to improve a Chamber of Commerce Facility not owned or operated by the city. The DA suggested the law limits authorized expenditures to instances in which the municipality actually owns or leases the visitor center, and additionally that the use of funds for a private organization that promotes "all the private businesses of its members" would violate the statutory requirement that the funds only "promote tourism and the convention and hotel industry." However, whether a city's specific expenditure is permissible as a matter of law depends on fact issues not appropriate for the opinion process and therefore the AG only advised generally as to the situation.

The DA's question requires addressing the use of public money for a private organization. The Texas Constitution prohibits the Legislature from authorizing a city "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). However, expenditures serving a legitimate public purpose and providing a clear public benefit qualify for an exception.

The Texas Supreme Court has articulated a three-part test to determine the constitutionality of an expenditure of public funds. A governmental entity considering a public expenditure must (1) ensure that the expenditure 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." *Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002).

Interestingly, the governing body of the governmental entity itself gets to make the determination of whether its own expenditures satisfy this three-prong test. *See* Tex. Att'y Gen. Op. No. KP-0208 (2018) at 2-3 ("The determination whether a particular expenditure satisfies the three-part test is for the [governmental entity] to make in the first instance, subject to judicial review for abuse of discretion.").

For the issue here, the relevant provisions come from chapter 351 of the Tax Code, which governs municipal hotel occupancy taxes. Section 351.002(a) allows a municipality to impose a tax on the use or possession of a hotel room; however, expenditures of revenue from that tax must adhere to certain limitations. Relevant here, subsection 351.101(a)(1) provides that revenue from the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry, and is limited to "the acquisition of sites for and the construction, improvement, enlarging, equipping, repairing, operation, and maintenance of convention center facilities or visitor information centers, or both;" TEX. TAX CODE § 351.101(a)(1)(emphasis added).

Ordinarily, the term "and" is not synonymous with the term "or," such that a court would construe a list of actions joined by the word "and" to require the fulfillment of every listed action, as opposed to the allowing for a selection among various options. See *State v. Gammill*, 442 S.W.3d 538, 541 (Tex. App. – Dallas 2014, pet. ref'd) (stating that "the terms 'and' and 'or' are not interchangeable in general"). But the terms "may be interpreted as synonymous when necessary to effectuate the legislature's intent or to prevent ambiguity, absurdity, or mistake." *Id.*

The latter interpretation takes precedence in the AG's analysis. The AG opines it would be unreasonable for the Legislature to intend that municipalities must acquire sites and take one of several other actions for each expenditure of this tax revenue. This would compel multiple actions in every instance and prevent singular actions such as repairing an existing building even when this is all that is necessary. The Legislature could not reasonably have intended this result and thus subsection 351.101(a)(1) must be construed not as aggregate requirements but as listing alternative authorized uses of the tax revenue.

Furthermore, the definition of "visitor information center" in the Tax Code contains no requirement of municipal ownership or leasing whereas the definition of "convention center facilities" specifically includes a municipal ownership or management requirement. See TEX. TAX CODE § 351.001(8) ("visitor information center means a building or a portion of a building used to distribute or disseminate information to tourists"); TEX. TAX CODE § 351.001(2)(defining convention center facilities as "civic centers, civic center buildings, auditoriums, exhibition

halls, and coliseums that are owned by the municipality…or that are managed in whole or part by the municipality." (Emphasis added). The contrast in these definitions likely supports a finding that "and" is synonymous with "or" as used in subsection 351.101(a)(1) and therefore this subsection does not limit the use of tax proceeds for visitor information centers only owned or leased by the municipality.

What about the other requirements of section 351.101? How do they come into play? Subsection 351.101(b) requires that municipal hotel occupancy tax revenue "be expended in a manner directly enhancing and promoting tourism and the convention and hotel industry" (emphasis added); *see also* Tex. Att'y Gen. Op. No. KP-0131 (2017) at 1-2 (noting that "directly" means "with nothing or no one in between"). Applying a notably different analysis than before, the AG construed this language literally in determining an expenditure of hotel occupancy tax revenue to repair a visitor information center must directly benefit a building, or portion of a building, used to distribute or disseminate information to comply with section 351.101.

In terms of statutory interpretation, this AG opinion serves as a helpful reminder to municipalities that not only the express language but also the broader context will often govern in a statute's application. Literal interpretations will typically carry the day but it is not uncommon for exceptions to be found when the result of literal application would be unreasonable or the Legislature's intent can be surmised in references to related provisions.

"Municipal Corner" *is prepared by Reid Barnes. Reid is an Associate in the Firm's Energy and Utility Practice Group. If you would like additional information or have any questions related to these or other matters, please contact Reid at 512.322.5811 or rbarnes@lglawfirm.com.*

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In preparing such requests, it is important to keep in mind the following types of potential causes to link to a COVID-19 impact:

- Worker shortage;
- Travel restrictions and social distancing restrictions at facilities that are consistent with announcements by the U.S. Centers for Disease Control and Prevention ("CDC");
- Lack of key staff and contractors;
- Unavailable testing laboratories; and
- Worker and third-party resource shortages that affect a facility's ability to meet reporting obligations or milestones under consent decrees.

It is highly recommended that clients diligently document any noncompliance issues that may be impacted by COVID-19 and consult with a Lloyd Gosselink attorney to evaluate whether an enforcement discretion request is warranted. Additional reports will be forthcoming as the TCEQ and EPA update their enforcement discretion guidance. In the meantime, we hope you, your family, friends, and co-workers are staying safe and healthy.

Please do not hesitate to contact the Air and Waste Practice Group with any questions.

Sam Ballard is an Associate in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Sam at 512.322.5825 or sballard@lglawfirm.com.

BEST PRACTICES FOR HOLDING REMOTE BOARD MEETINGS BY TELECONFERENCE OR VIDEOCONFERENCE

Districts Practice Group
by Lauren J. Kalisek

The following is a list of best practices for conducting open meetings by teleconference or videoconference under the March 16, 2020 action by Governor Abbott to suspend certain provisions of the Texas Open Meetings Act. Information on technology issues can be found on the Texas Department of Information Resources website at: https://pubext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Tips%20for%20Conducting%20Open%20Meetings%20Remotely.pdf

1. A quorum must participate in any remotely held meeting, whether by teleconference or videoconference. The Presiding Officer may participate remotely.

2. It is acceptable to post notice only online. Physical posting is not necessary, but consider posting if the County Clerk(s) arranged for posting and other local governments are physically posting.

3. The notice must include details for joining the teleconference or videoconference to listen or view the meeting and for two-way communication. If videoconferencing is used, consider allowing others to join by call-in or to have call-in as a back-up if videoconferencing system is not working for one or more participants.

4. Consider including notice language directing those wishing to make public comment to register via email prior

to the start of the meeting (similar to the sign-in process during a regular, in-person meeting).

5. Agenda packet material must be posted on the district's website or otherwise made publicly available during the meeting (such as through a request by email prior to the meeting).

6. A recording must be made of the meeting and made publicly available. This can be through posting on the district's website or providing it via email on request.

7. Per the Governor's Order of March 31 (GA-14) and subject to local shelter-in-place orders, physical attendance of the meeting, if at all, should be limited to the minimum number of people needed to conduct the meeting (such as staff) to monitor the conference call technology if it cannot be done remotely. It is acceptable to advise in the notice that the meeting is only accessible remotely.

8. Have the presiding officer or other assigned moderator give instructions at the beginning of the call asking call participants to:

- Mute their phones unless they are speaking;
- Announce their names each time they speak;
- Avoid talking over one another;
- Make sure they speak clearly into their speakers or handsets; and
- Announce when they are leaving and when they are coming back to the meeting

9. Votes on action items should be clear about how each member is voting (either by roll call or by asking "for," "against," and "any abstentions") so that each director's position is clearly understood.

10. Use a separate call-in number for executive session not publicly posted, or a conference call option that allows for disconnection of the public line from the call before going into executive session.

Lauren Kalisek is the Managing Director and leads our Firm's Districts Practice Group. Lauren focuses on providing counsel to cities, river authorities, water districts, and other local governmental organizations. If you would like additional information or have questions related to this article or other matters, please contact Lauren at 512.322.5847 or lkalisek@lglawfirm.com.

FAMILIES FIRST CORONOVIRUS RESPONSE ACT – NEW PAID EMERGENCY LEAVE REQUIREMENTS FOR EMPLOYERS

Employment Law Practice Group
by Sheila B. Gladstone, Sarah T. Glaser, and Emily R. Linn

On March 18, 2020, President Donald J. Trump signed into law the Families First Coronavirus Response Act (FFCRA). This new legislation provides a number of relief benefits in response to the COVID-19 global pandemic, including:

- making temporary additions to the Family and Medical Leave Act;
- requiring emergency paid leave for employees affected by COVID 19;
- providing free coronavirus testing;
- expanding food security initiatives;
- increasing Medicaid funding; and
- supplementing state unemployment insurance programs.

The provisions affecting employers have a broad reach, **applying to private employers with fewer than 500 employees and all public employers**, no matter how many employees they have.

If you are a covered employer under the FFCRA, you need to be aware of the new obligations under the Act, which became effective on April 1, 2020 and for which enforcement will begin on April 17, 2020.

Notably, the FFCRA provides paid benefits to employees who are unable to work due to COVID-19 related conditions. The FFCRA does not provide any benefits to employees who are out of work due to COVID-19 furloughs or layoffs (though such employees would be eligible for unemployment insurance benefits).

Specifically, the FFCRA created two new employer paid leave requirements:

First, there is the **Emergency Family Medical Leave Expansion Act (EFMLEA)**.

The Act expands the coverage of FMLA to provide 12 weeks of paid job protected FMLA leave for employees who are unable to work due to care for a son or daughter if the child's school or daycare is closed or the childcare provider is unavailable due to COVID-19. Under this new legislation, the employee need only be on payroll for 30 calendar days to qualify for the expanded FMLA leave.

The first ten days of this expanded FMLA leave are unpaid, though an employee can use paid sick leave under the EPSLA to cover this period or any other paid leave accrual (i.e., vacation, personal, sick leave, etc). The remaining ten weeks are paid at a rate equal to at least 2/3 the employee's regular rate of pay, up to a maximum of $200/day or $10,000 total.

Significantly, the EFMLEA has not expanded the amount of total FMLA leave an employee receives, meaning that an employee is entitled to 12 weeks total of FMLA leave (whether traditional unpaid FMLA leave or the new expanded FMLA). If an employee already used up their 12 weeks for the

year prior to April 1, 2020, they are ineligible for expanded FMLA to care for a child.

Second, is the **Emergency Paid Sick Leave Act (EPSLA).**

The Act provides for paid sick leave to employees who are unable to work because of COVID-19. Employers are required to give the following paid sick leave:

- Two weeks of paid sick leave at the employee's regular rate of pay, capped at $511/day or $5,110 total for:
  - employees who are subject to a quarantine or isolation order related to COVID-19;
  - employees who have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
  - employees who are experiencing COVID-19 symptoms and are seeking medical diagnosis.
- Two weeks of paid sick leave at a rate of at least 2/3 of the employee's regular rate, capped at $200/day or $2,000 total for employees:
  - caring for a family member who is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
  - caring for their son or daughter whose school or daycare is closed or child care provider is unavailable due to COVID-19.

There are several discretionary exemptions built into the FFCRA:

First, there is a small business exemption for private employers with less than 50 employees. This exemption allows for a small business to opt out of providing certain paid sick leave under the EPSLA and expanded FMLA leave under the EFMLEA.

Second, both public and private employers can exempt health care providers and emergency responders from both the EPSLA and EFMLEA. For the purposes of the exemption, health care providers and emergency responders are defined broadly to encompass all employees that either directly or indirectly aid in providing medical services generally, and specifically, in caring for COVID-19 patients. For the full regulatory definitions, see the comprehensive FFCRA summary, linked below.

Employers have several options to recover all or a portion of the costs of providing paid leave under the FFCRA. For private employers, the FFCRA provides a refundable tax credit in an immediate dollar-for-dollar offset against payroll taxes for paid leave provided under the Act. Public employers may be able to apply for reimbursement of COVID-19 spending under the FFCRA through the recently-enacted CARES Act, or through other state or federal programs.

One final note: while these new paid leave benefits are significant, and employers need to understand their present obligations under the FFCRA, they are not permanent. Rather, the FFCRA created a sunset date of December 31, 2020 for both the paid sick leave and expanded FMLA leave.

For more information on the FFCRA, click to view the comprehensive summary of the Act, incorporating the Department of Labor's regulations and guidance prepared by Lloyd Gosselink's Employment Law Practice Group. https://bit.ly/2VnvgMh

This summary was prepared by the Firm's Employment Law Practice Group: Sheila Gladstone, Sarah Glaser, and Emily Linn. If you would like additional information related to this article, please contact Sheila at 512.970.5815 or sgladstone@lglawfirm.com, Sarah at 512.221.6585 or sglaser@lglawfirm.com, or Emily at 214.755.9433 or elinn@lglawfirm.com.

ENERGY AND UTILITY: COVID - 19 UPDATE

Energy and Utility Practice Group

by Thomas L. Brocato and Patrick Dinnin

PUC Takes Actions to Address Coronavirus Threat

The Public Utility Commission of Texas (PUC, or Commission) has joined other state agencies and entities in adopting measures to address the rapidly growing threat presented by the coronavirus disease 2019 (COVID-19).

On March 16, 2020, the PUC conducted an emergency open meeting regarding Docket No. 50664, Issues Related to the State of Disaster for Coronavirus Disease 2019. The Commission announced that PUC Staff would be telecommuting until further notice, and that the PUC will be suspending requirements for filings to be provided in hard copies. For now, the PUC requests electronic filings only (unless the material is confidential or voluminous).

The commissioners designated the coronavirus threat as a public emergency, giving the PUC the authority to suspend its rules for different filing requirements and deadlines.

On March 26, 2020, the PUC exercised its emergency authority to issue three orders. The first Order provides exceptions to existing PUC rules for electric, water, and sewer utilities, and requires electric utilities to provide eligible customers with deferred payment plans (DPPs). The second Order is an accounting order that allows regulated utilities to create a regulatory asset to track costs associated with the effects of COVID-19. The third Order establishes the COVID-19 Electricity Relief Program, which is a mechanism that will protect Texas citizens impacted by the COVID-19 emergency and provide certainty to the electric utilities and retail electric providers for recovery of unpaid utility bills.

Exceptions to PUC Rules and Requirement for REPs to Offer DPPs

Initially, at the PUC's March 16, 2020 emergency open meeting, the commissioners had asked utilities to take voluntary action to suspend the practice of disconnecting residential customers for non-payment of their bills. However, at the March 26, 2020 open meeting, the Commission ordered exceptions to its rules for electric, water, and sewer utilities, prohibiting the assessment of late fees and disconnection of customers when they cannot pay their utility bills.

Additionally, the Commission ordered Retail Electric Providers (REPs) to provide DPPs to customers upon request. A DPP is a mechanism that allows a customer with a past-due balance to pay that balance over the course of several months. However, when a customer enters a DPP with a REP, the customer is placed on a switch-hold, which prevents that customer from switching to different REP until that DPP is paid.

The Order does not require water utilities to offer a DPP because water utilities are already required to offer a DPP under the PUC's rules when any bill is more than three times the average bill for the customer. Water utilities are encouraged to offer a DPP to any residential customer who cannot pay all at once but is willing to pay in installments. The exceptions from the PUC's Order, however, temporarily prevents a water utility from charging interest on DPPs.

This Commission Order, featuring the exceptions to the rules and the requirement for REPs to offer DPPs, is effective until Governor Abbott's disaster declaration is terminated.

Accounting Order, Establishing a Regulatory Asset

The Commission also approved an accounting order, authorizing an accounting mechanism and subsequent process through which regulated utilities may seek future recovery of expenses resulting from the effects of COVID-19. Electric, water, and sewer utilities may record as a regulatory asset expenses resulting from the effects of COVID-19. These expenses can include non-payment of customer bills, as well as other costs, such as the cost to have facilities cleaned and disinfected. In future proceedings, the Commission will consider whether each utility's request for recovery of these regulatory assets is reasonable and necessary. The Commission will also consider other issues at a future proceeding, such as the appropriate period of recovery for approved amounts.

The COVID-19 Electricity Relief Program

The Commission's third Order approved at the March 26, 2020 open meeting establishes the COVID-19 Electricity Relief Program (CERP). CERP is a customer assistance program for residential customers that meet PUC established criteria proving that they have been affected by the COVID-19 outbreak. In addition to the protections for these customers established by the first order, CERP establishes a mechanism for Transmission and Distribution Utilities (TDUs) and REPs to recover costs from customers who cannot pay their utility bills.

This Order establishes a CERP fund, which will be funded by a rider to utilities' existing rates. Utilities are allowed to establish a regulatory asset to track the costs related to the effects of the COVID-19 outbreak, and those costs will ultimately be reimbursed by the CERP fund. The rider will be based on $0.33 per megawatt hour, and utilities are required to implement it within ten days of the Order, effective immediately.

Initial contributions to the CERP fund will be paid by ERCOT. Utilities are required to estimate the amount of reimbursement requests that they will receive, and ERCOT will provide that amount (up to $15 million). If the initial amount requested is not enough to cover the TDU and REP costs, the TDU can file a request for an adjustment to the rider at any point during the CERP's existence. TDUs and REPs will be reimbursed for costs related to COVID-19 from the CERP fund.

Only certain residential customers are eligible for special treatment under CERP. A residential customer must be unable to pay the utility bill due to unemployment or low income because of the effect of the COVID-19 outbreak. When a customer informs the REP that he or she cannot pay, the REP is required to offer a DPP and direct customer to a third-party administrator, the Low-Income List Administrator (LILA). Once the customer has contacted LILA, they will have to provide attestation of unemployment (followed by documentation of unemployment within 30 days) and sufficient information to identify the customer's account (address, account number and telephone number). The LILA will compare the customer's information to the lists of customers submitted by REPs, which will deem the customer eligible for CERP funds.

Each REP will retrieve the list from LILA and request reimbursement of those customers' unpaid balances. REPs will cease submitting disconnection for non-payment orders from these eligible customers, and TDUs will cease charging REPs for delivery charges related to these customers. Additionally, the Order imposes reporting requirements on TDUs and REPs to track monthly reimbursements.

The Commissioners explained that the time period for the CERP is intended to track Governor Abbott's Executive Order GA-08, which limits social gatherings and requires the closure of certain businesses. The CERP, including the suspension of disconnections and the addition of eligible customers, will end six months after the Order. However, if the governor has not lifted GA-08 at the end of the six-month period, the PUC may extend the CERP and the related protections.

The Order specifies that the TDUs' riders will remain in place after the CERP has ended, until the regulatory asset costs have been recovered and reimbursements are disbursed to REPs, TDUs, and ERCOT. Final claims for reimbursement must be submitted no later than 90 days after the end of CERP. If the rider over-recovers funds, those funds will be refunded to customers.

The PUC may make additional changes to these Orders, as the COVID-19 landscape changes every day. As the PUC announces anything related to the coronavirus, we will provide updates.

Railroad Commission Adopts Measures to Address Coronavirus Threat

The Railroad Commission of Texas ("RRC") has also joined other state agencies and entities in adopting measures to address the rapidly growing threat presented by the novel coronavirus.

The RRC's March 31, 2020 Open Meeting was cancelled. Additionally, the RRC is no longer accepting in-person filings. Parties may submit filings via U.S. Postal Service, FedEx or United Parcel Service.

Further, on its website, the RRC has announced that most of its employees will be telecommuting, with the exception of a limited skeleton crew. This will be in effect from Tuesday, March 17 until further notice.

The RRC has also provided a link to important resources for the public and for operators at the following web address: rrc.state.tx.us/covid19/

The public can still contact RRC Staff who are teleworking to ask questions about the energy industry, and industry operators can still contact the RRC about filings and processing. The RRC has also provided a 24-hour emergency number to report environmental emergencies.

The RRC has established a process for operators, utilities, and other licensed companies and individuals to request a waiver from regulatory requirements. Entities may request waivers of RRC regulations by providing justifications as to why the regulatory requirements cannot be met. The RRC will review the waiver requests on a case-by-case basis and determine whether to accept or deny the request.

As the RRC announces changes related to the coronavirus, we will provide updated information.

This summary was prepared by Thomas Brocato and Patrick Dinnin, attorneys in the Firm's Energy and Utility Practice Group. If you would like additional information related to this article or other matters, please contact Thomas at 512.322.5857 or tbrocato@lglawfirm.com, or Patrick at 512.322.5848 or pdinnin@lglawfirm.com.

THE TEXAS LEGISLATURE AND STATE LEADERSHIP DURING THE COVID-19 PANDEMIC

Governmental Relations Practice Group

by Ty H. Embrey

The Texas Legislature and State Leadership are living, working, and leading in a new and difficult reality like all of us and are trying to find solutions to help all of Texas through this historic time. The normal rhythm to the legislative process and preparation for the next regular session of the Texas Legislature has been significantly altered as legislative leaders attempt to deal with the current issues created by the COVID-19 pandemic.

Governor Abbott has issued seven (7) Executive Orders since March 14 to lead the response to the pandemic at the state level. Governor Abbott's Executive Orders include Executive Order GA-14 published on March 31 that addressed the statewide continuity of essential services and activities through April 30, 2020, including social distancing guidelines.

Governor Abbott has typically held press conferences with state agency officials and legislative leaders every other day to update the citizens of Texas on the State's efforts to deal with the pandemic.

Lieutenant Governor Dan Patrick has created a task force to work on strategies for restarting the Texas economy when the time is right. The task force will "work on a set of recommendations for re-starting the economy, once President Trump and Governor Abbott announce that businesses can begin the re-opening process and Texans can go back to work," per Lt. Governor Patrick's office. Dallas businessman Brint Ryan, owner of tax advisor company Ryan LLC, will be the chairman of the task force.

Texas Senate staff members and Lt. Governor Patrick's staff members have begun training to help answer phone calls received by the Texas Workforce Commission related to unemployment claims. Speaker of the Texas House Dennis Bonnen has made a similar request of House staff members to help the Texas Workforce Commission to address the unemployment claims they are receiving. The Texas Workforce Commission has received an unprecedented number of phone calls and umemployment claims over the last month.

As far as preparation for the next regular session of the Texas Legislature that is scheduled to begin in January 2021, the Texas Senate and Texas House have stopped holding committee hearings to hear testimony and receive information on the various subjects, issues, and charges that the committees were assigned by Lt. Governor Patrick and Speaker Bonnen as part of the Legislature's social distancing effort. With the U.S. Census occurring in 2020, legislators were anticipating addressing redistricting matters during the 2021 Regular Session as the Legislature typically does in the Regular Sessions immediately following the Federal Government conducting the U.S. Census. The Legislature is also usually

holding hearings and working on the state budget at this time in preparation for the upcoming Regular Session, but that work has been reduced due to the COVID-19 pandemic. The state budget that legislators will be working on in the coming months and during the Regular Session will be particularly challenging with the economic ramifications of the COVID-19 pandemic coupled with the drop in oil and gas prices in 2020.

Those prices impact the amount of tax revenue the State of Texas receives from the production and sale of oil and gas.

This summary was prepared by Ty Embrey, Chair of the Firm's Governmental Relations Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com.

COVID - 19 UPDATE: LITIGATION

Litigation Practice Group

by James F. Parker

Along with the rest of the Firm (and much of the world) the Litigation Practice Group ("LPG") is working from home. But aside from the surroundings, little has changed. Courts are still operating. And, in fact, the anecdotal evidence is that they may even be functioning more efficiently.

Some thoughts:

Lloyd Gosselink lawyers and staff are still working for our clients: As you may know, the LPG has been essentially paperless for some years. Our staff, Karen Mallios and Cathy Daniels, are working from home with exactly the same technological set-ups that they have at the office. And as under normal circumstances, they remain critical to the smooth functioning of the (virtual) office.

Because Texas courts have mandated electronic filing for more than a year, we are able to file documents with the courts and receive filings from other lawyers. That aspect of our practice has not changed.

Moreover, discovery has been computerized for some years through our document-review platform, Logikcull. That platform allows us to review electronically large volumes of discovery documents much more efficiently than we used to be able to review paper documents.

The main change to our daily practice is that meetings between attorneys have switched from walking down the hall to FaceTime or Zoom video conferences. But the team-focused collaboration that we bring to case management and the development of litigation strategies has not changed.

The primary changes in the function of the LPG are in dealings with the courts:

The Supreme Court of Texas has limited all civil hearings: Under the Supreme Court's March 19 Third Emergency Order, Texas courts may not conduct non-essential proceedings in person contrary to local, state, or national directives. In our experience, that means that virtually all civil hearings are being conducted remotely.

Some hearings are proceeding: Civil hearings are still being conducted remotely, either by telephone conference or by Zoom meeting. But remote hearings often take longer than in-person hearings, so fewer are being scheduled by the courts.

Our experience with remote hearings: Telephone hearings are not preferred under the best of circumstances. As with other telephonic meetings, it is challenging to pick up on non-verbal cues from the judge, and people often talk over one another.

Happily, we have the technology to participate in video hearings (through Zoom or other platforms). We have seen that these generally go more smoothly than audio-only hearings. But not all counties have that technology available.

Courts are still receiving motions and briefs: Deadlines for motions and briefs remain in place. And in particular, the United States Court of Appeals for the Fifth Circuit remains as unwilling to grant long extensions as it is under normal circumstances. With hearings restricted, more courts are willing to consider motions solely on the briefing. This has perhaps led to an unexpected side-effect of the current emergency:

Court consideration may be expedited: Anecdotal evidence indicates that courts may be reaching decisions faster than they usually do.

With the federal courts, that is largely attributable to the fact that almost all criminal hearings have been canceled. Criminal hearings take up an enormous amount of a federal district judge's time. And without them, the federal district judges have been able to focus more time on issuing orders on pending motions in civil cases.

State courts outside the largest urban counties have a similar dynamic. With fewer criminal and family-law hearings, they are able to spend more time on their civil dockets. The courts' consideration of motions in civil cases is accelerated by the courts' newfound willingness to consider motions only on the briefing, rather than having a hearing.

So don't be surprised if you get a decision in a case significantly faster than what we may have previously estimated. If anything, litigation is speeding up. The courts are still open, the wheels of justice keep turning, and the judges and attorneys who work inthe

courts have already adapted to new practices and procedures to keep things that way.

This summary was prepared by James Parker, a Principal, for the Firm's Litigation Practice Group. If you would like additional information or have questions related to this article or other matters, please contact James at 512.322.5878 or jparker@lglawfirm.com.

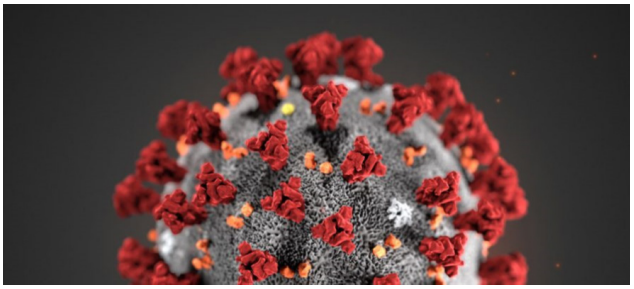
COVID - 19 UPDATE: WATER

Water Practice Group

by Mike Gershon

It is not surprising that the U.S. Department of Homeland Security's March 28, 2020 COVID-19 advisory prioritized various functions within the water and wastewater industries as essential to public health and safety, as well as economic and national security. Managing water and wastewater, operating utility facilities, and meeting demands of dozens of industries and our nation's citizens are as important as ever. Whether in the field, office, boardroom, council chambers, or agency, Lloyd Gosselink recognizes that the important work of our clients needs to get done.

Every day since the President's and Governor's disaster declarations, our Water Practice Group has stayed up to date on changes in the way our clients may have to do business. Our commitment has been to keep our clients' business moving forward, on task, even under new and ever-changing protocols of federal, state and local agencies—and in the way our clients' management, staff, consultants, and partners communicate. COVID-19 (SARS-CoV-2) is a type of virus that is susceptible to disinfection and standard treatment and disinfection processes according to TCEQ, EPA and the World Health Organization's March 19, 2020 guidance. In its COVID-19 guidance for water utilities, TCEQ emphasizes the importance that utilities (a) continue routine sampling and reporting to ensure appropriate treatment levels and (b) establish a plan for redundancy, back-up, and sharing licensed operators. Any temporary change in operator must be reported to PWSINVEN@tceq.texas.gov. Ensuring continuous and adequate water service has been a priority for PUC and TCEQ. As indicated in the EUPG summary above, PUC has ordered utilities not to disconnect for nonpayment.



Expenses incurred that relate to the virus pandemic should be accounted for because economic relief could be available. As detailed in the Employment Law COVID-19 story (see page 5), COVID-19 spending may be eligible for reimbursement. The PUC has stated that certain expenses can be deferred as a regulatory expense, as stated in the EUPG's summary above. Efforts are underway in Washington, D.C. and Austin to pursue additional economic relief for the water and water industries.

Most state and federal agencies where our clients conduct business have announced that their staff will remain working remotely, including the Texas Department of Licensing and Regulation, Office of the Attorney General, PUC, RRC, State Library and Archives Commission, TCEQ, Water Development Board, the United States Corps of Engineers, Fish and Wildlife Service, USDA, and the Federal Energy Regulatory Commission. It has been our experience through mid-April that most agency management and staff are accessible and responsive, and that the Commissions and Boards are holding their public meetings remotely with the opportunity for public participation with advance registration.

Notably, surface water rights and water quality permitting technical review work at TCEQ continues with TCEQ staff working remotely and accessible. Similarly, substantive groundwater rights permitting at groundwater conservation districts is ongoing, with staff processing drilling and production permit applications. If an application is contested and pending before SOAH or a district, filings are being accepted and accommodations made for remote hearings. On March 24th, TCEQ's Commissioners handled a heavy load of business on their agenda with the intent to stay on track with their April agenda. Likewise, many district boards have convened remotely to consider and act on pending applications.

Routine financing and grants for utility infrastructure depend upon extensive application and due-diligence work by TWDB, USDA-RD/RUS, or EPA. All three agencies have announced that their staff is in remote operational status and available by email and phone.

Enforcement offices at TCEQ and EPA have issued guidance intended to help regulated entities whose regulatory compliance may be affected by COVID-19.

For additional information regarding how TCEQ and the EPA are addressing enforcement during this period, see the piece authored by Sam Ballard on page 2 of this edition of *The Lone Star Current*.

This summary was prepared by Mike Gershon, Chair of the Firm's Water Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Mike at 512.322.5872 or mgershon@lglawfirm.com.

THE WOTUS SAGA'S NEXT CHAPER: THE NAVIGABLE WATERS PROTECTION RULE

by Nathan E. Vassar and Lauren C. Thomas

The early 2020 release of the pre-published version of the Navigable Water Protection Rule is the latest chapter in an ongoing regulatory tug-of-war over which waters are subject to federal oversight. This Administration's repeal-and-replace WOTUS effort began more than three years ago, when President Trump signed Executive Order 13778, requiring the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("ACE") (collectively "the agencies") to rescind and revise the Obama Administration's 2015 Waters of the United States ("WOTUS") Rule.[1] The agencies' repeal of the 2015 WOTUS Rule went final in December 2019.[2] On January 23, 2020, the agencies released the pre-publication version of the replacement version, now styled not as WOTUS, but as the Navigable Waters Protection Rule (the "Rule").[3] After the Rule is published in the Federal Register (the rule publication is still pending as of March 25, 2020), it will become final 60 days from the date of publication.

The Rule delineates Clean Water Act jurisdiction using four categories: (1) the territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters.[4] In addition, the Rule adds to the list of existing features that are excluded from WOTUS jurisdiction, including: (1) ephemeral features; (2) diffuse stormwater run-off and directional sheet flow over upland; (3) ditches that are not traditional navigable waters or tributaries; and an interesting catchall, (4) waters or water features that do not fall under the four jurisdictional WOTUS categories.[5] Groundwater remains non-jurisdictional.

Among greatest interest to much of the regulated community is the Rule's categorical exclusion of ephemeral streams. To that end, the Rule adds several key definitions to the existing WOTUS statutory scheme that largely influence WOTUS jurisdiction. The Rule defines a "tributary" as perennial or intermittent in a typical year.[6] The Rule also defines, for the first time, the terms perennial, intermittent, and ephemeral. "Perennial" is surface water flowing continuously year-round.[7] "Intermittent" is "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)."[8] "Ephemeral" is "surface water flowing or pooling only in direct response to precipitation."[9] It is important to note that, despite the new definition of ephemeral streams, effluent-dependent streams (that would otherwise be ephemeral without a wastewater discharge) remain jurisdictional, as the Rule doesn't analyze streams in hypothetical scenarios, but stream flow as it exists, which includes effluent contributions.

Importantly, the Rule narrows the scope of "adjacent wetlands," which will have an impact on Clean Water Act Section 404 permitting. The Rule defines "adjacent wetlands" to include all wetlands that abut (i.e. touch at least one point or side of) a territorial sea or traditional navigable water, tributary, or lake, impoundment, or jurisdictional water.[10] Wetlands no longer are deemed adjacent and jurisdictional if their only adjacency to water is to another wetland.[11]

Although the replacement chapter effort is just beginning, the overall history of the WOTUS rule (which includes U.S. Supreme Court analysis) promises that we can expect to see further plot twists and advocacy from stakeholders for and against this Rule. If you need help navigating the Rule's implications for your operations or particular projects, feel free to reach out.

[1]Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Feb. 28, 2017).
[2]See Definition of "Waters of the United States"–Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).
[3]EPA, The Navigable Waters Protection Rule: Definition of "Waters of the United States" (Jan. 23, 2020), https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf [hereinafter Final Rule]; Final Rule: The Navigable Waters Protection Rule, EPA (last visited Mar. 2, 2020), https://www.epa.gov/nwpr/final-rule-navigable-waters-protection-rule.
[4]Final Rule at 87, 323 (to be codified at 33 C.F.R. § 328.3(a)).
[5]Final Rule at 323–24 (to be codified at 33 C.F.R. § 328.3(b)). Only converted cropland and waste treatment systems were considered non-jurisdictional by definition in the 2015 WOTUS Rule. See 33 C.F.R. § 328.3 (2019).
[6]Id.
[7]Final Rule at 327 (to be codified at 33 C.F.R. § 328.3(c)(8)).
[8]Final Rule at 327 (to be codified at 33 C.F.R. § 328.3(c)(5)); see also id. at 96 (clarifying "in direct response" versus "more than in direct response").
[9]Id. at 325 (to be codified at 33 C.F.R. § 328.3(c)(3)). The agencies clarify that there is a distinction between ephemeral flow from a snowfall event from sustained intermittent flow from melting snowpack that is continuous for weeks or months at a time. Final Rule at 95.
[10]Id. at 111–12, 325 (to be codified at 33 C.F.R. § 328.23(c)(1)). Under the 2015 Rule "adjacent" meant "bordering, contiguous, or neighboring" and wetlands that were separated from other jurisdictional waters by artificial or natural structures were considered adjacent, regardless of the ability to have a direct hydrologic surface connection. See 33 C.F.R. § 328.3(c) (2019).
[11]Final Rule at 112.

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PFAS UPDATE: NEW DRINKING WATER REGULATIONS AND CLEAN-UP ACTIONS

by Sam L. Ballard, Lauren C. Thomas, and Danielle Lam

The federal government has recently taken several actions to further regulate per- and polyfluoroalkyl substances ("PFAS") by beginning the process to update the drinking water standards under the Safe Drinking Water Act ("SDWA") and by enacting the National Defense Authorization Act ("NDAA"), which amends sections of the Toxic Substances Control Act ("TSCA") and the SDWA.

As reported in the April and July 2019 editions of *The Lone Star Current*, PFAS are comprised of a diverse group of man-made chemicals, which are used in a variety of industries for their stain-resistant, waterproof, and nonstick properties. The most common types of PFAS chemicals include perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS"). These chemicals are found in products such as non-stick cookware, food packaging, water-resistant fabrics, and firefighting foam. EPA and many state agencies have issued a number of regulations over the past year to address these "forever chemicals," as they are persistent in the environment and studies indicate that they are carcinogens.

The SDWA requires EPA to make regulatory determinations every five years to determine whether to begin the process to promulgate a national primary drinking water regulation ("NPDWR") for an unregulated contaminant. On March 10, 2020, EPA published its Preliminary Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List, which states that the three criteria required for promulgating an NPDRW for PFOA and PFAS are met. Specifically, EPA found the following: (1) "PFOA and PFOS may have an adverse effect on human health"; (2) "PFOA and PFOS occur in public water systems ("PWSs") with a frequency and at levels of public health concern"; and (3) "regulation of PFOA and PFOS presents a meaningful opportunity for health risk reduction for persons served by PWSs." To make these preliminary determinations, EPA collected data from the Unregulated Contaminant Monitoring Rule Program, the community water system survey, and from individual states.

EPA has particularly requested comment on whether it should consider additional data before making its final regulatory determinations. The comment period closes on May 11, 2020. EPA announced that after making a final determination, it will propose a NPDWR within 24 months of the final determination and will promulgate a final NPDWR within 18 months following the proposal.

Not only is the EPA taking further action to address PFAS, but the White House and Congress have recently taken additional steps, as well. On December 10, 2019, the White House signed the NDAA, adding 172 PFAS chemicals to EPA's Toxic Release Inventory ("TRI"), which tracks the management of certain toxic chemicals. Effective January 1, 2020, facilities that manufacture, process, or otherwise use PFAS must report PFAS releases by July 1, 2021. Additionally, the NDAA amends the TSCA to require EPA to promulgate a rule requiring any person who has manufactured a PFAS substance since January 1, 2011 to submit a report documenting those manufacturing activities. Not only that, but the NDAA also requires PWSs serving more than 10,000 people to now specifically monitor PFAS.

Furthermore, the NDAA requires the Department of Defense ("DOD") to phase out use of military firefighting foam, or aqueous film forming foam (AFFF), by October 1, 2024. DOD is now required to enter into agreements with municipalities and water utilities adjacent to U.S. military installations to share PFAS monitoring data. However, the NDAA does not go as far as restricting PFAS discharges into drinking water supplies under the Clean Water Act ("CWA") or requiring utilities to reduce the amount of PFAS in tap water under the SDWA.

DOD estimates that PFAS cleanup on military installations will now cost at least $3 billion, as reports indicate that PFAS in AFFF has possibly affected 401 military installations across the country. As of March 2020, the U.S. Air Force has already spent almost $500 million in cleaning up PFAS. Also of note, the Navy has a $60 million budget for its cleanup efforts in fiscal years 2020 and 2021, and is taking the lead on finding AFFF alternatives.

While the NDAA is currently working to address PFAS, Congress has recently proposed additional federal legislation to provide financial assistance for testing and treatment. On March 12, 2020, Senator Jeanne Shaheen (D-N.H.) introduced the Providing Financial Assistance to States (PFAS) for Testing and Treatment Act. This proposed legislation would provide $1 billion annually for ten years to remove PFAS from groundwater and drinking water wells, as well as provide testing and treatment of private wells. It would also create a new grant program that would provide $1 billion annually for ten years. This particular piece of legislation will be worth monitoring, as it may result in future proposed legislation to address PFAS removal from other specific sources, including landfills. Currently, Vermont, Michigan, New York, New Hampshire, California, and Connecticut are among the states actively testing and investigating PFAS that end up in the waste stream.

Federal agencies and Congress are increasingly regulating PFAS over time. The effects of increased regulation will inevitably directly impact state and local governments, public water systems, landfills, and other stakeholders. Therefore, it is important to monitor these actions and stay informed of regulatory changes.

Sam Ballard is an Associate in the Firm's Air and Waste Practice Group and Lauren Thomas is an Associate in the Firm's Water Practice Group. If you would like additional information related to this article or other matters, please contact Sam at 512.322.5825 or sballard@lglawfirm.com, or Lauren at 512.322.5850 or lthomas@lglaawfirm.com. Danielle Lam is a law clerk at the Firm and a third-year law student at the University of Houston Law Center.

ASK SHEILA

Dear Sheila,

A white employee of ours complained to HR that a black supervisor made one possibly racially-charged comment (that she "needed a suntan" to work in the executive suite). When the supervisor found out that she had complained, he allegedly told her that she had "cut [her] own throat." Now she is complaining this response is unlawful retaliation. Could this really be a legal issue?

Signed,
Struggling with Political Correctness

Dear Struggling:

A recent federal appellate decision just held that, yes, the supervisor's response to the employee's complaint was enough to get to a jury on a Title VII retaliation claim. The lower court had granted summary judgement to the employer, because it did not think the alleged retaliation (one comment) was "sufficiently pervasive" enough to go to a jury. The appeals court reversed, however, stating that the standard was whether a jury could find that the comment was sufficient to dissuade a reasonable employee from going forward with her claim. This is a much easier standard for an employee to meet than having to prove that the alleged retaliation was "sufficiently pervasive to alter the conditions of her employment."

It is now more crucial than ever to train supervisors how to respond to discrimination and harassment complaints, and that they should never express negative thoughts to employees about the complaints. This is really hard for supervisors to do, and tends to go against human nature! Hence the importance of reinforcing it in training and policies. Also, if an employer can show it properly trained supervisors, it can sometimes have a defense against automatic liability for the supervisor's actions. We will definitely start including the facts of this case in our supervisor training programs.

"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 Downstream Addicks and Barker (Tex.) Flood-Control Reservoirs, No. 17-9002, 2020 WL 808686, (Fed. Cl. Feb. 18, 2020).

Hurricane Harvey poured 33.7 inches of rain over a four-day period across Harris County and the Houston metropolitan area. As a result, parties filed hundreds of cases against the Federal Government alleging unconstitutional takings under the Fifth Amendment. The cases were consolidated under a master docket, *In re Addicks and Barker (Texas) Flood Control Reservoirs*, which was subsequently split into two sub-master dockets—one for upstream cases and one for downstream cases.

In the January 2020 issue of *The Lone Star Current*, we covered a decision (*In Re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs)* regarding the upstream claimants, in which the U.S. Court of Federal Claims ruled that certain government action relating to the Addicks and Barker Damns, and the flooding of certain properties that occurred during and after Hurricane Harvey, constituted a Fifth Amendment taking. In arriving at that conclusion, the Court found that it was not a matter of if flooding would occur, but a matter of when and how often. Since flooding of the upstream properties was foreseeable to an objectively reasonable person, sufficient foreseeability and causation were found to support the takings claim.

Two months after the Court issued its decision in that case, the same Court issued its decision regarding the downstream plaintiffs, which we summarize here.

Like the upstream case, residents of Harris County sued the U.S. Army Corps of Engineers ("Corps") under the Fifth Amendment for allegedly taking property downstream from the Addicks and Barker Reservoirs ("Reservoirs") without just compensation during Hurricane Harvey. However, unlike the upstream cases, the Court found that the downstream damage was not caused by a foreseeable flooding event. Rather, the Court found that Hurricane Harvey, an unforeseeable "Act of God," was the sole cause of damage to the downstream properties. The Court found that the impounded

stormwater exceeded the Reservoirs' controllable capacity, and thereby caused the Corps to open the Reservoirs' gates to prevent additional flooding. The same court that found foreseeable causation in the upstream docket found no such intervening cause in the downstream docket. Therefore, the Court held that there is no property right to perfect flood control against waters resulting from an "Act of God" under state or federal law, and as such, no unconstitutional taking occurred.

City of Austin v. Kinder Morgan Tex. Pipeline, LLC, No. 1:20-CV-138-RP, 2020 WL 1324071 (W.D. Tex. Mar. 19, 2020).

Local governmental entities, the Barton Springs Edwards Aquifer Conservation District, and landowners sought injunctive relief with respect to Kinder Morgan's construction of a natural gas pipeline through the Central Texas Hill Country. Plaintiffs argued that Kinder Morgan and the U.S. Fish and Wildlife Service ("FWS") manipulated the Endangered Species Act's consultation process to sidestep the incidental take permitting process, specifically the environmental review requirement under the National Environmental Policy Act. Kinder Morgan sought verification of authorization of certain impacts to waters of the United States under Nationwide Permit ("NWP") 12 for Utility Lines. The Army Corps of Engineers ("Corps") conducted a biological assessment, and then initiated a formal consultation process with FWS. FWS issued a biological opinion ("BiOP") and found the project would not jeopardize the continued existence of local protected species. However, this conclusion was expressly predicated on implementation of avoidance and mitigation measures, including Kinder Morgan taking all necessary measures to avoid any potential contamination due to leaks within the recharge zone of the Edwards Aquifer. The Corps issued verification letters under NWP 12, but conditioned the authorization upon compliance with the mandatory terms of the BiOP and incidental take statement. Kinder Morgan violated these mandatory terms. The court ultimately denied the request for a preliminary injunction because Plaintiffs failed to show either imminent or reasonably certain irreparable harm.

Hatchett v. W. Travis Cty. Public Util. Agency, No. 03-18-00668-CV, 2020 WL 1161108 (Tex. App.—Austin Mar. 11, 2020).

The Hatchetts entered into an agreement with Masonwood Development to develop their land, leaving Masonwood with title to a portion of the property and the remainder owned by the Hatchetts. West Travis County Public Utility Agency ("PUA") granted Masonwood's service extension request ("SER"), seeking water service for the property, in 2013. In 2016, the Hatchetts submitted a second SER for the remainder property, but were denied. In 2018, the PUA amended its tariff, which required the Hatchetts to comply with certain impervious cover rules in order to obtain service to their remainder property.

At trial, the Hatchetts sought declaratory judgments that (i) the PUA's rules limiting density and impervious cover on the property violate the PUA's statutory and constitutional authority, and (ii) under the Texas Local Government Code's ("TLGC") vested rights protections, the PUA's rules enacted after Masonwood's SER cannot be applied to the remainder property. The trial court, which dismissed the Hatchetts' claims, held that the Hatchetts had no standing under the Uniform Declaratory Judgment Act ("UDJA") or the TLGC's vested rights protection provision, and that—at any rate—the PUA enjoyed governmental immunity from such claims.

On appeal, however, the Appellate Court found that the Hatchetts did have standing to sue under the Local Government Code's vested-rights protection provision because, according to the facts alleged in the Hatchetts' petition, they owned the property at issue. The Appellate Court also found that the Hatchetts had standing to sue under the UDJA, because the question of whether the PUA acted beyond the scope of its statutory authority by denying the Hatchett's SER constitutes a justiciable controversy over which the trial court had jurisdiction.

With regard to the PUA's claim of immunity under the TLGC's vested-rights protection provisions, the Court held that the case did not fit within the "utility connection" exception to the TLGC vested-rights protection provision's express waiver of immunity. According to the Court, "utility connection" means something narrower than the provision of water service. Therefore, the PUA did not have governmental immunity. However, the Court did affirm that the PUA enjoyed immunity under the UDJA. By alleging that the PUA's rules exceeded its authority, the Hatchetts made a quintessential *ultra vires* claim. Therefore, the Uniform Declaratory Judgment Act did not waive the PUA's immunity. Thus, the Court affirmed the trial court's dismissal of the Hatchetts' UDJA claims, but reversed the trial court's dismissal of their TLGC vested-rights claims and remanded for further proceedings.

Petition of the Cities of Garland, Mesquite, Plano and Richardson Appealing the Decision By N. Tex. Mun. Water Dist. Affecting Wholesale Water Rates, Docket No. 50382, 2020 WL 757950 (Tex. P.U.C. Feb. 27, 2020).

The North Texas Municipal Water District ("NTMWD") provides water, wastewater, and solid waste services to 13 member cities. In December 2016, four NTMWD member cities filed a petition with the Public Utility Commission of Texas (PUC) alleging that NTMWD's 2017 wholesale water rates were unreasonably preferential, prejudicial, and discriminatory.

On February 27, 2020, in an unprecedented move, the Public Utility Commission ("PUC") determined that NTMWD rates were adverse to the public interest. The petitioning cities state that under their existing contract with NTMWD, they have paid substantial sums of money for water that residents did not use. NTMWD states that the contract requires each city is to pay for the amount of water it consumed in its highest-usage year, even if residents use less water in subsequent years.

This is the first time since the 1994 court decision in *Texas Water Commission v. City of Fort Worth* that a state agency has found a wholesale water rate to

be adverse to the public interest. In Fort Worth, the court found that the Texas Constitution's prohibition against state impairment of contracts restricts the state's exercise of jurisdiction over wholesale rates, and that rates set by contracts can only be reviewed where the public interest requires it. The PUC has remanded the docket to the State Office of Administrative Hearings to conduct a cost-of-service determination to set new rates.

Bonin v. Sabine River Auth., No. 1:19-CV-00527, 2020 WL 614032 (E.D. Tex. Feb. 10, 2020).

The Sabine River forms the border between Texas and Louisiana, beginning at the southern base of the Toledo Bend Reservoir and ultimately flowing into the Gulf of Mexico. Texas and Louisiana property owners sued the Sabine River Authority of Louisiana ("SRA-L") and the Sabine River Authority of Texas ("SRA-T") (collectively, the "Defendants") alleging a taking of their property during the March 2016 Sabine River flood when the Defendants opened nine spillway gates in response to water levels rising above 172.5 feet. However, plaintiffs claimed that this was merely the last straw in a series of deliberate actions the Defendants took prior to the flooding, including (i) renewing its license to operate the facility knowing there was substantial certainty downstream flooding would occur; (ii) operating the reservoir at the upper bounds of their 168 to 172 feet allowance, despite its authority to release more water than it actually released in February 2016; and (iii) operating only one of the two hydroelectric generators in the months leading up to the flood, when operating both would have caused water levels to be much lower at the time of the flood.

The Court considered SRA-L's motion to dismiss, which claimed Eleventh Amendment sovereign immunity. Applying the 5th Circuit's six-factor sovereign immunity test from *Clark v. Tarrant Cty.*, the court found that—for purposes of the Eleventh Amendment—SRA-L was not an arm of the state, and therefore could not take shelter under the Eleventh Amendment sovereign immunity clause. Specifically, the Court found that (i) state law characterized SRA-L as an arm of the state; (ii) SRA-L was mainly self-funded; (iii) SRA-L had considerable local autonomy; (iv) SRA-L was focused on local issues rather than statewide problems; (v) SRA-L could sue and be sued; and (vi) SRA-L could hold property in its own name. Noting that case law is scarce, and considering whether a local or regional government is an arm of the state or merely a political subdivision, the Court weighed those factors that favored a finding that SRA-L was an arm of the state against those that favored a finding that SRA-L was not. Ultimately the Court concluded that SRA-L could not claim Eleventh Amendment immunity because it was not an arm of the State of Louisiana.

Litigation Cases

In this issue of *In the Courts*, we will spend some time talking about contracts, because that's what the Supreme Court has wanted to talk about over the past few months.

But first, let's talk about bond validation, and specifically the bond-validation procedure set forth in the Expedited Declaratory Judgments Act, Tex. Gov't Code ch. 1205 (EDJA).

SCOTX Speaks on EDJA After Years of Silence.

For the first time in nearly four decades, the Texas Supreme Court has issued an opinion concerning the EDJA. Almost all EDJA cases go through the Austin Court of Appeals, and the Supreme Court has typically been satisfied with that court's EDJA jurisprudence. So the Supreme Court's willingness to even consider this case represents a departure.

The EDJA is a vital legal mechanism for issuers of public securities to resolve disputes impacting their bonds and related public security authorizations on a final, binding, and expedited basis. Here, the Court answered two questions: (1) whether the EDJA permits a declaration of the legality and validity of rate amounts set under a contract when the resulting revenues are pledged to pay off bonds and (2) whether the EDJA allows for a declaration of whether a party complied with a contract in setting specific rates. In both cases, and for similar reasoning, the answer is "no."

City of Conroe v. San Jacinto River Auth., No. 18-0989, 2020 WL 1492411 (Tex. Mar. 27, 2020).

The San Jacinto River Authority sells water to cities and other customers under the terms of various contracts, and the revenue from those contracts is pledged to pay off SJRA's bonds. In response to accusations of violating its underlying contracts after a rate increase, SJRA filed suit under the EDJA.

Alleging that the rate increase was justified, SJRA sought four declarations: (1) that SJRA had the authority to set such rates under the contracts (the Authorization Declaration); (2) that SJRA complied with the underlying contracts in setting their rates (the Compliance Declaration); (3) that the rates and contract were legal and valid (the Validation Declaration); and (4) that a city's refusal to pay the rate increase was a breach of the underlying contract (the Breach declaration). The Cities argued that SJRA's declarations were outside the EDJA's statutory authority to declare "the legality and validity" of a "public security authorization" and further argued they were protected from SJRA's suit by governmental immunity.

At the outset, the Texas Supreme Court clarified that the scope of the EDJA is confined to an "authorization" in connection with a "public security." An "authorization" in the public-security context includes the initial actions or approvals needed to ensure the proper issuance of the public securities. Ordinarily, a public-security authorization will occur before or close in time to the public security's issuance.

Using that reasoning, the Court found that the Authorization Declaration (i.e., that SJRA has authority to set such rates under the contract) was within the scope of the EDJA because it concerned the "legality and validity" of the contracts and

"contracts must be properly executed to be valid."

But the Court concluded that the Compliance Declaration (i.e., that SJRA complied with the contracts in setting its rates) was not within the scope of the EDJA because it lacked "an authorizing connection with the public securities." The Court observed that the rates were established six years after the contracts were entered into and the bonds were authorized. The Court used these two contrasting declarations to emphasize its ultimate conclusion: that the EDJA allows for the adjudication of a party's contractual authority to set rates but not compliance with an underlying contract in doing so.

The Court applied this reasoning to the Validation Declaration, holding that the EDJA confers jurisdiction to declare whether the contracts (as public security authorizations) are legal and valid, but it does not extend to declaring whether a specific rate amount set in a particular rate order is valid. The Court also emphasized the EDJA's applicability to *in rem* declarations concerning property rights and not to any *in personam* rights and liabilities, and affirmed the court of appeals' holding that the Breach Declaration (i.e., that a City's action constituted a breach of contract) was outside the scope of the EDJA.

Lastly, the Court held that governmental immunity does not apply to the EDJA because it adjudicates *in rem* rights that do not implicate the "costs and consequences" governmental immunity is designed to protect against.

Although it doesn't change what we thought we knew about the EDJA, **this case provides new clarity as to the scope of bond-validation actions.** The EDJA remains a powerful tool to adjudicate governmental entities' authority to take various actions associated with their bonds, including entering into the contracts that will go to repay the bonds and the expenditure of the money generated from the bonds' sale. But if a party allegedly breaches that contract (for example, either with respect to the customer's payment or the utility's rate-setting under the contract), then the claim is one for breach and can't be brought under the EDJA.

SCOTX Clarifies When Emails are a "Meeting of the Minds."

As our society moves toward more electronic communication, those communications also tend to become more informal. When do those informal email communications create a "formal" contract? This is a question that courts have been struggling with for the last 30 years.

Chalker Energy Partners III, LLC v. Le Norman Operating LLC, No. 18-0352, 2020 WL 976930 (Tex. Feb. 28, 2020).

The latest decision to wade into this murky area is *Chalker Energy*, an opinion delivered by Chief Justice Hecht, in which the court set out to decide whether an email exchange between the parties reflected a meeting of the minds, which is required in the formation of a contract.

Chalker Energy—the "sellers" in the case—were a group of owners of working interests referred to by the Court as "the assets." Chalker Energy had agreed amongst themselves to develop and sell the assets. Le Norman Operating LLC (LNO) bid on the assets, and its bid was rejected. After some negotiation, LNO's representative sent a counteroffer to the sellers via email, offering to buy 67% of the assets for a particular price and setting a time at which the offer would expire. Before the stated deadline, Chalker Energy responded to the offer via email, stating that they were "on board to deliver 67% subject to a mutually agreeable PSA." *Id.* at *5. However, a few days later, a different bidder stepped forward with a better offer, and Chalker Energy accepted the new offer. LNO sued for breach of contract, arguing that a contract of sale had been formed through the email communications.

The court of appeals held that whether bidding procedures were followed and if the seller intended to be bound were fact issues which precluded summary judgment. The Supreme Court reversed, emphasizing the ability to include conditions precedent to contract formation is essential to freedom of contract.

In order to submit a bid, LNO signed a confidentiality agreement which included a No-Obligation Clause. This clause stated that, unless a definitive agreement had been executed and delivered, there was no contract between the parties. By agreeing to this clause, the parties made the execution of a definitive agreement a condition precedent to contract formation. LNO argues that the email exchange raises an issue of fact regarding the existence of a definitive agreement; however, the Court concluded that Chalker Energy's inclusion of the phrase "subject to a mutually agreeable PSA," makes clear that no definitive agreement had been reached, and that the emails were more akin to a preliminary agreement, such as a letter of intent. Accordingly, the Court concluded that there was no definitive agreement as required by the No Obligation clause.

This case creates an important pathway for contract negotiators to follow to ensure that they do not inadvertently agree to a contract by email. A memorandum—even an informal one contained in an email—exchanged at the outset of negotiations that (1) email communications will not constitute agreement to contract terms, and (2) the execution of a formal written contract is a condition precedent to any contract may avoid this danger.

Copano Energy, LLC v. Bujnoch, 18-0044, 2020 WL 499765 (Tex. Jan. 31, 2020).

Bujnoch alleged that an email chain constituted a valid and enforceable contract for Copano Energy to receive an easement in exchange for developing a pipeline on Bujnoch's land. After negotiation via email, no formal agreement was ever formed, and Copano never built its pipeline.

Because the easement is an interest in land, an agreement must be in writing. The writing need not be a single

document, but the essential elements of the agreement must be evident from the writing, and there must be no need to resort to oral testimony.

The Supreme Court held that the emails did not satisfy the requirement for a writing, in large part because of the phrasing of the emails, which included phrases like "pursuant to our conversation earlier," and "in reliance on your representation." Though one of the emails clearly contained an offer and an acceptance, what was being offered and accepted was not apparent from the writings themselves. Instead, they specifically referred to oral agreements. And while other emails laid out terms of an agreement, the Court found that there was no intent to be bound.

The Court held that it was impossible to piece together from the emails one agreement with clear essential terms and an intent to be bound by those terms; thus, the Court concluded that the claim was barred by the statute of frauds.

For a lot of us, email introductory phrases such as "following up on our conversation this afternoon" are boilerplate. But in negotiations for contracts that must be in writing (e.g., contracts for land, contracts that cannot be performed within one year), such references may undermine the requirement of a writing.

SCOTX Takes up Liquidated Damages.

Governmental contractors often use liquidated-damages provisions to meet the "balance due and owed" requirement of the Texas Local Government Contracts Claims Act. But liquidated damages cannot be punitive; they must reflect the actual value or loss. Evaluating liquidated-damages provisions under that requirement has been a longstanding problem.

Atrium Med. Ctr., LP v. Houston Red C LLC, No. 18-0228, 2020 WL 596873 (Tex. Feb. 7, 2020).

Houston Red contracted with Atrium to provide healthcare laundry service. After Atrium suffered financial difficulties, it cancelled the contract, which triggered a liquidated-damage provision. That provision required Atrium to pay "40 percent of the greater of (i) the initial 'agreement value' and (ii) the current invoice amount, multiplied by the number of weeks remaining in the agreement's term."

The court of appeals held that Houston Red was entitled to the weekly value of the contract for the remainder of the contract term. It further held that, at the time of contracting, determining the Respondent's actual damages was almost impossible due to the uncertainty of Atrium's needs. This is further supported by the fact that the weekly value of the contract was estimated at $2,500 at the time of contracting, but in practice, the actual weekly value was around $8,000. The court explained that the 40% figure in the contract was a "reasonable forecast" of the harm that the Respondent would suffer due to Atrium's cancellation.

The Supreme Court agreed, and explained that contract damages must be "just compensation" for loss or for the damage actually sustained. Liquidated damages therefore must reflect the actual damages or loss to avoid functioning as a penalty. The Court explained that, in order to show that a facially reasonable liquidated damage provision is unreasonable, there must be an "unbridgeable discrepancy" between the liquidated damage provision and the damage actually suffered by Respondent. Atrium offered no evidence of an unbridgeable discrepancy.

This case sets forth a **model for an enforceable liquidated-damages pro-vision.** When encountering such a provision in contract drafting/negotiations, match the provision up to the value of the contract to ensure that the non-breaching party does not get a windfall.

Texas Supreme Court Declines to Reinstate $535M Judgment.

The terminal at Cushing is not just a cornerstone of the oil-and-gas industry, it is an outdated one. And moving oil from Cushing to the Gulf Coast is big business. The oil industry knew that a new pipeline solution was necessary. But first a contract needed to be formed. And that requires definite terms and the performance of all conditions precedent. Without those things, there is no contract.

Energy Transfer Partners, L.P. v. Enter. Products Partners, L.P., 17-0862, 2020 WL 622763 (Tex. Jan. 31, 2020).

In 2011, the energy industry faced a lack of necessary infrastructure to move oil south from Cushing, Oklahoma to the Texas Gulf Coast. Several oil companies, including Enterprise and ETP, sought to meet this need by converting an existing pipeline owned by ETP and leased by Enterprise into a line capable of moving oil south.

The parties signed three agreements by which they agreed not to be bound until each company's board approved a formal contract. By May 2011, the companies formed an integrated "Double E" team, attempting to solidify sufficient shipping commitments. Over the next few months, the companies marketed the project to potential customers as a "50/50 JV." However, the project failed to meet the necessary shipping commitments, and Enterprise ended its relationship with ETP. Enterprise subsequently worked with a different company to open a new pipeline.

ETP sued Enterprise on the theory that, despite the written agreements, the parties had formed a partnership to market and pursue the pipeline through their conduct. The jury found that a partnership had existed and that Enterprise had breached its duty of loyalty by pursuing the new pipeline, awarding a $535,000,000 judgment. The appellate court reversed, holding that companies could contract for conditions precedent to the formation of a partnership, as they did here, by requiring a definitive agreement and board approval. The court noted that, in order to prevail, ETP had to conclusively prove waiver of these conditions, or secure a jury finding that the conditions were waived, which it did not.

The Supreme Court agreed. The court observed that parties can contractually create conditions precedent to the formation of a partnership under the Business Organizations Code. The court went on to explain that an agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership.

However, an agreement of this kind can be waived. The Court clarified the only kind of evidence that can be considered when evaluating if a condition has been waived is evidence directly tied to the condition precedent, such as a direct disavowal of the signed agreement. A signed partnership agreement is not relevant in the absence of evidence that the precedent had been waived. Because ETP presented no evidence that the condition had been waived or Enterprise had acted inconsistently with the agreement, there could be no partnership under Texas law.

Aside from the massive amount of money involved, this case is notable for recognizing the place of conditions precedent in contract formation. Board approval is a common condition precedent. But there can be many others. Contract negotiators/drafters should be wary of such conditions precedent lurking in their contracts that may prevent the document from ever becoming an actual contract.

Air and Waste Cases

Government of Guam v. United States of America, 950 F.3d 104 (D.C. Cir. 2020). The D.C. Circuit Court of Appeals recently ruled that Guam waited too long to file a Superfund claim for the cleanup of a landfill on the island, known as the Ordot Dump, where the U.S. Navy disposed of dangerous munitions and chemicals for decades, including agent orange and DDT. The Navy began using the landfill in the 1940s and throughout the Korean and Vietnam Wars. The landfill was unlined and released contaminants into nearby rivers flowing into the Pacific Ocean.

In 2002, EPA sued Guam as the site owner for violating the Clean Water Act for discharging pollutants into the Waters of the U.S., leading to a consent decree into 2004.

In turn, Guam sued the Navy in 2017, seeking to recoup its landfill-closure and remediation costs, which it estimated would exceed $160 million.

The D.C. Circuit Court ruled that the 2004 consent decree triggered a three-year statute of limitations for Guam to pursue a Superfund Contribution Claim; therefore, Guam's claims against the Navy were time-barred.

"In the Courts" *is prepared by Cole Ruiz, an Associate in the Districts and Water Practice Groups; Lindsay Killeen, an Associate in the Litigation Practice Group; and Samuel Ballard, an Associate in the Air and Waste Practice Group. If you would like additional information, please contact Lauren at 512.322.5887 or cruiz@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 Plans to Review Air Quality Standards for Lead. On March 12, 2020, EPA announced that it plans to initiate a review of the air quality standards for lead. This review will be conducted to determine if the current lead standards protect public health or need to be tightened.

EPA sets national ambient air quality standards ("NAAQS") for pollutants that endanger the public health or the environment. Lead is one of the six criteria pollutants for which EPA sets NAAQS. In October 2016, EPA retained the lead standards set in 2008 following a review of the NAAQS. EPA retained both the primary and secondary standards at .015 micrograms of total suspended lead particles in a cubic meter of air. Sources of lead such as waste incinerators, utilities, lead-acid battery manufactures, lead smelters, and ore and metal processors may be impacted by stricter lead standards.

EPA Finds Texas Failed to Submit State Plan for Landfill Emission Guidelines. On February 29, 2020, EPA found that Texas, along with 41 other states, had failed to submit a state plan for the 2016 Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills.

EPA required states to submit plans for review and approval by August 29, 2019. The regulations in the Emission Guidelines establish a deadline of two years for EPA to promulgate a federal plan for states that have failed to submit a state plan. EPA announced that it is now beginning work on the federal

plan; however, states may still have an opportunity to submit a plan before the federal plan is promulgated. Furthermore, EPA announced that its finding does not impose sanctions and it is committed to working with states to expedite the missing submissions and to review and act on their state plan submissions.

In response, the Texas Commission on Environmental Quality ("TCEQ") has announced plans for a future rulemaking to revise 30 Texas Administrative Code, Chapter 113, Subchapter D to incorporate a new state plan in compliance with the Federal Clean Air Act and 2016 Emission Guidelines. The future rulemaking would revise Subchapter D to remove outdated references to prior Emission Guidelines and add references to the provisions of the 2016 Emission Guidelines under 40 C.F.R. Part 60. TCEQ anticipates proposing the rulemaking in September 2020 with a comment period to end on November 16, 2020. TCEQ announced plans for a separate, concurrent, rulemaking to replace the existing standard air permit for MSW Landfills with a non-rule standard permit that would be issued to reflect the changes in the federal regulations.

EPA Offers Additional $5 Million to Recipients of Brownfields Loan Fund Agreements. On March 6, 2020, EPA announced that it is offering an additional $5,000,000 to recipients of its Brownfields Revolving Loan agreements. The Small Business Liability Relief and Brownfields Revitalization Act authorizes EPA to make additional funds available. The agency will accept requests for the funding from parties with existing revolving loan fund agreements. This funding may contribute to the redevelopment of underused properties that may be contaminated.

EPA Releases Proposed 2020 Multi-Sector General Permit. On March 2, 2020, EPA released its 2020 National Pollutant Discharge Elimination System ("NPDES") Multi-Sector General Permit ("MSGP") for public comment. The MSGP permit authorizes storm-water discharges associated with various industrial activities.

The revisions include changes to signage of permit coverage, requirements for operators to consider major storm control measure enhancements, changes to eligibility for stormwater discharges at federal CERCLA sites, revisions to sector-specific fact sheets, and changes to monitoring requirements. Monitoring requirements would include a universal benchmark requirement for pH, total suspended solids, and chemical oxygen demand that would apply to all facilities subject to the MSGP. The final MSGP permit will take effect on June 4, 2020, when the current MSGP expires. Public comments on the proposed MSGP are due May 1, 2020.

TCEQ also has announced plans to renew its state MSGP before it expires on August 14, 2021, but has not yet released the revised plan.

EPA Launched New Web Portal Containing All Guidance Documents. On February 28, 2020, EPA launched a new web portal listing all of its guidance documents. EPA took this action pursuant to an executive order in October 2019 requiring agencies to post all of their guidance on one easily accessible website. The order defines guidance documents as the tools that agency officials use to interpret regulations under their jurisdiction, including letters, adjudication decisions, press releases, and technical memoranda. Violation notices, advisory or legal opinions, and agency correspondence with individual persons or entities are exempted from the requirements of the order.

EPA Agrees to Conduct Rulemaking for Potential Spills of Hazardous Substances. On February 3, 2020, EPA published a consent decree in which it agreed to issue, within two years of the consent decree, a proposed rulemaking on the planning required for potential hazardous waste discharges (similar to the existing Spill Prevention, Countermeasure and Control (SPCC) program for oil). According to the consent decree, a final rule would be required within 30 months of the proposed rulemaking.

EPA Updates Petition Process to Object to Title V Air Permits. On February 5, 2020, EPA issued a final rule updating the process for petitioning the agency to object to state-issued Clean Air Act Tile V air permits. The rule describes the information needed in a petition for the EPA to review a claim of substantive or procedural permit shortcomings. The rule also requires delegated state permitting authorities, such as TCEQ, to respond in writing to "significant" comments and describe the basis for the permit terms and conditions. The effective date of the final rule is April 6, 2020.

EPA issues Draft Guidance to Increase Use of Plantwide Permitting. On February 13, 2020, EPA issued draft guidance clarifying the conditions used to adjust "plantwide applicability limits" ("PALs"). PALs are intended to afford large sites the flexibility to better manage compliance with emissions caps when making upgrades and plant changes. However, few PAL permits have been issued. The new guidance is intended to increase industry use of PALs, which EPA considers a more flexible approach to permitting.

Executive Office of the President Council on Environmental Quality ("CEQ")

CEQ Issues a Proposed Rulemaking to Update Procedural Provisions of the National Environmental Policy Act ("NEPA"). On January 10, 2020, the CEQ published a Notice of Proposed Rulemaking ("NPRM") to "modernize and clarify" NEPA's procedural provisions for "more efficient, effective, and timely NEPA reviews." In this NPRM, the CEQ proposes changes to the scope, depth, and length of the NEPA review process.

Several of the CEQ's proposed changes affect the scope of NEPA. The CEQ proposes restraints on the previously broad interpretation of what constitutes a "major federal action" triggering NEPA review. The NPRM clarifies that "major" projects do not include "non-discretionary decisions," federal projects

with minimal Federal funding, or federal projects with minimal Federal "control and responsibility." Under the proposed changes, any federal projects that are not "major," even if they have "significant" environmental impacts, would not be subject to NEPA review.

The CEQ's proposed changes affect the depth of a NEPA review by altering several key definitions, including the definition of "effects" and the definition of "reasonable alternative." Currently, NEPA requires agencies involved in a project to consider three types of environmental effects: direct, indirect, and cumulative. The CEQ proposes to simplify the definition of "effects" by removing the "direct, indirect, and cumulative" language. Additionally, the CEQ proposes to revise the definition of "reasonable alternative" to include "ranges of alternatives that are technically and economically feasible."

The proposed rulemaking suggests changes to limit the length of the NEPA review process. The NPRM proposes presumptive time limits of two years for completion of environmental impact statements ("EISs") and one year for completion of environmental assessments ("EAs") unless a senior agency official modifies the time limit due to certain factors such as the "potential for environmental harm."

The comment period for this proposed rulemaking closed on March 10, 2020. For more information about the proposed NEPA revisions, visit: https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ's Pending Rule Proposal Requires Customer Notifications when Public Water Systems Stop Adding Fluoride. TCEQ Commissioners plan to vote on a pending rule proposal that will require public water systems to provide written notification to customers at least 60 days before terminating fluoride additions in the water system. The reasoning behind the rulemaking stems from House Bill 3552, passed in 2019 by the 86th Texas Legislature, which amended the Texas Health and Safety Code to require public water systems to notify their customers prior to permanently terminating the addition of fluoride to drinking water. The rulemaking would amend sections 290.39 and 290.122 of the Texas Administrative Code. For more information on the pending rule proposal, visit: https://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/proposals/20007290_pro.pdf

Morgan Johnson Joins the TCEQ as the Senior Advisor to Commissioner Emily Lindley. In January 2020 Morgan Johnson took on the role of Special Counsel at the TCEQ. Johnson previously worked as an attorney at McGinnis Lochridge in Austin, Texas, and will now serve as Senior Advisor to TCEQ Commissioner Emily Lindley. Johnson has a background in transactional, legislative, and administrative law, with a focus on water resources, real estate, and regulatory compliance issues.

TCEQ Proposes Updates to Application Processing. On March 6, 2020, TCEQ announced plans for a proposed rulemaking to amend 30 Texas Administrative Code § 281.18 to "modernize communications" between TCEQ and applicants by specifically providing an option for the use of electronic mail for communicating application deficiencies and receiving responses from applicants, rather than communication via letter and mailed notices. TCEQ claims that this update will reduce TCEQ postage costs and improve the efficiency of application processing. The anticipated comment period is April 10-May 11, 2020.

TCEQ Updates Sludge Rule. On March 6, 2020, TCEQ adopted a final rule to amend sections of 30 Texas Administrative Code, Chapter 312, concerning Sludge Use, Disposal, and Transportation. This rulemaking was adopted to clarify the purpose of rule requirements, remove inconsistencies in the rules, and improve the clarity of Chapter 312.

Specifically, the rulemaking clarifies: when wastewater treatment plants are authorized to apply domestic sewage sludge mixed with processed or unprocessed grit trap or grease trap waste to the land; the requisite buffer zones; and the conditions for authorization under 30 Texas Administrative Code, Chapter 330 or 332 for processing of sewage sludge or domestic septage. The rulemaking also adds metal limits, management practices, monitoring requirements, and recordkeeping and reporting requirements for water treatment sludge in order to be consistent with federal requirements.

MSW General Operating Permit Revisions. TCEQ recently issued a renewal and revision to the Municipal Solid Waste ("MSW") Landfill General Operating Permit (GOP) No. 517, which covers air emissions at MSW facilities, effective February 24, 2020.

The GOP contains revisions based on recent federal and state rule changes, which include updates to the requirements tables; the addition of new requirements tables; updates to the terms; and updates to the compliance assurance monitoring and periodic monitoring. The renewal also corrects typographical errors and updates language for administrative preferences.

Current permit holders are required to submit an application for a new authorization to operate ("ATO") no later than May 24, 2020, if any of the emission units, applicability determinations, or the basis for the applicability determinations are affected by the revisions to the GOP. If the revisions in the GOP do not affect your site, a new ATO is not required.

TCEQ Considers Proposed Rulemaking to Amend 30 TAC 305 and 330 pertaining to MSW Applications. On March 20, 2020, TCEQ announced plans to consider a rulemaking amending sections of 30 Texas Administrative Code 305 and 330 to incorporate recent legislative changes specific to Municipal Solid Waste ("MSW") permit applications. The legislative changes include increasing the MSW application fee from $150 to $2,050. The increase would only apply to new applications, not those already

submitted, and applies to new applications and amendments, but does not include modifications.

In addition, the future rulemaking requires the TCEQ to perform a "site assessment" before issuing a MSW permit. Next, the future rulemaking will exclude gasification and pyrolysis from regulation as an MSW facility, but require a showing that the product is valuable. And finally, the TCEQ seeks to repeal Chapter 330, Subchapter F, Analytical Quality Assurance and Quality Control in the future rulemaking. The chapter was found to be obsolete as a result of the Quadrennial Rules Review, which found that the rules "expired on January 1, 2009 and the agency uses other guidance documents to implement data quality controls and sampling guidelines."

The anticipated comment period is April 24 through May 25, 2020.

Texas State Soil and Water Conservation Board ("TSSWCB")

TSSWCB Finalizes Rules to Implement Dam Infrastructure Projects. On February 6, 2020, the TSSWCB's final rules implementing Senate Bill 500—which appropriated $150 million for dam infrastructure projects—went into effect.

The final rules set out general definitions and provide requirements for requesting and submitting an application for funding from the $150 million supplemental funds pool. The rules also lay out how the TSSWCB administers the funds and reviews the applications. The TSSWCB will distribute funds based on six factors: (1) accuracy and completeness of the application; (2) risk of dam failure; (3) potential loss of life due to dam failure; (4) potential damage to critical infrastructure due to dam failure; (5) the extent and type of structural repair needed; and (6) the ability of sponsors to provide the required percentage of the total cost of the project through funds not originating from state appropriations.

The final rules are located in 31 TAC §§ 529.51, 529.52, 529.54-57. More information is also available at the TSSWCB's website: www.tsswcb.texas.gov/flood-control-repair-projects.

Texas Senate

Senator Kirk Watson Retires from the Texas Senate. Kirk Watson, Texas State Senator for District 14, announced that he will retire from the Senate effective April 30, 2020 to become Dean of the University of Houston Hobby School for Public Affairs. Watson had served as senator since 2006 and previously served as the Mayor of Austin from 1997 to 2001.

In a statement released on February 18, 2020, Watson noted that his new role will give him "a unique opportunity to serve this state" in an institution that will be "a leader in 21st Century public policy education." Watson also stated that the two months between his announcement and his retirement should allow "a reasonable amount of time before a special election," which will "minimize the time that Senate District 14 will be without a senator."

Texas Public Utility Commission ("PUC")

CenterPoint Energy Rate Case Settlement Approved by PUC. On April 5, 2019, CenterPoint Energy Houston Electric, LLC (CenterPoint or Company) filed its application to increase system-wide transmission and distribution rates by approximately $161 million annually (Docket No. 49421). This is CenterPoint's first full rate case in a decade.

The case went to hearing in June 2019, but before the PUC could finally decide the extent to which it would adopt the Administrative Law Judges' (ALJs) Proposal for Decision, the parties reached an agreement that resolved the issues on mutually satisfactory terms. The key principles of the parties' agreement are outlined below:

1. CenterPoint's total base revenue requirement would increase by $13 million instead of the $161 million increase originally requested by the Company;
2. CenterPoint's return on equity (ROE), which is a component of the return or "profit" that the utility is permitted to earn, would be 9.4% on its invested capital. This is compared to its original request of 10.4%. In its last case, CenterPoint obtained an approved ROE of 10%. Under the agreement, its capital structure for regulatory purposes would be 57.5% debt and 42.5% equity, a lower-cost capital structure than the 55% debt and 45% equity that its current rates are based upon;
3. The impact of the resulting increase on class revenues will vary by customer class, with residential customers receiving a 1.22% increase, and small and large secondary customers receiving a 7.8% decrease and 8.45% increase, respectively. Lighting will receive a decrease of approximately 21% to 26%, depending on lighting class;
4. CenterPoint agrees to not seek recovery of its own rate case expenses dating back to its last rate case, approximately a decade ago, and will pay cities' rate case expenses without recovering those amounts in rates. CenterPoint expects that this foregone recovery will be approximately $12 million; and
5. CenterPoint will not file a Distribution Cost Recovery Factor (DCRF) case in 2020. A DCRF case is a "mini" rate case, focused on distribution (poles and wires) investment that CenterPoint typically files each year in April.

The PUC approved the settlement at its February 14, 2020 Open Meeting, but directed its Docket Management division to make changes to the order to prevent the settlement from binding future Commissions on certain issues. On March 9, 2020, the PUC issued a written order consistent with the Commissioners' direction. New rates will go into effect on April 23, 2020.

AEP Rate Case Approved by PUC at Open Meeting, Written Order to Follow. As we have previously reported, on May 1, 2019 AEP Texas Inc. (AEP) filed its application to increase rates by $35.14 million per year (Docket No. 49494). The case went to hearing in July 2019, but before the PUC could decide whether to adopt the Administrative Law Judges' (ALJs) Proposal for Decision (PFD), the parties reached an agreement that resolved the issues on mutually satisfactory terms. The key aspects of the parties' agreement are:

1. The parties agreed that it is reasonable for AEP to consolidate the rates and tariffs of its Central and North Divisions;
2. AEP's total base revenue requirement would decrease by $40 million instead of the $35.14 million increase originally requested by the Company;
3. AEP's return on equity (ROE), which is a component of the return or "profit" that the utility is permitted to earn, would be 9.4% on its invested capital. This is compared to its original request of 10.5%. Under the agreement, its capital structure for regulatory purposes would be 57.5% debt and 42.5% equity, a lower-cost capital structure than the 55% debt and 45% equity that the ALJs' PFD recommended;
4. The impact on class revenues of the resulting change will vary by customer class and whether the customer is located in the Central or North Division. For prior Central Division customers, residential customers receive an increase of approximately 3.6%; secondary customers receive an approximately 26.3% decrease; and lighting will receive a decrease of approximately 11.2%. Compared to the prior North Division customers, residential customers receive an approximate 33.8% decrease; secondary customers receive an approximate 65.0% decrease; and lighting will receive a decrease of approximately 13.3%;
5. To address the effects of the Tax Cuts and Jobs Act of 2017 (TCJA), AEP agreed to refund $108 million through a separate rider deemed the Income Tax Refund (ITR) Rider. AEP will refund $76.5 million to distribution customers through its proposed ITR Rider over a one-year period, implemented separately for each division. AEP will refund $31.5 million to transmission customers as a one-time credit through the Company's interim transmission cost of service (TCOS) proceedings; and
6. AEP agreed to not seek recovery of its own rate case expenses and will pay cities' rate case expenses without recovering those amounts in rates. AEP expects that this foregone recovery will be approximately $10 to $11 million.

The PUC approved the settlement at its February 27, 2020 Open Meeting, and issued its order in the case on April 6, 2020.

Parties Comment on PUC Rulemaking, Establishing the Cybersecurity Monitor. The PUC is currently considering public comments on its Proposal for Publication of new PUC rule 16 Texas Administrative Code (TAC) § 25.367, in Project No. 49819. This proposed rule implements two newly enacted laws (SB 64 and SB 936) that establish an independent third-party "cybersecurity monitor" (CSM) and related programs, in order to establish best practices for combatting cybersecurity threats against the electricity industry.

Interested parties submitted initial comments in Project No. 49819 on January 27, 2020, and reply comments on February 10, 2020. Many entities that will be subject to the legislation and new rule submitted comments with similar concerns, mainly regarding the proposed requirements on entities that will be monitored by the CSM (Monitored Utilities), enforcement of such requirements, the functions of the CSM, and the confidentiality of information provided by Monitored Utilities. Further, the Monitored Utilities emphasize that it is clear that the legislature intended participation in CSM to be entirely voluntary in nature. Along with Electric Reliability Council of Texas (ERCOT) utilities, municipally-owned utilities are required to participate in the CSM programs, while utilities that are outside of ERCOT may opt in or out of the programs.

Ironically, on January 28, 2020, during the comment period for the Proposal for Publication, the PUC's website was hacked. The PUC's home page was briefly obscured by a single banner reading "Hacked by Anonymous Iranian." PUC officials said that no indication exists that the attack was actually perpetrated by Iran, and that no sensitive information was exposed. However, this event highlights the cyber threat faced by the power sector and its regulators.

We will provide updates as this rulemaking progresses.

Lubbock CCN Transmission Line Approved. On September 1, 2017, the City of Lubbock, acting through its municipally-owned utility Lubbock Power & Light (LP&L), filed an application with the PUC seeking authority to transfer a portion of its electrical system from SPS to ERCOT (Docket No. 47576). The PUC ultimately approved this application and issued an order to this effect on March 15, 2018, whereby it found that the transmission buildout endorsed by ERCOT was a reasonable plan for integrating the affected load into ERCOT. The PUC further found that June 1, 2021 was a reasonable integration date. LP&L and Sharyland Utilities were designated as the entities that would own and operate the lines. Later, Oncor acquired Sharyland's transmission assets, and took its place as a "Joint Applicant" in the follow-up proceedings for Certificates of Convenience and Necessity (CCNs) necessitated by the Commission-approved transmission integration plan.

The approved transmission plan included the integration of the affected load through the construction of four separate transmission projects. For each project, Sharyland (and subsquently, Oncor) and LP&L would work together to file the applications and obtain the necessary approvals from the PUC. In time, these applications were filed and processed in Docket Nos. 48625, 48668, 48909, and 49151. The PUC has previously issued orders in 48625, 48668, and 48909, approving the projects and authorizing the construction of these lines.

At its Open Meeting on February 27, 2020, the PUC considered the Proposal for Decision (PFD) in Docket No. 49151, and weighed the approval of the last line in the process contemplated by the approved transmission plan. After discussion, the PUC approved the PFD, subject to a few modifications, and has thereby approved the final portion of the transmission projects found necessary to integrate LP&L's load into ERCOT.

WETT Files for New Ownership at PUC. On February 24, 2020, Wind Energy Transmission Texas, LLC (WETT), AxInfra US LP (AxInfra), Hotspur HoldCo 1 LLC (Hotspur 1), Hotspur HoldCo 2 LLC (Hotspur 2), and 730 Hotspur, LLC (730 Hotspur) (together, Joint Applicants) filed an application with the PUC (Docket No. 50584) for approval of a sales transaction that would result in the transfer of ownership and control of WETT to AxInfra, an investment fund managed by Axium Infrastructure US, Inc. (Axium US). The Steering Committee of Cities Served by Oncor (OCSC) has intervened in the proceeding, as it will impact service in OCSC's member cities.

WETT is a Texas-based transmission service provider (TSP) that operates exclusively in the Electric Reliability Council of Texas (ERCOT). The PUC designated WETT as a Competitive Renewable Energy Zone (CREZ) TSP in 2009 and granted it a certificate of convenience and necessity (CCN) in 2010. Headquartered in Austin with a field office in Big Spring, WETT owns and operates transmission facilities across approximately 20,000 square miles of predominately rural areas of West Texas. Specifically, WETT owns and operates six switching stations, and 500 circuit miles of transmission lines carried over 375 miles of right-of-way in 11 counties. In addition to the CREZ facilities WETT has operated for years, WETT has also accommodated interconnections to wind and solar generators nears its facilities.

AxInfra is an investment fund whose holdings consist exclusively of infrastructure assets located in the United States. AxInfra is managed by Axium US, an independent fund manager dedicated exclusively to "high-quality" infrastructure. Axium US and its affiliates manage a diversified asset portfolio valued at about $4.3 billion as of December 2019.

Under the application, AxInfra will ultimately control WETT. 730 Hotspur will acquire a non-controlling minority interest in Hotspur SPC, an Axium subsidiary that will have an upstream, indirect ownership interest in WETT.

PUC staff has filed recommendations that WETT's notice is reasonable and its application is sufficient for further review.

On March 20, the PUC's Office of Policy and Docket Management filed a draft preliminary order, recommending a list of issues to be addressed in the matter. The PUC approved the list of issues at its March 26 Open Meeting, and issued an Order reflecting its approval.

Pursuant to the parties' proposed procedural schedule, filed on March 25, 2020, the Hearing on the Merits will take place on June 25-26, 2020.

We will provide updates as this case progresses.

New Numbering Plan for the Metroplex. On October 11, 2018, the North American Numbering Plan Administrator (NANPA) filed a petition with the PUC for approval of an overlay area code for the Dallas Metroplex area. The PUC issued a final order on February 27, 2020, in Project No. 48765 approving the new overlay code 945. The current area codes—214, 469, and 972—apply within the counties of Collin, Dallas, Denton, Fannin, Hunt, Johnson, Kaufman, and Tarrant (the numbering plan area, or NPA). The central office codes (CO or NXX) are expected to be exhausted by the third quarter of 2021. The new all-services distributed overlay will cover the same geographic area and is projected to last 13 years. When the 214, 469, and 972 numbers are exhausted, the new overlay code of 945 will be assigned to new numbers. Current customers will retain their existing area code, and will continue to dial 10 digits for a local call.

Despite Senator Rodriguez's Request, El Paso City Council Approves Transfer of El Paso Electric Company to Sun Jupiter. At its Open Meeting on January 16, 2020, the PUC issued an order adopting the parties' stipulation and settlement agreement regarding IIF US Holding 2 LP (IIF) and Sun Jupiter Holdings LLC's (Sun Jupiter) purchase of El Paso Electric Company (EPE). However, on February 3, 2020, Texas Senator José Rodriguez sent a letter to the Mayor and City Council Members of El Paso, requesting that they postpone their approval of the sale until federal regulators have completed their proceedings and the question of ownership of EPE has been answered.

Senator Rodriguez's letter emphasizes the importance of the decision to sell the monopoly utility and warns that the lack of transparency regarding exactly who is buying and controlling EPE is problematic. Senator Rodriguez describes Public Citizen's research into JP Morgan's degree of ownership and control of IIF, and the issues that JP Morgan's ownership could bring. In sum, Senator Rodriguez explains that federal regulators are examining the same questions regarding the relationship between IIF and JP Morgan, and therefore, that the City should delay action on the transfer of EPE until the federal proceedings are completed.

Notwithstanding Senator Rodriguez's request, on February 4, 2020, the El Paso City Council voted 4 to 2 in favor of approving the agreement. EPE is hoping to close the deal by early summer 2020, but still needs final federal and state approvals.

Annual Revisions to Access Line Fees. Since 2001, the PUC has used Project No. 24640 as the docket under which it annually adjusts access line fees, as required by Local Government Code Section 283.055(g). The statute permits cities to increase the rates by an amount equal to one-half the annual change in the most recent consumer price index.

On March 27, 2020, the PUC approved the Order for the 2020 adjustment, resulting in a 0.7267% increase in access line rates. The Order also set the maximum rates that each city may charge per access line (listing every city and the 2019 and 2020 maximum rates per category in an attachment to the Order). The CPI used in the 2020 adjustment is the one for all urban consumers in the South, which is the same formula used in 2019.

Additionally, the Order permits cities to notify the PUC by April 30, 2020 of its preferred rates:

- A municipality whose 2019 city-preferred access line rates are below its 2019 CPI-adjusted maximum access line rates will remain at its 2019 city-preferred rates unless it notifies the Commission of its desired rates by April 30, 2020.
- For a municipality whose 2019 city-preferred access line rates equal its 2019 CPI-adjusted maximum access line rates, the 2020 city-preferred access line rates will be set at the 2020 CPI-adjusted maximum access line rates unless the municipality notifies the PUC of its desired rates by April 30, 2020.

The PUC will then issue an order setting new preferred access line rates incorporating any reductions or increases requested by cities. The adjustments are required to be implemented prospectively, no later than July 1, 2020.

Railroad Commission of Texas ("RCT")

CenterPoint Gas Rate Case Settlement. On November 14, 2019, in Gas Utility Docket (GUD) No. 10920, CenterPoint Energy Entex and CenterPoint Energy Texas Gas (CenterPoint) filed their Statement of Intent to change rates with the Railroad Commission of Texas (RCT), and with all municipalities exercising original jurisdiction within their Beaumont/East Texas Division service area. In its filing, CenterPoint seeks to increase system-wide distribution rates by $6.8 million per year (an increase of 9.4%).

After all intervening city groups and RCT Staff filed testimony, the parties reached an agreement that disposes of all issues in the case. While the Hearing on the Merits was cancelled, the parties admitted testimony as exhibits into the evidentiary record. The parties have finalized the settlement agreement and will soon file it with the Administrative Law Judge. Subsequently, the RCT will need to approve the settlement agreement at an Open Meeting. We will provide updates as this case is finalized.

TGS Rate Case Update. On December 20, 2019, in GUD No. 10928, Texas Gas Service Company (TGS or Company), a Division of ONE Gas, Inc. (ONE Gas), filed its Statement of Intent to change gas rates at the RCT, and in all municipalities exercising original jurisdiction within the City of Beaumont and the incorporated areas of the Central Texas Service Area (CTSA) and Gulf Coast Service Area (GCSA), effective February 6, 2020. The RCT suspended the effective date of the rate request for 150 days, until July 5, 2020.

In its filing, TGS is seeking to: (1) increase its gas rates on a system-wide basis by $17 million per year; (2) consolidate the CTSA, GCSA, and the City of Beaumont into a new service area called the Central-Gulf Service Area (CGSA); and (3) implement new CGSA tariffs and withdraw the CTSA and GCSA tariffs for incorporated and environs areas.

Parties conducted a technical conference on February 18, 2020. Otherwise, the parties are conducting discovery and attempting to negotiate the settlement of the case. Intervenor testimony was filed on March 24, 2020, and RCT Staff filed testimony on March 31, 2020.

COVID-19-Related Summaries

EPA Authorizes Telecommuting and Voluntary Unscheduled Leave Due to COVID-19. On March 16, 2020, EPA Administrator Andrew Wheeler extended full-time telework options and voluntary scheduled leave to EPA employees across the nation. The decision came after a March 15, 2020 memo from the Office of Management and Budget ("OMB") that directed all federal agencies to offer "maximum telework flexibilities" in light of the evolving coronavirus situation across the nation.[1] Wheeler's directive is effective through April 3, though the memo states that "the timing will be assessed continually."[2] Wheeler released a video in which he stated: "My expectation is that most everyone on the EPA team across the country is working at home, unless there is a compelling mission critical reason for you to be in the office."[3]

Though telework is encouraged, EPA's offices remain open across the country. The agency also stated that there have not been any changes in enforcement or inspections. Going forward, it is unclear how, or if, social distancing measures will affect field enforcement like in-person inspections of industrial facilities.[4] Eric Shaeffer, the former director of EPA's Office of Civil Enforcement, stated that national self-quarantine "would obviously start to cramp inspections as everyone is being advised to avoid social contact." Though much of enforcement work happens remotely, COVID-19 may start to affect environmental enforcement as companies cut down on business hours and inspectors reduce field visits.[5]

[1]Stephen Lee, Coronavirus Spurs EPA to Roll Out Nationwide Telecommuting, BLOOMBERG ENVIRONMENT (Mar. 16, 2020), https://news.bloombergenvironment.com/environment-reporter/coronavirus-spurs-epa-to-roll-out-nationwide-telecommuting

[2]Corbin Hiar, White House Calls for 'Maximum Telework' in D.C. Region, E&E NEWS (Mar. 16, 2020), https://www-eenews-net.eu1.proxy.openathens.net/greenwire/stories/1062620765/search?keyword=EPA

[3]Corbin Hiar, Wheeler Urges Telework as 2nd Staffer Tests Positive, E&E NEWS (Mar. 20, 2020), https://www-eenews-net.eu1.proxy.openathens.net/greenwire/stories/1062655813/search?keyword=telework.

[4]EPA Grudgingly Embraces Telecommuting Amid Pandemic, BLOOMBERG LAW PARTS PER BILLION PODCAST (Mar 18, 2020), https://news.bloombergenvironment.com/environment-and-energy/epa-grudgingly-embraces-telecommuting-amid-pandemic-podcast

[5]Stephen Lee & Amena Saiyid, Virus Could Bite into Environmental Enforcement: Ex-Officials (1), BLOOMBERG ENVIRONMENT (Mar. 19, 2020), https://news.bloombergenvironment.com/environment-and-energy/virus-could-bite-into-environmental-enforcement-ex-officials-say.

In Response to COVID-19, TCEQ Closes its Offices to the Public, Authorizes Full-time Teleworking for its Staff, and Relaxes Certain Reporting Requirements. On March 23, 2020, TCEQ closed all buildings—both in Austin and in the regional offices—to the general public. TCEQ staff are still operating the buildings on a skeleton-crew basis, but most TCEQ employees will telework through April 3.

TCEQ also announced its intention to exercise "administrative relief and enforcement discretion" for various reporting requirements. Regulated entities are advised to check the TCEQ webpage for updates, but as of March 23, two program changes are listed: First, point source emissions inventory reports that were originally due March 31, 2020 may now be submitted up to April 30, 2020. Second, reporting deadlines for the Mass Emissions Cap and Trade (MECT) program and the Highly Reactive Volatile Organic Compounds Emissions Cap and Trade (HECT) programs have similarly been pushed back from March 31 to April 30. For both programs, TCEQ also notes that it "will consider additional enforcement discretions regarding this deadline as conditions warrant."

TCEQ also posted a notice that responses to requests for public information may be delayed "until the agency resumes normal operations." For more information on TCEQ's responses to COVID-19, visit: https://www.tceq.texas.gov/response/covid-19.

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