Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 25, NO. 4 OCTOBER 2020

THE LONE STAR CURRENT

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

UPDATED COVID-19 HOT TOPICS FOR EMPLOYERS

by Sheila Gladstone, Sarah Glaser, and Emily Linn

Perhaps the most significant event this year (in a year full of significant events) is the novel coronavirus (COVID-19) pandemic. With the rapid spread of the virus in the United States, the World Health Organization's declaration that COVID-19 constitutes a global pandemic, and the continually updating state and local emergency orders, Texas employers have had to grapple with questions of how to safely continue their operations during COVID-19. As employment counsel, we have advised our public and private employer clients through disasters including hurricanes, floods, wildfires, and financial crises. Yet nothing has required us to interpret entirely new laws quite so urgently, nor required us to confirm we are still up-to-date on the new laws and regulations on a nearly daily basis, as this pandemic has.

Throughout 2020, we have been assisting clients in preparing for and operating during COVID-19, initially assisting with pandemic action plans, advising on how to move offices to remote work, and monitoring the interplay of questions about medical conditions within the bounds set by the Americans with Disabilities Act and the Families First Coronavirus Response Act. When COVID-19 cases increased rapidly in Texas over the summer, we helped our clients work with employees in quarantine and isolation, as well as navigate the exhaustion of leave under FFCRA, and consider how to ensure their offices were as safe as possible for employees returning to work. Now, as Texas schools return to in-person learning and the end of the year approaches, we find ourselves advising clients on a new set of challenges yet again. This article outlines some of the most common and timely COVID-19 employment law topics.

Families First Coronavirus Response Act (FFCRA)

There have been several updates from the Department of Labor related to the FFCRA. By way of reminder, the FFCRA was signed into law on March 18, 2020 in response to the rapidly spreading COVID-19 virus and is set to expire on December 31, 2020, unless it is renewed by Congress. The FFCRA provides up to 80 hours of paid sick leave (total) for employees and expands the use of FMLA leave, allowing paid leave for employees who need time off work to care for a child whose school or regular childcare provider is closed or unavailable. Private employers with fewer than 500 employees and all public employers, regardless of size, are covered by the Act. Employment lawyers everywhere immediately took a crash course in the law and shortly thereafter, the Department of Labor issued Regulations interpreting the law and a Frequently Asked Questions page on its website.

Since April, the DOL has been continuously updating the FAQs to address new concerns, and the recent changes are particularly interesting.

Revised Regulations

In early August, the Southern District of New York issued a decision invalidating portions of the Department of Labor's ("DOL") rules implementing the FFCRA. When the decision was issued, employment lawyers wondered if the decision applied nationally, and whether the DOL would appeal, as the stricken provisions would significantly change the way the FFCRA is implemented. On September 11, the DOL specified that the decision should be considered binding nationally but issued revised Regulations in response that reaffirmed most of the provisions struck down by the court. The revised Regulations made several changes to the FFCRA and are listed below.

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

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

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

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

FIRM NEWS

Georgia Crump, Jamie Mauldin, and Patrick Dinnin will be presenting "Updates on Telecom and Water Utilities from the PUC, Courts and Home" at the Texas Coalition of Cities for Utility Issues ("TCCFUI") Fall 'Virtual' Seminar on October 23.

Thomas Brocato will be giving "An Update on Electric and Gas Utility Matters at the PUC and Railroad Commission" at the TCCFUI Fall 'Virtual' Seminar on October 23.

Nathan Vassar will be a panelist addressing "Developments in Clean Water Enforcement" at the NACWA's Clean Water 'Virtual' Seminar on November 19.

On September 16, the Firm launched our first ever podcast series "Listen In With Lloyd Gosselink – a Texas Law Firm." You can find the episodes on most major streaming platforms, such as Apple, Google, Amazon, Spotify, and lglawfirm.com, as well as at this link: https://www.lglawfirm.com/lg-podcast/

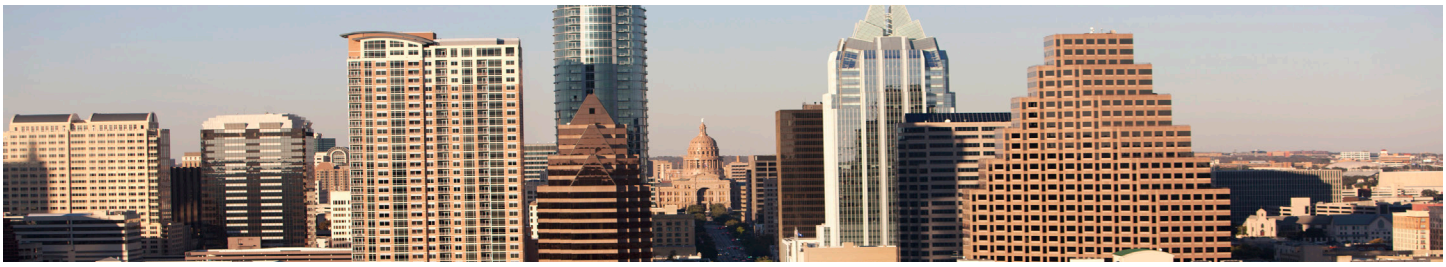
Every two weeks, we will be uploading a new episode featuring some of our attorneys who will provide updates and perspectives on issues of interest.

For more information, email editor@lglawfirm.com and follow us on Facebook, LinkedIn, and Twitter.

What's out now?

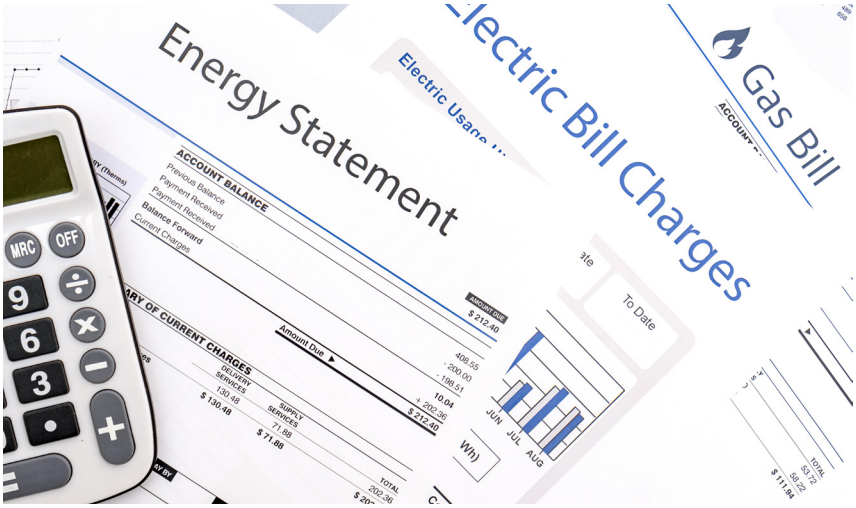
- Episode 1 – A Litigator's Perspective on COVID-19
- Episode 2 – Lead & Copper Rule

MUNICIPAL CORNER



Municipal electricity and natural gas bills must be released under the Texas Public Information Act notwithstanding any arguments that they contain "commercial or financial information" that could competitively harm the utility provider. Tex. Att'y Gen. OR2020-19766.

William Chesser, City Attorney for the City of Brownwood ("City"), sought an opinion by the Attorney General ("AG") to determine if the City's electricity and natural gas bills ("bills") are excepted from disclosure under the Texas Public Information Act ("PIA"). The AG determined that the City must release the bills for public disclosure, but that it could withhold its account number from the documents.



In requesting the opinion from the AG, the City took no position as to whether the bills fall under a PIA exception. Instead, the City notified its electricity and natural gas provider—Gexa Energy, L.P. ("Gexa")—that it had received a PIA request and that Gexa had a right to submit comments to the AG regarding disclosure of the documents. Gexa submitted comments arguing that the bills fall under Tex. Gov't Code § 552.110(c), which excepts "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm."

In evaluating Gexa's argument, the AG determined that the "commercial or financial information" exception is limited by Tex. Gov't Code § 522.0222, which provides certain required disclosures for public contracts. This section of the Government Code took effect on January 1, 2020 after the Texas Legislature passed a bill aiming to overturn the 2015 Texas Supreme Court decision in *Boeing v. Paxton*, which had previously held that private entities could petition the AG to except information that "if released, would give advantage to a competitor or bidder." 466 S.W.3d 831, 839 (Tex. 2015). The new law codified in section 522.0222—titled "Disclosure of Contracting Information"—narrows the available PIA exceptions related to contracts between public and private entities.

The AG found that the City's bills are "subject to section 522.0222(b)" and thus "may not be withheld on the basis of [the commercial or financial information exception]." The AG did not note which provision of 522.0222(b) applied, but instead determined that the City's bills were "subject to" the required disclosures in 522.0222(b), which include information related to any "contract for the purchase of goods or services from a private vendor" (522.0222(b)(1)) and any "major contract" (522.0222(b)(2)). The AG concluded that the City must release all information in its electrical and natural gas bills except for its account number with Gexa, which the AG determined was excepted under Tex. Gov't Code § 552.136, which protects a public entity's "credit card, debit card, charge card, or access device number" from disclosure.

While this Open Records Letter Ruling is "limited to the particular information at issue in the [City of Brownwood's] request," it serves as a signal to Texas municipalities that the previously broad exceptions for information affecting a private entity's "competitive advantage" is narrowing. The AG will likely continue its trend of denying requests to withhold information from public contracts containing relevant "commercial or financial information," and accordingly municipalities should be prepared to publicly disclose contracts with vendors, contractors, and other private entities.

Municipal Corner *is prepared by Chris Brewster. Chris is a Principal 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 Chris at 512.322.5831 or cbrewster@lglawfirm.com.*

COVID-19 continued from page 1

- Reaffirmed the DOL's previous position that employees may take FFCRA leave only if work would otherwise be available to them. If work is unavailable to the employee, then he or she is not eligible for leave under the FFCRA.
- Reaffirmed the DOL's previous position that an employer must approve the use of intermittent leave under the FFCRA. An employer has the discretion to grant intermittent leave, but is not required to do so under the FFCRA.
- Revised the definition of "healthcare provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. The DOL further clarified that the employee's role is what matters, not the type of service the employer provides (for example, a receptionist at an urgent care clinic is not a health care provider because he or she is not providing services directly, even though the clinic provides healthcare services).
- Clarified that employees must provide required documentation supporting their need for FFCRA leave to their employers "as soon as practicable" rather than before leave begins, although in many cases notice would be provided before leave begins.

The revised Regulations do not substantially change *most* employers' implementation of the FFCRA; however, those who have exempted employees from coverage under the healthcare provider exemption should revisit that decision in light of the new, narrower definition. Additionally, employers should take note that employees must provide documentation "as soon as practicable," which may not necessarily be before the leave begins.

Use of FFCRA Leave for Virtual Learning

As September and the return to school approached, one glaring piece of information was missing in the DOL's FAQs and Regulations—whether employees who opt in to virtual learning are eligible for FFCRA leave. FFCRA leave is available for employees unable to work due to a *bona fide* need for leave to care for a child whose school or child care provider is **closed or unavailable** for reasons related to COVID-19. Many wondered whether that extended to employees who kept their child home from school voluntarily due to a concern for the child or family's safety.

In late August, the DOL finally answered the question in new FAQs 98–100. When a school is "closed" to a child, such that he or she cannot attend in person, an employee is eligible to take paid leave under the FFCRA. If the school is temporarily closed, or operating on an alternate day (or other hybrid attendance) basis, FFCRA leave is available for those periods where an employee's child cannot attend in-person instruction. On the other hand, if the school is open and giving the parent a *choice* between in-person or virtual learning, FFCRA leave is not available because the school is not "closed" due to COVID-19.

Therefore, when an employee requests FFCRA leave to care for a school-age child when school is back in session, employers must determine whether the school is "closed" due to COVID-19 to determine whether the employee is eligible for FFCRA leave. The IRS has added that when the child is 14 or older, the parent must explain why leave is needed for virtual learning.

FFCRA, ADA, and FMLA

Another important topic is the intersection between the FFCRA, the Americans with Disabilities Act (the ADA), and the Family and Medical Leave Act (FMLA). The ADA requires employers to provide reasonable accommodations to qualified employees with disabilities. Employees who are high risk based on guidance from the CDC may provide a note from their doctor requesting to work from home. Alternatively, employees may provide documentation that they have a medical condition that prevents them from wearing a facial covering. In either event, employers should engage in the usual ADA interactive process with the employee to determine whether they can provide a reasonable accommodation, and whether another reasonable accommodation will do. It may not be possible to accommodate an employee who is unable to wear a facial covering if doing so would threaten the safety of other employees or customers. In these instances, the employers should then consider whether working from home is an alternative. If work from home is not an option, employers may consider other accommodations such as allowing the employee to take more frequent breaks in areas where the employee may be able to safely take off their mask.

The ADA also regulates the medical inquiries employers can make of their employees, and requires employers to keep employees' medical information confidential. A pandemic raises particular concerns under the ADA because the disaster intrinsically involves a medical condition. Some of the ADA's parameters regarding medical inquiries have been relaxed to protect public health. For example, the EEOC has said that during the current COVID-19 pandemic, employers may take an employee's temperature or ask about their symptoms in order to protect the workplace as a whole. On the other hand, the EEOC advises that the ADA's confidentiality requirements remain – employers may not disclose to coworkers the name of employees who have contracted COVID-19, even during contact tracing. Instead, others who had close contact (less than 6 feet for more than 15 minutes) with the affected employee should be told only that they came into such close contact with "a coworker" and that they should be tested.

The FMLA provides eligible employees with 12 weeks of job-protected leave for their own or a family member's serious health condition. Often, employees eligible for 80 hours paid sick leave under the FFCRA are also eligible for regular, unpaid FMLA leave, which should run concurrently with the paid sick leave. Additionally, the FMLA and ADA interact occasionally. An employee who exhausts FMLA leave may be entitled

to additional unpaid leave as a reasonable accommodation under the ADA, when it is for a definite period of time.

Returning to Work After Quarantine or Isolation

Quarantine keeps someone who might have been exposed to the virus away from others. Isolation keeps someone who is *infected* with the virus away from others, even in their home. The CDC's guidance on quarantine can be found here, and its guidance on isolation can be found here. Employers with employees who are either quarantining or isolating and wish to return the employee to work should check the CDC's website for the most up-to-date information. The CDC has changed position more than once on the parameters for employees returning to work. The time period for returning to work may depend on the employee's decision whether to get tested or to wait out the recommended time; when testing is available and recommended, two negative tests in a row at least 24 hours apart can shorten the isolation period. Because of such frequent guidance changes, employers should keep up to date on the latest guidance as necessary; we are happy to assist with providing current answers.

This article was prepared by the Firm's Employment Law Practice Group: Sheila Gladstone, Sarah Glaser, and Emily Linn. If you would like more information, 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.

TCEQ'S NEW RECYCLING RULES NOW IN EFFECT

by Sam Ballard

The Texas Commission on Environmental Quality's ("TCEQ") new Governmental Entity Recycling Rule Package went into effect on July 2, 2020.

The new rules require non-exempt governmental entities to do the following:

- Establish a program for the separation and collection of all recyclable materials generated by the entity's operations;
- Provide procedures for collecting and storing recyclable materials, containers for recyclable materials, and procedures for making contractual or other arrangements with buyers of recyclable materials;
- Evaluate the amount of recyclable material recycled and modify the recycling program as necessary to ensure that all recyclable materials are effectively and practicably recycled; and
- Establish educational and incentive programs to encourage maximum employee participation.

These requirements have been codified in Chapter 361 of the Texas Health & Safety Code since 1991. The TCEQ recently issued these new rules to administer the statutory requirements, following the passage of SB 1376 last legislative session. SB 1376 amended Texas Health & Safety Code §§ 361.425 and 361.426, adding exemptions from the statutory requirements. The requirements apply to "governmental entities," which are broadly defined as a "state agency, state court or judicial agency, a university system or institution of higher education, a county, municipality, school district, or special district." Likewise, "recyclable material" is broadly defined as "[a] material generated by the entity's operations, including aluminum, steel containers, aseptic packaging and polycoated paperboard cartons, high-grade office paper, and corrugated cardboard." However, there are three types of potential exemptions under the rules:

1. 30 Texas Administrative Code § 328.203(a) - This is an exemption to the entire subchapter, but is only available to certain small school districts and municipalities.
2. 30 Texas Administrative Code § 328.203(b) - This is an exemption allowing the governmental entity to exclude one or more recyclable materials (as defined above) from its program if recycling for that material is not available through the entity's solid waste provider, or recycling that material would create a hardship.
3. 30 Texas Administrative Code § 328.203(c) - This is an exemption from the entire subchapter based on hardship.

TCEQ has indicated that governmental entities may make a self-determination of whether an exemption applies, and must document the basis for that determination in the event of an investigation. What creates a hardship is loosely defined, and will be considered by the TCEQ on a case-by-case basis.

More specifically, if a governmental entity wants an exemption under 30 Texas Administrative Code § 328.203(b) (to exclude one or more recyclable materials from the entity's recycling program), then the burden will fall on the governmental entity in an enforcement context to show that it qualifies for the exemption. For example, if the entity decides to exclude some type of material from its recycling program, then the entity would need to document the reasons why the exemption applies and keep a record of this self-determination. The TCEQ has not provided any separate guidance on what would constitute adequate documentation of this self-determination.

In addition, the catch-all hardship exemption found under 30 Texas Administrative Code § 328.203(c) provides that an entity can request "additional consideration from the commission if compliance with this subchapter would create a hardship." Because this would allow for an exemption such that entities would not be required to establish a recycling program at all, the

TCEQ may not be as inclined to grant such a broad and permanent exemption, especially given that an entity's hardship may change over time in response to market conditions and other factors.

The TCEQ published a Recycling Rules webpage in September 2020, indicating that if a hardship exists that causes a governmental entity to exempt all recyclable materials, then that entity can contact the TCEQ. In addition, the webpage identifies factors for governmental entities to consider in establishing a recycling program (i.e., conducting a waste audit and creating a written plan) and deciding on purchasing preferences (i.e., encouraging staff to buy recycled products and referring to the Texas Smart Buy Membership). The public can access the webpage at https://www.tceq.texas.gov/p2/recycle/governmental-entity-recycling-program.

The rules do not establish a separate enforcement program, so enforcement would likely fall under the agency's existing default penalty policy.

If you have any specific questions on how these rules apply to your organization, or how to best comply with the rules, you should consult with your consultant or legal counsel. Please be on the lookout for further developments and visit https://www.lglawfirm.com/news/ for more information.

Sam Ballard is an Associate in the Firm's Air and Waste Practice Group. Please feel free to reach out to Sam with questions about TCEQ's new recycling rules or other regulatory matters at 512.322.5825 or sballard@lglawfirm.com.

THE U.S. COURT OF APPEALS - FIFTH CIRCUIT'S SEA CHANGE OPINION REGARDING THE SCOPE OF FEDERAL PROTECTION OF CCNS FROM DECERTIFICATION UNDER 7 U.S.C. § 1926(B)

by David J. Klein and Danielle N. Lam

For many years, we have been reporting and updating our readers on the ever-changing landscape of the regulation of water and sewer certificates of convenience and necessity ("CCN") in Texas. Typically, these updates arise from events at the Texas Legislature, the Public Utility Commission, Texas state courts, and for a period of time, the Texas Commission on Environmental Quality. However, on August 7, 2020, the triggering event came from the United States Court of Appeals-Fifth Circuit, with its *en banc* Opinion in the case of *Green Valley Special Utility District v. City of Schertz, et al.*, 969 F.3d 460 (5th Cir. 2020). In this case, the Fifth Circuit overturned its precedent set in 1996 in *North Alamo Water Supply Corporation v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996)(*per curium*) regarding the scope of protection afforded to federal debtors under 7 U.S.C. § 1926(b) when another party has tried to decertify some or all of its water or sewer CCN boundary. Said another way, this new precedent addressed the criteria for when a third party could decertify some or all of a water or sewer CCN possessed by an entity that has obtained a loan from the United States Department of Agriculture – Rural Utilities Division ("USDA-RUD").

The Texas Legislature has established laws in Chapter 13 of the Texas Water Code to regulate CCNs, and the PUC has adopted regulations implementing such laws. CCNs are permits granted by the Public Utility Commission ("PUC") that provide their holders with the exclusive right and obligation to provide continuous and adequate retail water and/or sewer service within a specific geographic area. That being said, a CCN is not a vested right and is subject to being decertificated in accordance with applicable Texas laws and regulations. Generally speaking, retail water or sewer service is provided when a service provider is furnishing water or sewer service to the end-user customer for compensation. See Texas Water Code § 13.002(20)(defining retail water or sewer service).

Typically, a service provider files an application at the PUC to obtain a new CCN, transfer an existing CCN to/from another entity, or either expand or reduce its existing CCN. Additionally, a landowner or other retail public utility can file an application at the PUC to decertify another entity's CCN, in part or in whole.

Many retail water and sewer service providers obtain loans to pay for the costs to construct new facilities or replace aging infrastructure to meet the needs of their present and future customers. Such loans can come from many private or public sources. One of those public lenders is the USDA-RUD; loans that originate from the USDA-RUD are subject to the provisions of 7 U.S.C. § 1926(b), which provides in part that "*the service provided or made available* through any such association shall not be curtailed or limited by inclusion of the area served by such association . . . ."

There has been an abundance of litigation for decades, throughout the United States, on determining when service is "provided or made available" under 7 U.S.C. § 1926(b). This law and analysis is usually pertinent when a third party files an application to decertify a CCN holder that has federal debt. Prior to this *Green Valley* case, the Fifth Circuit held in *North Alamo* that the possession of a CCN gives a utility the exclusive right to serve the area within its CCN boundary and an obligation to serve every consumer within that area and render continuous and adequate service; this state law duty to provide service was seen as the legal equivalent

of "making service available" under § 1926(b).

In *Green Valley*, the City of Schertz filed an application under Texas Water Code § 13.255 at the PUC to decertify approximately 405 acres of Green Valley Special Utility District's ("GVSUD") sewer CCN area that overlapped with the corporate limits of the City. In addition to the litigation arising at the PUC regarding the CCN decertification application, GVSUD also filed a complaint in federal district court in part to challenge the ability of the PUC to decertify its sewer CCN, in light of 7 U.S.C. § 1926(b), since GVSUD had an existing loan with the USDA-RUS for water system improvements. Schertz filed a Motion to Dismiss GVSUD's complaint, and the district court denied that Motion, based in part on the then current Fifth Circuit precedent from the North Alamo case.

Schertz appealed that decision to the U.S. Court of Appeals - Fifth Circuit, and it requested an *en banc* hearing – a request that is rarely granted. In particular, Fifth Circuit Rule 35.1, entitled "Caution, " provides that, "…*en banc* hearing or rehearing is not favored." In any event, the *en banc* hearing request was granted– meaning, that the case would be heard by all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the *en banc* consideration, as opposed to the usual three-judge panel.

Ultimately, the Fifth Circuit's Opinion in this case overruled the decades-old precedent in *North Alamo* and established a new test for determining whether service has been "provided or made available" for purposes of § 1926(b) protection from CCN decertification. Looking at the ordinary meaning of the words, the court concluded that "inherent in the concept of providing service or making service available is the *capability* of providing service, or, at a minimum, of providing service *within a reasonable time*." Therefore, it created a new test requiring a CCN holder and § 1926(b) claimant to show it has: (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made; and (2) the legal right to provide service. The court noted that what makes a facility "adequate" or a time lag "reasonable" will be fact specific. The court did not clarify "*exactly* what facilities are necessary or precisely *how nearby* they must be located," simply holding that "the utility must have *something* in place to merit § 1926(b) protection." With that holding, the Fifth Circuit remanded this case back to the district court to determine whether GVSUD has satisfied this physical capability test.

Thus, this decision has created a new standard for evaluating the scope of protection under 7 U.S.C. § 1926(b), and the scope of protection is certainly more limited than the protection afforded under the prior precedent in the *North Alamo* case. We will continue to monitor this case and others in the state to ascertain how this new precedent will be applied.

David Klein is a Principal and Danielle Lam is a to-be-licensed Associate in the Firm's Water and Districts Practice Groups. If you would like additional information on CCNs or have questions related to this article, please contact David at 512.322.5818 or dklein@lglawfirm.com, or Danielle at 512.322.5810 or dlam@lglawfirm.com.

ASK SHEILA

Dear Sheila,

With so many employees working from home this year, our Director is questioning our non-exempt employees' overtime claims, or even if they are working a full day. He suspects other employees of working on nights and weekends but not writing down their overtime hours. He wants to track their hours more precisely, and not pay for any hours not actually worked or not authorized, and does not want a big overtime bill in the future. Any suggestions?

Thanks,
What are They Doing all Day?

Dear What are They Doing,

This is an issue we have been dealing with even before COVID-19, but it has really come under the microscope lately. The U.S. Department of Labor recently issued Guidelines on employers' obligations to track and pay hours accurately when the non-exempt employee is not working in the office. This guidance does not change what the law has always been, but provides more focus on the issue. The Guidelines are not just for telework related to COVID-19, but apply anytime the employee is not checking in and out of the office, including working at home, field work after hours, etc.

Bottom line, employees must be paid their hourly rate and overtime whenever they are performing work for the employer, whether or not it was authorized. The proper remedy for dealing with unauthorized work and overtime is through the disciplinary process and not through withholding pay. Employers should have a clear and widely-known policy that no unauthorized overtime may be performed, in order to take disciplinary action.

Employers must perform "reasonable diligence" to make sure they are tracking hours accurately, even when such hours are unscheduled or unauthorized. The DOL suggests having a system for tracking hours worked, such as establishing a mandatory reporting procedure for non-scheduled time. Employers are also expected to look at electronic time stamps of when work is done and when communications come in, especially when more or faster work than expected is being performed. If the employer "should have known" that more work was being done than the employee reported, the employer must pay for that work, even at overtime rates. There can be no "off the clock" work done, even when teleworking, and both policies and supervisors must emphasize that. A few years ago the DOL assessed millions in

overtime liability against a Texas state agency, when non-exempt child services workers often spent time outside their work schedule to help children, but were told there was no overtime in the budget. The employees cared more about the children than their overtime, so they did this work off-the-clock voluntarily. The DOL used log-in times, communication date-stamps, and calendar appointments to prove up the overtime, and to show the employer should have known about it. Remember, employees cannot "waive" their right to overtime.

Conversely, employers do not have to pay for work that it had no reason to know was being performed. To withhold pay, the employer has the burden to prove it made every effort to maintain compliance with its reporting rules to show it could not have known the work was not done. Besides having a reporting system, employers may look at time logged off the system, lack of electronic communications or responses during the time period, not answering the phone, and the employee's failure to report the time using reasonable procedures. If you suspect an employee is not working during scheduled hours, you can call or send short-notice meeting invites to test if they are at their desk (while accounting for normal break and meal times). You may also work with employees who have remote school childcare obligations to allow a more flexible schedule, and authorize a longer work day, but with more breaks throughout.

Not paying for work that an employee claims was done is very risky for employers, and it is usually a better practice to focus on performance management and discipline for lack of efficiency, failure to respond to calls and emails, failure to get a certain amount of work done in a day or week, and failure to show up at video-conferences, for example. You may also discipline for working unauthorized overtime if you have a strong policy in place prohibiting unauthorized overtime. Finally, you should have a time tracking system that allows employees to easily clock in and out of work, rather than simply providing a total number of hours worked each day, as a more accurate system will hold more credibility with the DOL in an audit.

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

IN THE COURTS

Water Cases

Hyde v. Harrison County, No. 14-18-00628-CV, 2020 WL 4360350 (Tex. App.—Houston [14th Dist.] July 30, 2020, no pet. h.).

Following a Texas Commission on Environmental Quality ("TCEQ") investigation that determined that Harrison County had failed to provide release detection for certain underground fuel storage tanks, TCEQ initiated an enforcement action seeking an administrative penalty of $5,626. Harrison County challenged this penalty in state district court, arguing that it was shielded by governmental immunity. In a case of first impression, the Fourteenth Court of Appeals held that the Texas Legislature waived governmental immunity for administrative penalties under the Texas Water Code.

According to Texas Supreme Court precedent, courts may find that immunity has been waived when (1) a statute defines "person" to include governmental entities, (2) a statute imposes liability on a "person," and (3) construing the statute not to waive immunity would make part of the statutory scheme meaningless. Harrison County's argument involved Texas Water Code § 7.051, which authorizes the TCEQ to assess administrative penalties against any "person" who violates the Water Code or the Health and Safety Code. The Fourteenth Court of Appeals looked to the Texas Government Code's definition of "person," which includes any "government or governmental subdivision or agency." To satisfy the last prong of this test, the Fourteenth Court of Appeals pointed to Texas Water Code § 7.067, which provides specific standards for supplemental environmental projects when a "local government" faces an administrative penalty. Noting that governmental immunity would render this provision meaningless, the court held that the Legislature has waived governmental immunity for administrative penalties under the Texas Water Code, and thus Harrison County could be held liable for TCEQ's administrative penalty.

Green Valley Special Util. Dist. v. City of Schertz, Tex., 969 F.3d 460 (5th Cir. 2020).

In 2003, the Green Valley Special Utility District ("Green Valley") obtained a $584,000 federal loan from the U.S. Department of

Agriculture to fund its water service. In 2016, the Texas Public Utility Commission ("PUC") issued two orders that decertified territory from Green Valley's state-issued Certificate of Convenience and Necessity ("CCN"). Green Valley challenged the PUC's orders in federal district court, arguing that because it had already "provided or made available" sewer service, federal law prevented encroachment on its service area.

Under 7 U.S.C. § 1926(b), recipients of federal loans are protected from encroachment if they have "provided or made available" water or sewer service in the service area at issue. Green Valley argued that the PUC unlawfully allowed encroachment by approving two petitions to decertify portions of its CCN: (1) a 160-acre tract owned by the Guadalupe Valley Development Corporation ("GVDC") and (2) a 405-acre tract within the City of Schertz's corporate limits. Green Valley ultimately settled with GVDC, leaving the Fifth Circuit to consider only the decertification issue involving the City of Schertz.

In decertifying the City's tract, the PUC found that Green Valley: (1) "provide[d] no retail sewer service," (2) had no contractual obligations to do so, (3) had not received any requests for such service, (4) had made no physical improvements, and (5) was not (at the time of decertification) capable of providing sewer service to anyone in the decertified area. Green Valley argued that its service area was nonetheless protected from encroachment because previous Fifth Circuit precedent had held that a utility with a "state law duty to provide service" has "ma[de] service available" under the federal statute.

The Fifth Circuit did not decide whether Green Valley had "provided or made available" sewer service, but instead articulated a new test for what protects a utility from encroachment under 7 U.S.C. § 1926(b). The court determined that a "physical capability" test better satisfied the "provided or made available" standard in the federal statute: under this test, a utility can be protected by 7 U.S.C. § 1926(b) only if it shows that it has: (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made, and (2) the legal right to provide service. The court noted that a utility cannot satisfy the test if "it has no nearby infrastructure," but that the "pipes in the ground" idea is "not a strict requirement."

The Fifth Circuit remanded the case to district court to determine if Green Valley had satisfied the "physical capability" test with regard to the City of Schertz tract.

Quadvest, L.P. v. San Jacinto River Auth., No. 4:19-CV-4508, 2020 WL 5034155 (S.D. Tex. Aug. 14, 2020).

The federal district court for the Southern District of Texas recently denied a motion to dismiss a lawsuit brought by the San Jacinto River Authority ("SJRA") in a case where several private utility companies alleged violations of federal antitrust law. Plaintiffs claim that SJRA's groundwater reduction plan creates a monopoly and artificially inflates the price of wholesale raw water. SJRA's groundwater reduction plan involves contracts with large-volume groundwater users that impose withdrawal fees in exchange for SJRA's financing of a surface water treatment plant on Lake Conroe.

After disposing of SJRA's arguments that the claim was barred by the statute of limitations and the *laches* doctrine, the court addressed SJRA's contention that it is protected by state action immunity. The court held that SJRA was not shielded by immunity because its enabling statute does not authorize it to "displace or regulate competition in the wholesale raw water market." The court also determined that Plaintiffs alleged sufficient factual allegations to satisfy their antitrust claim.

On August 21, 2020, SJRA filed a notice to appeal the district court's order.

Motley v. Gulf Coast Authority, September 11, 2020; Memorandum Opinion, 2020 WL 5491201.

The City of Odessa has an easement for a wastewater pipeline through a property owned by Motley Capital, LLC ("Motley"). The City granted a license to the Gulf Coast Authority ("the GCA") to operate, maintain, and repair the pipeline. In April 2018, the pipeline was shut down for twenty days due to damage to the section of the pipeline that was on Motley's property. The GCA alleges that it suffered lost income while the pipeline was shut down and that it incurred costs to repair the damage to the pipeline.

The GCA sued Motley for negligence, for violation of the Texas Water Code, and for tortious interference with the license. The GCA also sought a declaration that it had the right to install steel bollards around the manholes on the easement. Motley filed a motion to dismiss the GCA's claims pursuant to the Texas Citizens Participation Act. The trial court denied the motion.

Motley initially argued that the trial court erred when it denied the motion to dismiss because (1) the TCPA applies to the GCA's claims, (2) the GCA did not establish by clear and specific evidence a *prima facie* case for each essential element of its claims, and (3) Appellants proved each essential element of any valid defenses by a preponderance of the evidence.

The Eastland Court of Appeals held that the GCA had standing to assert its claims, and therefore, the trial court had jurisdiction to rule on the motion to dismiss. The court of appeals affirmed the trial court's order denying Motley's motion to dismiss because (1) the TCPA does not apply to the GCA's claims for negligence and for violation of the Texas Water Code; (2) even if the TCPA applies to the GCA's claim for tortious interference and to its request for declaratory relief, the GCA established by clear and specific evidence a *prima facie* case for each essential element of those claims; and (3) Motley's claimed defenses, even if preserved, either relate to the claims to which the TCPA does not apply, were not established by a preponderance of the evidence, or require a merits determination more appropriately made after a trial or in a summary judgment procedure.

Air and Waste Cases

Environmental Groups Lack Standing to Sue EPA over COVID-19 Enforcement Guidance: Natural Resources Defense Council, et al. v. EPA, et al., No. 1:20-cv-03058-CM (S.D. N.Y., July 8, 2020) and New York, et al. v. EPA et al., No. 1:20-cv-03714 (S.D. N.Y., pet. filed May 13, 2020).

In the July 2020 edition of *The Lone Star Current*, we reported that 15 environmental groups (one Texas-based: Texas Environmental Justice Advocacy Services) and nine states (New York, California, Illinois, Maryland, Michigan, Minnesota, Oregon, Vermont, and Virginia) filed separate lawsuits against the EPA earlier this year, opposing the agency's guidance on enforcement discretion due to COVID-19. The guidance allows regulated entities to seek enforcement discretion from the EPA for non-compliance issues caused by COVID-19, but the plaintiffs claim that the guidance promotes non-compliance.

The EPA responded to the lawsuits, arguing that the plaintiffs do not challenge the actual merits of the enforcement discretion policy, but have instead wrongly demanded that the agency undertake a multi-state rulemaking imposing an enforceable requirement that all regulated entities unable to comply with EPA's monitoring or reporting requirements because of COVID-19 file a public justification for their reasons and other information.

Since EPA's response, the Southern District Court of New York found that the 15 environmental groups lack standing to pursue their lawsuit because they failed to show a concrete injury fairly traceable to the EPA's actions. While that lawsuit concerns a requested adaptation of the EPA's policy, the litigation over the EPA's authority to adopt the policy in the first place is still pending in the same court and is currently being briefed by the nine states' Attorneys General. This litigation continues even after the EPA terminated its COVID-19 enforcement discretion guidance policy on August 31, 2020.

EPA Sued for Delaying Landfill Methane Emissions Guidelines: Environmental Defense Fund, et al. v. EPA, No. 19-1222 (D.C. Cir., pet. filed Oct. 23, 2019).

In the October 2019 edition of *The Lone Star Current*, we reported on the EPA's decision to delay the deadline for the agency to promulgate a federal plan to administer the 2016 Emissions Guidelines ("EG") rule until August 30, 2021. The EG rule is aimed at regulated air emissions from existing landfills. Currently, EPA has only approved state plans for CA, AZ, NM, DE, WV, and VA.

The Environmental Defense Fund and a coalition of nine states (CA, IL, MD, NJ, NM, OR, RI, VT, and PA) previously filed suit against the EPA in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the agency's decision to delay implementation of the federal plan. The petitioners filed a brief on August 12, 2020, claiming "EPA has deployed a series of tactics to delay implementing the standards, without ever providing a valid reason for doing so." The petitioners are now asking the court to vacate the delay and require EPA to immediately implement the federal plan, asserting that any further delays will have adverse environmental and public health effects.

This lawsuit is pending while some states that did not timely submit a state plan to EPA are announcing plans for future rulemakings to ensure the state rules comply with the federal regulations. Specifically, TCEQ announced earlier this year 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 the September 25, 2020 edition of the Texas Register.

ExxonMobil Awarded Over $20 Million from U.S. for Cleanup of Wartime Environmental Contamination: Exxon Mobil Corporation v. U.S., No. 10-2386 (Tex. S.D. 2020).

On August 19, 2020, the U.S. District Court for the Southern District of Texas issued its opinion in the decade-long lawsuit between the U.S. government and ExxonMobile concerning which party is responsible for remediation costs incurred to clean up contamination caused by ExxonMobile's Baytown and Baton Rouge refineries, used during World War II and the Korean War to produce aviation fuel and rubber under government control.

ExxonMobile first sued the U.S. government 10 years ago seeking more than $45 million in damages associated with groundwater contamination at the Baytown refinery. In 2011, the company filed a second lawsuit seeking costs associated with cleanup for the Baton Rouge refinery. Both cases were consolidated and ExxonMobile argued that the federal government was liable under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) as a past operator of the plants due to the government's level of control and involvement.

The U.S. District Court for the Southern District of Texas sided with ExxonMobil, ruling that the federal government was responsible under CERCLA for an allocated share of past response costs incurred for cleanup measures at the plants. The court applied the equitable "Gore" and "Torres" factors in reasoning that (1) the government's knowledge and acquiescence in the contamination-causing activities at the plants, (2) the value of the war materials produced at the plants to support national defense, (3) certain cost reimbursement provisions in wartime contracts, and (4) the plants' substantial post-war waste handling improvements all supported a "substantial" or "increased" allocation of the response costs to the government. Accordingly, the court awarded ExxonMobil $20,328,670 and allocated a future share of response costs to the government.

Utilities Cases

New Boston Litigation.

Last month we became aware of a suit filed by the City of New Boston in the Texarkana federal court against Netflix, Inc., and Hulu, Inc. on August 11, 2020. Defendants have been given extensions of time until October 2, 2020 to file their answers; therefore, nothing has transpired procedurally in the case.

The suit alleges that these companies are video service providers using wireline facilities, and should be required to obtain a State Issued Certificate of Franchise Authority (SICFA) and pay the City a cable franchise fee under Chapter 66, Texas Utilities Code. The Complaint requests certification of a class consisting of all Texas municipalities in which one or more of the defendants has provided video service. The cause of action is similar to that alleged in state court in Missouri by the City of Creve Coeur against DIRECTV, LLC, DISH Network Corp., and Dish Network, LLC. The Missouri case has not yet gone to trial.

"In the Courts" *is prepared by Cole Ruiz, an Associate in the Districts and Water Practice Groups; Samuel Ballard, an Associate in the Air and Waste Practice Group; and Patrick Dinnin, an Associate in the Energy and Utility Practice Group. If you would like additional information, please contact Cole at 512.322.5887 or cruiz@lglawfirm.com, Sam at 512.322.5825 or sballard@lglawfirm.com, or Patrick at 512.322.5848 or pdinnin@lglawfirm.com.*

AGENCY HIGHLIGHTS

Environmental Protection Agency ("EPA")

EPA ends temporary COVID-19 enforcement policy. In a memo from June 29, 2020, EPA announced that its temporary policy on "enforcement discretion" during the COVID-19 pandemic will end on August 31, 2020. The temporary enforcement policy—which began on March 26, 2020—indicated that EPA would not take enforcement action for certain forms of noncompliance resulting from the COVID-19 pandemic. The policy noted that EPA generally does not expect regulated entities to "catch-up" with missed short-term monitoring or reporting requirements. EPA's memo announcing termination of the policy reserves the agency's ability to "exercise enforcement discretion on a case-by-case basis" even after the policy's end date.

EPA finalizes rule requiring lead-free certification for certain drinking water fixtures. On September 1, 2020, EPA published a final rule that tightens requirements for lead free "pipes, pipe or plumbing fittings, or fixtures, solder, or flux" in public drinking water systems. The rule—which takes effect on October 1, 2020—sets out two main parts: (1) a prohibition on "use and introduction into commerce" of leaded water fixtures, and (2) certification requirements for "lead free" plumbing products.

First, the rule prohibits the use of "pipes, pipe and plumbing fittings, fixtures, solder and flux that are not lead free." "Lead free" means not more than a weighted average of 0.25 or 0.2 percent lead, depending on the product. EPA's prohibition on leaded fixtures applies to any "person" as defined under the Safe Drinking Water Act ("SDWA"), which includes individuals and municipalities. While the rule does not mandate the replacement of any existing water systems including "lead free" fixtures, it does require lead free fixtures for any "installation or repair" of (1) a public water system or (2) any plumbing in a residential or nonresidential facility or location that provides water for human consumption.

Second, the rule requires certain "manufacturers and importers" of plumbing fixtures to obtain third-party certification for lead free products. The rule does not, however, impose any type of labeling requirements.

The rule contains two main enforcement provisions: EPA can (1) obtain information and records from any "person" to determine compliance with these rules and (2) take enforcement action for noncompliance (including injunctive relief, declaratory relief, civil penalties, or criminal penalties).

The final rule will be codified in 40 CFR Part 143.

EPA's COVID-19 enforcement discretion guidance terminates, while TCEQ's remains active. In the April 2020 edition of *The Lone Star Current*, we reported on both the TCEQ and EPA COVID-19 enforcement discretion guidance policies, which allow regulated entities to seek enforcement discretion from the respective agencies for non-compliance issues caused by COVID-19. EPA's policy

terminated on August 31, 2020 and so now that agency will revert back to its pre-COVID enforcement policy. However, the EPA has not yet announced a termination date for its related enforcement policy for remediation obligations, the Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19. TCEQ has not yet announced plans to terminate or revise its policy.

EPA proposes metrics for U.S. National Recycling Goals. EPA is accepting comments through October 2, 2020 on its proposed metrics for national recycling goals to be announced at the America Recycles Summit on November 17, 2020. EPA developed the metrics as part of the agency's National Framework for Advancing the U.S. Recycling System and a congressionally-mandated National Recycling Strategy. These metrics and their associated national recycling goals will represent the first time that the federal government has set an objective for recycling at a nationwide level. The proposed metrics are broken down in the following categories: (1) System-Wide Recycling Measures to Assess Recycling Performance; (2) Reducing Contamination in the Recycling Stream; (3) Increasing Materials Processing Efficiency; and (4) Strengthening Markets for Recycled Materials.

EPA Releases Pre-Publication Final Rule to Formalize Guidance Document Process. In the July 2020 edition of *The Lone Star Current*, we reported that EPA published a proposed rule to revise the agency's practice of organizing, evaluating, and issuing guidance documents subject to an Executive Order titled, Promoting the Rule of Law Through Improved Agency Guidance Documents in order to increase the transparency of its guidance practices and improve the process used to manage its guidance documents. On September 14, 2020, EPA released a pre-publication version of the final rule. More specifically, the stated purpose of the rule is to ensure EPA guidance documents:

- Are developed with appropriate review;
- Are accessible and transparent to the public;
- Are subject to public participation;
- Meet standards established for guidance documents and "significant guidance documents"; and
- Contain procedures allowing public petition to modify or withdraw an active document.

The final rule will be effective 30 days after its publication in the Federal Register.

EPA Proposes to Maintain Ozone NAAQS at Current Levels. On August 14, 2020, EPA released a proposed action to retain the current National Ambient Air Quality Standards ("NAAQS") for ozone, without revision. The current ozone NAAQS were set at 70 parts per billion for both primary and secondary standards in 2015. The Clean Air Act requires EPA to review the NAAQS at least every five years for updates. In EPA's proposal, the agency indicates that the 2015 primary standard "protects public health with an adequate margin of safety, including the health of at-risk populations," and that this analysis is supported by the review of independent advisors and the Clean Air Scientific Advisory Committee.

EPA is accepting public comments until October 1, 2020.

EPA Proposed Greenhouse Gas Standards for Aircraft. On August 20, 2020, EPA published its first-ever proposed rule to regulate greenhouse gas ("GHG") emission standards emitted by aircraft. The proposed rule stems from EPA's finding in 2016 that certain aircraft GHG emissions cause or contribute to elevated atmospheric concentrations of GHGs, endangering public health and welfare through climate change. EPA relied on the 2017 Airplane C02 Emission Standards established by the United Nations' International Civil Aviation Organization ("ICAO").

According to EPA, the agency chose standards equivalent to ICAO because the standards have "substantial benefits for future international cooperation" on aircraft emissions, which the agency deemed "key for achieving worldwide emission reductions."

The proposed rule would not apply to certain smaller aircraft or those covered by various exemptions identified in the proposed rule. The proposed rule would require certain new aircraft to meet a "fuel efficiency" metric based on the weight and design of the aircraft. In addition, the proposed rule would not require emission reductions more stringent than the ICAO standards.

The comment period closes on October 19, 2020.

U.S. Fish and Wildlife Service ("FWS")

FWS proposes two definitions for the term "habitat" under the Endangered Species Act. On August 5, 2020, FWS and the National Marine Fisheries Service jointly proposed a regulatory definition and an alternative regulatory definition of "habitat" under the Endangered Species Act.

The primary proposal defines "habitat" as "physical places that individuals of a species depend upon to carry out one or more life processes" and further clarifies that habitat "includes areas with existing attributes that have the capacity to support individuals of the species."

The alternative proposal defines "habitat" as "the physical places that individuals of a species use to carry out one or more life processes," also adding that habitat "includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist."

The proposed rule solicited comments on whether species "depend upon" (primary proposal) or "use" (alternative proposal) their respective habitats. FWS also solicited comments on the second sentence of the alternative proposal, which excludes areas that have no "present capacity" to support individuals of a species. The public comment period closed on September 4, 2020.

U.S. Department of Justice ("DOJ")

DOJ announces that it will avoid pursuing Clean Water Act civil enforcement cases that overlap with state actions. On July 27,

2020, Assistant Attorney General Jeffrey Bossert Clark issued a memo stating that the DOJ will "strongly disfavor" bringing any action under the Clean Water Act ("CWA") if a state has "already initiated or concluded its own civil or administrative proceeding" on the same issue. Citing federalism concerns and the need to avoid "piling on" enforcement actions, the memo notes that express prior approval is needed for any DOJ action if a state has already initiated or concluded its own action. Approval for an additional federal action will only be granted under specific circumstances (for example, if "standing on the prior state enforcement action would amount to an unfair windfall to the would-be defendant"). The DOJ's new policy for CWA actions applies only to civil actions, not criminal actions.

U.S. Army Corps of Engineers ("USACE")

USACE proposes to renew existing Nationwide Permits ("NWPs") and add five new NWPs. On September 15, 2020, USACE published a proposal to reissue 52 existing NWPs and add five new NWPs. The new NWPs authorize certain activities related to (1) seaweed mariculture, (2) finfish mariculture, (3) utility lines for water, sewage, and other substances, (4) electric utility lines and telecommunications lines, and (5) water reuse and reclamation facilities. The public comment period for this proposal will close on November 16, 2020. After reviewing public comments, USACE will prepare final NWPs to replace the existing set, which were authorized in 2017.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ announces new leaders in four top positions. On August 10, 2020, TCEQ announced that it filled four top leadership positions in the agency. Ramiro Garcia (formerly deputy director of the Office of Compliance and Enforcement) and L'Oreal Stepney (formerly deputy director of the Office of Water) will both serve as the TCEQ's new deputy executive directors. Earl Lott (formerly director of the Water Permits Division) will now serve as deputy director of the Office of Water. Craig Pritzlaff (formerly an Assistant Attorney General in Texas's Office of the Attorney General) will lead the Office of Compliance and Enforcement. Additional information on each agency leader can be found here.

TCEQ finalizes rule requiring public water systems to provide notice to customers before terminating fluoride addition. On August 26, 2020, TCEQ finalized a rule that creates notice requirements for any public water system that stops adding fluoride to its water. A public water system may not terminate fluoridation unless it (1) provides written notice to its customers (using direct delivery methods) at least 60 days before termination and (2) provides written notice to the TCEQ Executive Director at least 60 days before termination, as well as a copy of the notice and a Certificate of Delivery certifying that public notice was sent to its customers. The new rule took effect on September 17, 2020.

TCEQ to adopt final rule allowing for the use of electronic mail for application deficiency notices and responses. On May 15, 2020, the TCEQ published a proposed rule to amend Section 281.18 of Title 30 of the Texas Administrative Code concerning Applications Processing, in order to allow for the use of electronic mail for application deficiency notices and responses. Currently, Section 281.18 requires that notices of application deficiencies be sent to the applicant via certified, return receipt mail and allows the applicant 30 days to respond. The TCEQ Commissioners are scheduled to consider the proposed rule for adoption as a final rule during the October 7, 2020 Commissioners' agenda. According to TCEQ, the adopted changes will: (1) modernize communications between the agency and applicants; (2) reduce TCEQ postage costs; and (3) improve the efficiency of application processing. TCEQ indicates that applicants will benefit from a more efficient permit processing time, especially those seeking new permits or amendments to existing permits.

If approved by the TCEQ Commissioners, the effective date is anticipated to be October 29, 2020.

TCEQ Proposes Rulemaking to Implement HB 1331, HB 1435, and HB 1953. On October 7, 2020, the TCEQ Commissioners are considering adopting a final rulemaking (2019-1389-RUL) aimed at implementing House Bill ("HB") 1331, HB 1435, and HB 1953 passed this last legislative session (86th Texas Legislature, 2019).

HB 1331 created new Texas Health and Safety Code ("THSC") § 361.0675 to require the TCEQ to increase the application fee for a permit, or major permit amendment, for a municipal solid waste ("MSW") facility from $100 to $2,000. The rulemaking amends 30 Texas Administrative Code ("TAC") §§ 305.53(a)(7) and 330.59(h)(1) to implement these changes. This results in a total application fee of $2,050 as TCEQ rules also require that the application fee include an additional $50 to be applied toward notice costs.

HB 1435 amended THSC § 361.088 to require the TCEQ to confirm information included in an application for a permit for an MSW management facility by performing a site assessment of the facility before the agency issues an authorization or issues a permit or a major permit amendment. The rulemaking amends 30 TAC § 330.73(c) to implement these requirements.

HB 1953 created new THSC § 361.041 and amended THSC §§ 361.003, 361.119, and 361.421 to exempt from regulations the beneficial conversion of plastics and recoverable materials using pyrolysis and gasification processes from regulation as an MSW facility. The rulemaking amends 30 TAC §§ 330.3 and 330.13 to add and amend definitions and activities to exempt pyrolysis and gasification of post-use polymers from regulation under Chapter 330. According to TCEQ, the rulemaking is aimed at reducing the regulatory burden to begin pyrolysis or gasification activities using recyclable materials.

In addition, the rulemaking will repeal TCEQ rules determined to be obsolete as a result of the Quadrennial Rules Review of 30 Texas Administrative Code Chapter 330, Subchapter F, Analytical Quality Assurance and Quality Control. The rulemaking indicates that the repealed rules are no longer necessary because Subchapter F expired on January 1, 2009 and the agency uses other guidance documents to implement data quality controls and sampling guidelines.

The anticipated effective date of the rulemaking is October 29, 2020.

TCEQ Announces Potential Revisions to Penalty Policy. TCEQ recently announced that the agency is considering potential significant revisions to its current penalty policy and compliance history rules.

On September 14, 2020, the TCEQ Enforcement Division submitted an Interoffice Memorandum to the TCEQ Commissioners' Work Session regarding potential revisions to the agency's penalty policy. The TCEQ Commissioners deliberated on the potential revisions during a Work Session on September 24, 2020.

The penalty policy was last revised on April 1, 2014. Since then, statutory changes have occurred, and according to TCEQ, recent incidents (including fires and explosions at industrial sites) "have caused significant impacts to the public and the environment demanding accountability within the bounds of TCEQ authority."

The revisions under consideration include:

1. Increasing the percentage of the maximum statutory penalty for alleged violations involving actual releases of pollutants. For example, the recommended penalty for an alleged violation involving a major harm from a minor source will be adjusted from 30 percent to 50 percent of the maximum penalty. Similar adjustments are under consideration for alleged violations involving a moderate or minor harm.
2. Increasing (and in some cases, doubling) the percentage of the maximum statutory penalty for programmatic alleged violations. These include operating without a permit or authorization, or failing to maintain proper records or submit reports.
3. Increasing the number of violation events for any form of alleged continuing violations. For example, a single monthly violation event may be considered four weekly violation events, thereby resulting in a significantly increased penalty.
4. Removing eligibility for the 20 percent expedited enforcement penalty deferral for facilities for which there are two or more prior final administrative orders for violations in the same environmental media.
5. Enhancing the penalty by 20 percent for a reportable emissions event occurring in counties with a population of more than 75,000 residents.

The proposed changes are not subject to formal rulemaking, but TCEQ is accepting comments until October 30, 2020. The comments will be presented to the Commissioners for their consideration at a future Work Session. Comments can be submitted to penalty_policy@tceq.texas.gov. Please visit TCEQ's webpage about the revisions for further information.

In addition to the penalty policy revisions, TCEQ has started the rulemaking process to revise its compliance history rules in 30 Texas Administrative Code Chapter 60. This future rulemaking would allow the agency to change a site's compliance history classification to a new classification (called "under review") if that site "has caused, suffered, allowed, or permitted the creation of exigent circumstances," such as a major explosion or fire that impacts the surrounding community and environment. By changing the site's compliance history to "under review," the agency would have a specified length of time to determine the final appropriate classification. The anticipated proposal date for this future rulemaking (Project No. 2020-049-060-CE) is December 16, 2020.

Texas Water Development Board ("TWDB")

TWDB proposes a new rule allowing groundwater conservation districts to authorize production of brackish groundwater. On August 21, 2020, TWDB issued a proposed rule that designates a permitting process for producing brackish groundwater for (1) municipal drinking water projects and (2) electric generation projects. The proposed rule would define a "brackish groundwater production zone" and a "brackish groundwater production zone permit." It would also clarify how TWDB designates brackish groundwater production zones, outline how TWDB will conduct assessments and technical reviews on these permits, and describe how TWBD will investigate and conduct technical reviews of annual reports if requested to do so by a groundwater conservation district. The public comment period for this proposed rule closed on September 21, 2020.

Public Utility Commission ("PUC")

Lone Star Transmission Rate Reduction Settlement. In August, 2020, the Oncor Cities Steering Committee ("OCSC") and other parties reached a rate related settlement with Lone Star Transmission ("Lone Star"), a transmission-only electric utility with facilities located primarily in West Texas. OCSC has historically participated in Lone Star rate cases because the transmission charges apply to customers throughout the state. Under a Public Utility Commission rule, Lone Star was required to file a rate case by December 8, 2020.

However, Lone Star, PUC Staff, and other participating parties reached an agreement replacing Lone Star's obligation to file a rate case. The agreement, filed in PUC Docket No. 51206, reduces Lone Star's annual revenue requirement by $5.3 million and requires Lone Star to file for an adjustment to its transmission rates to give effect to this reduction by December 8 of this year. Further, the prudence of any new investment by Lone Star since its last rate case would be considered in its next rate case, which will occur in four years.

PUC Staff's analysis of the settlement determined that the $5.3 million reduction brings down Lone Star annual revenues to its authorized rate of return pending its next full rate review in four years.

PUC approved the settlement at the September 24, 2020 open meeting.

EECRF Update: Oncor & TNMP Settlements Approved by PUC; AEP and CenterPoint Await PUC Approval. Each year, electric utilities' file Energy Efficiency Cost Recovery Factor ("EECRF") pleadings to adjust their rates for 2021 to reflect changes in program costs and performance bonuses. The EECRF filings also true-up any prior energy efficiency

costs over- or under-collected, pursuant to the Public Utility Regulatory Act ("PURA") and PUC rules**.** The PUC approved EECRF settlements for Oncor Electric Delivery Company, LLC ("Oncor") and Texas-New Mexico Power Company (TNMP) at its September 10, 2020 Open Meeting. Oncor will collect $64,782,106 in 2021, and TNMP will collect $5,921,913 in 2021. At the September 24, 2020 open meeting, the Commission approved the EECRF settlement for AEP Texas Inc. (AEP Texas) in the amount of $20,431,462 for 2021.

CenterPoint Energy Houston Electric, LLC ("CenterPoint") has settled to recover $48,796,013 in rates in 2021, but the settlement will still need to be approved by the PUC at an open meeting.

Under the proposed agreements, the new rates for each company would go into effect on March 1, 2021.

PUC Considers Emerging Electric Vehicle Issues. In recent years, electric industry regulators nationwide have contended with issues arising from electric vehicles ("EVs"). PUC has opened a project to consider these questions — Project No. 49125 — and has sought comments from interested parties on a variety of issues.

EVs present challenges and opportunities to Texas' entire utility framework. By potentially shifting a portion of the state's very large energy needs arising from transportation onto the electric system and away from gasoline, the increasing usage of EVs has caused the PUC to consider what changes to our system need to be made to accommodate this technology.

OCSC filed comments in Project No. 49125 in August and generally argued that the current Texas deregulated market model can accommodate increased EV usage. Specifically, OCSC argued that EV charging stations should not be owned and operated by electric utilities (like Oncor and CenterPoint) but rather ownership should be left to competitive third parties. This would mean that difficult and risky decisions about EV charging stations — such as where to locate them and what kind to offer — would be left to the private market. In reaching this conclusion, OCSC determined that ownership and operation of an EV charging station is not a retail sale of electricity, and, as a result, any entity could own and operate one.

The municipal coalition also argued that any distribution infrastructure associated with an EV charging station should be treated for ratemaking purposes in the same manner as distribution investments are handled by regulators now.

Analysts expect a surge in electric vehicle use within just a few years, with projections of $300 billion in electric vehicle investment in EVs worldwide within a decade. By 2030, electric vehicles could comprise as much as 15 percent of all vehicles on Texas roads, according to analysts.

At this point, Project No. 49125 is at an informal stage, with the PUC asking interested parties for comments, and with no rule yet proposed.

Entergy Details Impact of Hurricane Laura at PUC Open Meeting. Hurricane Laura will go down in the record books as the strongest storm to hit Louisiana since 1856 and has tied for the fifth strongest to make landfall in the continental U.S. She made landfall in Cameron, Louisiana as a catastrophic Category 4 hurricane with maximum sustained winds of 150 mph. At the September 10 PUC Open Meeting, a representative from Entergy Texas detailed the impacts of Hurricane Laura and the efforts of utilities to restore service to affected areas. This historic storm caused severe damage to Entergy's electrical transmission and distribution systems across both Louisiana and Texas. Over 290,000 Texas customers lost power after the August 27 landfall. Laura damaged sixty miles of transmission facilities affecting sixty-three separate lines and thirty-nine substations. On the distribution side, over 1,000 utility poles were damaged along with 211 transformers.

Damage from Hurricane Laura eliminated much of the redundancy built into the transmission system, making it difficult to move power around the region to customers. The degradation of these facilities required Entergy to shed over 300 megawatts of load with little notice. Only one of nine Texas transmission lines remained in service after the initial damage.

To quickly repair its facilities, Entergy deployed over 16,000 employees and contractors working around the clock to repair critical infrastructure. One of the first items mended was a 500 kV transmission line serving Texas. This critical line was repaired within sixteen hours, restoring power to core customers and providing some redundancy and flexibility to the underlying system.

Four of the nine major transmission lines that power Entergy Texas remain out of service as a result of significant storm damage. Several transmission structures within these lines were damaged beyond repair and require complete replacement.

The Commissioners thanked Entergy, utilities, and cities from other areas of the state for sending resources and workers to help the affected area. Utilities are still working to fully restore power to all customers.

PUC Denies Petition for Rulemaking Regarding Texas Universal Fund. The PUC recently emphasised its intent to have the Texas Legislature address the shortfall in revenues in the Texas Universal Service Fund ("TUSF"). In June the PUC rejected a proposal by PUC Staff to increase the TUSF assessment rate from 3.3% to 6.4%, and instead recommended that the Legislature address the issue with TUSF funding. The PUC decided to leave the TUSF as is, but limit TUSF funding to lifeline projects.

In response, the Texas Telephone Association ("TTA") and Texas Statewide Telephone Cooperative, Inc. ("TSTCI") (together, the Associations) filed a petition for rulemaking in Docket No. 51020, asking the PUC to reconsider its inaction to adjust the assessment rate, and its decision to only fund lifeline projects, leaving high-cost programs unfunded. The Associations claimed that the PUC's inaction on the impending TUSF shortfalls was unprecedented and illegal.

At its open meeting on August 27, 2020, the PUC shot down the Associations' petition, in line with a memo filed by Chairman Walker. Her memo explained that the PUC already made clear its intent

to let the Legislature handle the TUSF shortfall, due to the magnitude of the decision and the importance of the related policy issues. She emphasized that nothing had occurred since their initial decision to leave the TUSF untouched, and therefore, nothing had changed her mind on their decision.

DCRF Settlements Approved by Commission. As we have previously reported, in early April 2020, electric utilities filed applications with the PUC to amend their Distribution Cost Recovery Factors ("DCRFs"). Utilities file DCRF proceedings to update the DCRF Rider and Wholesale DCRF ("WDCRF") Rider in their tariff to include additional distribution invested capital placed in service since their last full base rate case.

The parties have settled the DCRF cases for Oncor (Docket No. 50734), Texas-New Mexico Power Company ("TNMP") (Docket No. 50731), and AEP Texas, Inc. ("AEP Texas") (Docket No. 50733). Pursuant to the agreements, Oncor will increase distribution rates by $69.9 million annually; TNMP will increase distribution rates by $14.3 million annually; and AEP will increase distribution rates by $39.1 million annually.

At the July 31, 2020 open meeting, the PUC approved the Oncor and AEP DCRF settlements with minor changes from Chairman Walker to the proposed orders. Later, at the August 13, 2020 open meeting, the PUC approved the TNMP DCRF settlement with minor changes from Chairman Walker to the proposed order.

Pursuant to the final orders, the agreed rates for each Company's DCRF became effective September 1, 2020.

SPCOA Update. The pace of filings for SPCOA relinquishment or terminations has slowed; it appears that PUC Staff is winding up its housecleaning of certificates that are not being used, or certificate holders who have not complied with reporting requirements. One new filing is by Voxbeam Telecommunications, Inc. (Docket No. 51235). Voxbeam has filed to relinquish its SPCOA, citing the fact that it has no customers in Texas, and its business plans have changed so that it does not expect to have customers in the state.

For filings that have previously been reported, relinquishment requests have been approved for Advanced Integrated Technologies (Docket No. 50272), Comity Communications, LLC (Docket No. 50620), and NDS Technologies, LLC (Docket No. 50759).

PUC Announces Intent to Audit Telecommunications Companies' Use of Universal Fund. The TUSF controversy continues at the Commission. The Commission has been tangling with how to address a shortfall in the TUSF. In June the PUC rejected a proposal by PUC Staff to increase the assessment rate from 3.3% to 6.4%, and instead recommended that the Legislature address the issue with TUSF funding. The PUC left the assessment alone, and directed providers to limit the funding to lifeline projects, which make up a small percentage of the TUSF (Project 50796). The PUC's decision precipitated the filing in that project of approximately 20 letters from elected state and county officials, the Texas Association of Rural Schools, and the Texas Border Sheriffs Coalition, all urging the PUC to fully fund the TUSF.

On July 29, 2020, the *Texas Tribune* published an article entitled: "Analysis: Funding for rural broadband in Texas is in trouble. The pandemic might save it." In the article, the TUSF is described as a "state fund used to buttress rural telecommunications and internet services." Emphasizing the need for connectivity to rural areas, the article quoted several of the letters filed with the PUC which extolled the efforts of rural telecommunications providers to bring broadband services to underserved areas.

Chairman Walker referred to this article at the PUC's open meeting on July 31, 2020; she was obviously concerned with the cited use of the TUSF revenues for the provision of broadband services. (The statutory purpose of the TUSF is to enable all residents of Texas to obtain basic local telecommunications services.) Chairman Walker also noted that she had discussed the TUSF issues with Senator Kelly Hancock. As a result, Chairman Walker had decided that the PUC needs to look into whether companies are using TUSF funds correctly. Chairman Walker then directed PUC Staff to audit the telecommunications companies to ensure that TUSF monies are used correctly, and to determine which companies are actually laying down fiber using these funds. She added that the audit should also help the PUC properly tee-up the TUSF issue to the Texas Legislature. Commissioner D'Andrea mirrored the Chairman's concerns and added that there has been a misuse of USF funds in other states.

Proceeding separately is the petition for rulemaking filed on July 8, 2020 by the Texas Telephone Association and the Texas Statewide Telephone Cooperative, Inc. (Docket No. 51020), asking the PUC to amend 16 Texas Administrative Code § 26.420 to change the methodology for funding the TUSF. These entities had filed an earlier petition for rulemaking (Docket No. 50818), but withdrew that petition when the PUC asked for comments in Docket No. 50796. This second petition proposes two options to amend the rule: (1) require Voice-over-Internet-Protocols service be included in the assessment for the TUSF; or (2) change the TUSF assessment from a revenue-based assessment to a connection-based assessment. The petition is scheduled for discussion and possible action at the August 27, 2020 Open Meeting. Under § 2001.021 of the Texas Government Code, the Commission must either initiate a rulemaking action or deny the petition by September 8, 2020. The August 27, 2020 Open Meeting is the last currently scheduled open meeting before this deadline.

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