Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 26, NO. 1 JANUARY 2021

THE LONE STAR CURRENT

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

PREVIEW OF REGULAR SESSION OF 87TH TEXAS LEGISLATURE: THE LEGISLATURE DURING A PANDEMIC

by Ty Embrey

The Texas Legislature commenced its 87th Regular Session Tuesday, January 12, 2021, and promises to be unlike any we have seen in some time. Every Regular Session of the Texas Legislature is unique, but the 2021 Regular Session will be conducted during the COVID-19 Pandemic, which presents a whole new set of challenges for state legislators.

One of the biggest issues facing the Texas Legislature during the 2021 Regular Session will be addressing the logistical challenges of holding a Regular Session while trying to protect the health of all of the individuals involved, from the state legislators themselves and the legislative staff to the members of the public who want to participate in the legislative process. The State Preservation Board, the Texas Senate and Texas House have all issued guidelines and protocols that explain how access to the State Capitol, the Senate and House chambers, and the individual offices of the legislators will work during the beginning phases of the 2021 Regular Session. As the vaccination effort continues throughout the U.S. and in Texas, the logistics are likely to be revised and updated to reflect the current public health situation.

The Texas House members are expected to elect Dade Phelan of Beaumont as the next Speaker of the Texas House when the Texas Legislature convenes. This Speaker election will establish the leadership for the Legislature with Governor Abbott and Lieutenant Governor Patrick already in place. The leadership has indicated an interest in minimizing the amount of in-person legislative activity, particularly at the beginning of the Regular Session after the Texas Senate and Texas House adopt their respective rules for each chamber. It is interesting to note that as of January 8, state legislators have filed 1,335 bills, which is a larger number of bills filed than any other Regular Session in the last 10 years.

The Texas Legislature definitely has several significant issues to address during the Regular Session which will impact every citizen of Texas in some way. The Texas Constitution requires that the Legislature adopt only one bill during the Regular Session: the appropriations bill to establish a budget for the state government for the next two years. This task of adopting a state budget has been made more difficult this year, with the negative impact the Covid-19 Pandemic has had on the state's economy and tax revenue, as well as the drop in oil and gas prices due to international oil and gas market developments. The State Comptroller, Glenn Hegar, provided the Biennial Revenue Estimate on Monday, January 11 which will give the Texas Legislature information to enable the legislators to know how much money they have to work with to establish a budget.

The Texas Legislature also has the substantial task of addressing redistricting for the Texas Senate, the Texas House, and the U.S. Congressional seats for Texas during the Regular Session. The Texas Legislature is required by the Texas Constitution to address the redistricting issues during a Regular Session after receiving the population data and related information from the federal government following the completion of the U.S. Census which occurs every 10 years. The Texas Legislature is still waiting on receiving the information associated with the 2020 U.S. Census and the Legislature's redistricting efforts are contingent on obtaining such information. The Legislature is also likely to address police reform issues in some form, Medicare access, possible reform of the election process, and how Texas will respond to the Covid-19 Pandemic along with responses to future pandemics.

There are several legislative issues that will impact clients of Lloyd Gosselink in

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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

We are pleased to announce that **Sarah T. Glaser** has been elected as a Principal of the Firm effective January 1, 2021.

Sarah's practice focuses on employment law by helping employers navigate hiring, leave programs, performance counseling, workplace safety, and issues that may arise as a result of the termination of an employment relationship. She also represents clients in front of federal and state courts and administrative agencies, such as the EEOC.

Sarah was named a Texas Super Lawyers Rising Star in Employment Litigation: Defense for 2019 and 2020 and was named a Top Austin Attorney by Austin Monthly Magazine in Labor and Employment in 2020.

Kathryn Thiel has joined the Firm's Districts and Water Practice Groups as a new Associate. She assists in the governance, organization, and operation of a variety of local government entities, including water districts and utilities. She also assists clients with regulatory compliance issues, including open meeting requirements and public information requests.

Kathryn received her B.A. in English and History from The University of Texas at Austin. After working as a legislative research associate for a political nonprofit, she left Texas to attend George Mason University Law School in Arlington, Virginia. Prior to joining Lloyd Gosselink, Kathryn provided trademark, patent, and operational support for an Austin startup.

Danielle Lam has joined the Firm's Districts and Water Practice Groups as a new Associate. She assists clients with matters relating to certificates of convenience and necessity, water supply, water quality, and water rights in addition to providing general counsel services.

Danielle received her B.A. in International Relations at The University of Texas at Austin while focusing her studies on renewable energy. During law school, she clerked with the Electric Reliability Council of Texas, the Texas Commission on Environmental Quality, the U.S. District Court for the Southern District of Texas, and private law firms.

Lauren Thomas will be co-presenting "Case Law Update" at the TWCA Texas Water Law Conference 2021 on January 22 virtually.

Sheila Gladstone will present "Employment Law for Public Employees" for the Certified Public Manager Course with Texas State on January 22 virtually.

Lauren Thomas will be discussing "Surface Water Applications" at the 22nd Annual Course Changing Face of Water Law on February 10 virtually.

David Klein will be co-presenting "CCN Issues" at the 22nd Annual Course Changing Face of Water Rights on February 12 virtually.

MUNICIPAL CORNER

The common-law reserved powers doctrine could limit whether a home-rule municipality may enter a contract that would prohibit decertification of a special utility district's certificate of convenience and necessity in the future. Tex. Att'y Gen. Op. KP-0340 (2020).

The Honorable Brian Birdwell, Chair of the Senate Committee on Natural Resources and Economic Development ("Chairman"), requested an opinion by the Attorney General ("AG") to determine whether a home-rule municipality may enter into a contract with a special utility district that prohibits the city from petitioning for decertification of all or part of the special utility district's certificate of convenience and necessity ("CCN") in the future. The AG opined that such questions must be determined on a case-by-case basis, failing to conclude as a matter of law that a city could in all instances agree by contract not to petition to decertify from a special utility district's CCN.

The AG presumed the Chairman was referencing CCNs for water and sewer service as governed by subchapter G in chapter 13 of the Water Code. Most notably, the AG cited section 13.248 of the Water Code, which provides that agreements designating areas to be served, when approved by the Public Utility Commission, are valid and enforceable and incorporated into the respective CCNs. The Chairman's request specifically referenced Sections 51.072 and 51.078 of the Texas Local Government Code, along with article XI, section 5 of the Texas Constitution, known as the "home-rule amendment." The AG noted section 51.072(a) gives a home-rule municipality "full power of local self-government," which the Texas Supreme Court has found means that home-rule municipalities "look to the Legislature not for grants of authority, but only for limitations on their authority." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016); TEX. LOC. GOV'T CODE § 51.072(a). The AG further noted the 2018 Texas Supreme Court decision in *City of Laredo v. Laredo Merchs. Ass'n*, providing that any limitations the Legislature imposes on local authority "must appear with unmistakable clarity." 550 S.W.3d 586, 593 (Tex. 2018).

The Texas Rural Water Association submitted briefing to the AG arguing that chapter 13 of the Water Code reflects no clear and unmistakable legislative intent to prohibit a home-rule municipality from entering into an agreement that would give away its ability to decertify territory from a neighboring utility's CCN. Appearing to agree at least in part, the AG made specific reference to the fact that no provision in the Water Code, either in chapter 13 or otherwise, addresses whether a municipality may waive its right to petition for decertification. However, the AG went on to note that a home-rule municipality nevertheless remains a political subdivision of the State, which pursuant to the reserved powers doctrine and the Texas Supreme Court's decision in *Clear Lake City Water Auth. v. Clear Lake Util. Co.*, may "not, by contract or otherwise, bind itself in such a way as to restrict its free exercise of governmental powers, nor [can] it abdicate its governmental functions, even for a reasonable time." 549 S.W.2d 385, 391 (Tex. 1977).

The AG determined that the reserved powers doctrine may limit a city's authority to waive decertification petitioning rights because water and sewer service constitute a municipal government function. Noting that it would depend on such factors as the purpose for seeking decertification and the posture of the city (e.g., as a competing utility or as a landowner), the AG explained that instances may exist where a city's governmental power could not be exercised without the decertification process, thus making that process ineligible to be bargained away. Accordingly, the AG concluded that even if chapter 13 of the Water Code does not reflect a clear and unmistakable legislative intent to prohibit cities from entering into the type of contracts described, a city's contracting authority may nevertheless be limited in this regard. This opinion provides helpful guidance to municipalities regarding the extent of their contracting authority. While generally having full authority within its jurisdiction, a city may nevertheless not enter into a contract that seeks to limit the exercise of the city's governmental powers.

"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 questions related to these or other matters, please contact Reid at 512.322.5811 or rbarnes@lglawfirm.com.*

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some way and bills have already been filed or will be filed on those issues. There is likely to be legislation filed to amend the Texas Open Meetings Act to enable more use of technology to implement some of the lessons we have learned from the Covid-19 Pandemic, such as the ability to hold virtual meetings. There are several bills that have been filed which will impact the municipal solid waste industry, including bills that address the ability of governmental entities to establish bag bans and bills that place limitations on the franchise fees municipalities can charge. In the water arena, bills have been filed that impact groundwater conservation districts and a district's ability to address petitions for rulemaking, recover attorney fees, and provide notice of permitting activities. It is anticipated that bills will be filed to affect the wholesale water rate process in Texas.

The Texas Legislature will be a busy place again during the 2021 Regular Session, even if some of that legislative activity will occur on-line, on Zoom calls, by phone, by text and by email correspondence. We will be participating in the legislative process and monitoring all of the legislative developments in an effort to keep our clients informed. If you think you need help with a legislative issue during the Regular Session, please contact me at tembrey@lglawfirm.com or 512-322-5829 and we will be glad to help you.

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

NEW "PHYSICAL CAPABILITIES" TEST FOR 7 U.S.C. 1926(b) DEBTORS APPLIED TO DISMISS CCN DECERTIFICATION COMPLAINT

by David Klein and Maris Chambers

As we have reported in a number of recent editions of *The Lone Star Current*, the legal and regulatory landscape governing the protection afforded under 7 U.S.C. § 1926(b) to holders of water and wastewater certificates of convenience and necessity ("CCNs") in Texas that have loans from the United States Department of Agriculture ("USDA") has been rapidly evolving over the past few years. Most recently, on November 23, 2020, the United States District Court for the Western District of Texas, Austin Division, applied a newly-adopted legal standard to dismiss the complaint of a Texas sewer CCN holder and debtor to the USDA who alleged that its wastewater CCN was protected from decertification under § 1926(b). There, on remand from the decision of the United States Court of Appeals for the Fifth Circuit in *Green Valley Special Util. Dist. v. City of Schertz*, *Texas*, 969 F.3d 460 (5th Cir. 2020), the federal district court rejected Green Valley Special Utility District's ("GVSUD's") claim to protection under § 1926(b), finding that it could not satisfy the first prong of the new "physical capabilities" test adopted by the Fifth Circuit. *Green Valley Special Util. Dist. v. Marquez*, *et. al*, No. 1:17CV00819 (W.D. Tex. 2020).

In Texas, CCNs are granted by the Public Utility Commission of Texas ("PUC") and provide their holders with the exclusive right and obligation to provide retail water and/or wastewater service within the specific geographic area designated by that CCN. Nevertheless, a CCN is not a vested right and a landowner or other retail public utility can file an application at the PUC to decertify another entity's CCN, in whole or part. The ability to decertify CCN service area, however, is constrained by § 1926(b) because water and sewer utility service providers that have obtained federal loans under § 1926 are entitled to protection for "the service provided or made available" by the indebted utility.

As reported in the October 2020 edition of *The Lone Star Current*, the Fifth Circuit's decision in *Green Valley* marked a sea change in the law governing water and wastewater CCN decertification and the protection afforded by § 1926(b). The issues addressed in that case stemmed from the PUC's grant of the City of Schertz's ("Schertz's") application to decertify approximately 405 acres of GVSUD's sewer CCN area that overlapped with Schertz's corporate limits. Aggrieved by the PUC's decision, GVSUD filed a complaint in federal district court to challenge the decertification, arguing it was entitled to protection under § 1926(b) in light of its outstanding federal loan for water system improvements. Initially, Schertz filed a Motion to Dismiss GVSUD's complaint, and the district court denied that Motion, based in part on the then-current precedent establishing that GVSUD's mere possession of its CCN, imposing a state law duty to provide retail service, meant GVSUD had made service available for purposes of § 1926(b). Schertz then appealed that decision to the Fifth Circuit, which, before remanding the case to federal district court, adopted a new standard for determining whether a federally-indebted utility is entitled to § 1926(b) protection from CCN decertification.

The "physical capabilities" test adopted by the Fifth Circuit in *Green Valley* overruled longstanding precedent establishing the prerequisites for a federally-indebted utility to receive protection from decertification of all or a portion of its water or sewer CCN service area under § 1926(b). Previously, a CCN holder's state law duty to provide service was seen as the legal equivalent of "making service available" under § 1926(b). Now, in order to have provided or made service available for purposes of § 1926(b),

a utility must have (i) a legal right to provide service and (ii) adequate facilities to serve the area within a reasonable time after a request for service is made. The Fifth Circuit clarified, however, that although an indebted utility need not demonstrate that it has "pipes in the ground" in order to merit § 1926(b)'s protection, it must have some sort of infrastructure in place.

Having adopted this new "physical capabilities" test, the Fifth Circuit instructed the district court to apply it on remand. Thus, in reconsidering GVSUD's claims under § 1926(b), the district court found that while GVSUD had a plan to provide sewer service to its entire CCN service area, the plan alone was not sufficient to entitle GVSUD to § 1926(b)'s protections under the new standard. Instead, citing the PUC's determinations that GVSUD provided "no retail sewer service in the decertificated area" and had made "no physical improvements within the decertificated area, including any wastewater infrastructure," the district court concluded that GVSUD could not satisfy the first prong of the "physical capabilities" test. The district court then indicated it need not address the second prong of the new test, held that GVSUD was not entitled to protection under § 1926(b), and dismissed GVSUD's § 1926(b) claims related to the Schertz decertification.

As such, this decision provides an early example of the application of the "physical capabilities" test. Even so, we will continue to monitor the development of this case, and others like it, to maintain an up-to-date understanding of how Texas courts are likely to apply the recently-adopted standard.

David Klein is a Principal and Maris Chambers is an 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 Maris at 512.322.5804 or mchambers@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We have received an internal complaint at our company where a black employee accused another black employee of using racial slurs against her. The accused employee defended herself by saying that she felt these are acceptable words to use among black people, and would only be unacceptable if someone of a different race used them. Is this something we should discipline for and/or something the company could be liable for?

Sincerely,
Employee Relations Manager

Dear ERM,

The short answer is yes, you should take this seriously, without regard to whether the parties are the same race. There have been several cases over the years addressing race-based discrimination and harassment claims among members of the same race. A federal appeals court upheld a six-figure jury verdict based on a black employee accusing a black supervisor of addressing him with the n-word and "black boy." As a whole, these cases have taught us:

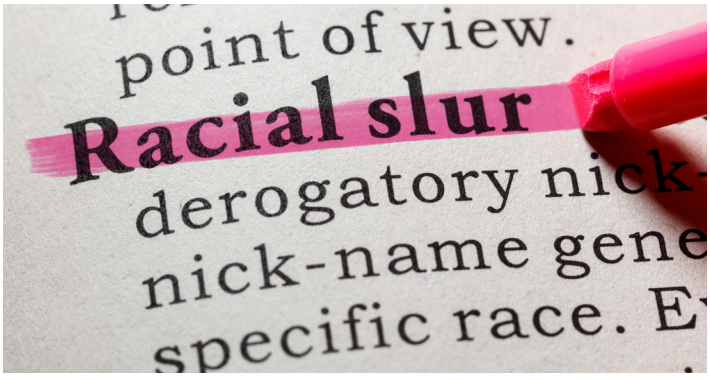
- Title VII of the Civil Rights Act, and likely your policies, prohibit harassment "based on race." Courts hold that because these comments would not have been made to someone who was not Black, they are "based on race" and the fact that the person saying them is Black also doesn't change that.

- This analysis holds true with other protected classes. We know that women cannot make unwelcome sexual comments to other women in the workplace, and older people cannot make ageist comments to other older people.

- While it is true that a jury might find that the comments are not as severe when made by someone of the same protected class, employers should not rely on that, and should be consistent on prohibiting these comments in the workplace, regardless of who is making them, or what their intent is.

- Race based discrimination can take many forms, and none are appropriate. Another interesting line of cases focus on discrimination against Black employees with darker skin in favor of Black employees with lighter skin. In a case out of a company in Atlanta, where the two applicants for promotion were Black, and all the decision-makers were Black, a court found that choosing the lighter-skinned applicant because of skin color violated Title VII, because the law prohibits discrimination based on "color" as well as race.

"Ask Sheila" *is prepared by Sheila Gladstone, Chair of the Firm's Employment Law Practice Group. If you would like additional information or 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

Tex. v. New Mexico, 65, ORIG., 2020 WL 7327826 (U.S. Dec. 14, 2020).

This water dispute between Texas and New Mexico concerns the evaporative losses associated with water stored in New Mexico upon the request of Texas's Pecos River Commissioner.

The Pecos River originates in the Sangre de Cristo Mountains east of Santa Fe, New Mexico, traversing New Mexico and Texas before converging with the Rio Grande River near Del Rio, Texas. In 1949, Texas and New Mexico entered into, and Congress approved of, the Pecos River Compact, providing for the equitable apportionment of the use of the Pecos River's water between the two states.

In 1987, after a number of early disputes, the Supreme Court determined that New Mexico had not complied with the Compact when it failed to release sufficient water to Texas, and issued a decree setting forth each state's rights and duties. The Court also appointed a disinterested River Master to perform annual calculations of New Mexico's water delivery to ensure it complies with its Compact obligations. In making those calculations, the River Master must abide by the River Master's Manual, which the Court described as "an integral part" of its Decree. A party may seek the Supreme Court's review of the River Master's calculations within 30 days of its final determination.

In 2014, Tropical Storm Odile poured heavy amounts of rain over the Pecos River Basin, filling Texas's Red Bluff Reservoir. To prevent flooding, Texas's Pecos River Commissioner requested that New Mexico store Texas's portion of the flows. New Mexico's Commissioner agreed, caveating that the water belongs to Texas, and that evaporative losses will be borne by Texas. A federally owned reservoir in New Mexico retained large amounts of flood waters in the Pecos Basin. When the reservoir's authority to hold the water expired, it began to release the water. Texas could not use the released water, so it also released the water to make room for water flowing from New Mexico.

The River Master's calculations of New Mexico's Compact obligations for 2014 and 2015 (the time during which it stored Texas's water) did not reduce Texas's rights to delivery based on the evaporated losses. The 30-day review period lapsed, and New Mexico filed no objection. However, in 2018, New Mexico challenged the River Master's calculations. Rather than dismiss the untimely objection, the River Master modified the Manual, allowing retroactive changes to final reports, and amended the 2015 report to credit New Mexico for the evaporative loss.

The Supreme Court, which has original jurisdiction over river compact disputes, held for New Mexico, citing language in the Compact and Decree, which provides that "If a quantity of the Texas allocation is stored in facilities constructed in New Mexico at the request of Texas, then … this quantity will be reduced by the amount of reservoir losses attributable to its storage…"

Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc., 01-18-00088-CV, 2020 WL 7502493 (Tex. App.—Houston [1st Dist.] Dec. 22, 2020, no pet. h.).

The dispute in this case follows the 2014 issuance of a Coastal Surface Lease (the "Lease") from the Chambers–Liberty Counties Navigation District ("Navigation District") to Sustainable Texas Oyster Resource Management, L.L.C. ("STORM"). The Lease authorized STORM to cultivate and harvest oysters on certain submerged land in Galveston and Trinity Bays, granted STORM the exclusive right to produce oysters on the submerged land, and authorized STORM to protect the submerged land from trespassers.

However, when the Navigation District issued STORM the Lease, parts of the 23,000 acres covered by the Lease were already subject to six existing oyster-production permits, known as "certificates of location," and accompanying oyster leases issued by the Texas Parks and Wildlife Department ("TPWD") to several oystermen ("the Oystermen"). The certificates of location and accompanying leases authorized the Oystermen to plant and construct private oyster beds. TPWD had also issued permits and licenses to the Oystermen authorizing the Oystermen to harvest oysters from naturally-occurring oyster reefs located within public fishing grounds, which also lie within the boundaries of STORM's lease.

Under the Lease, STORM began to treat the Oystermen as trespassers. Litigation ensued, and the Oystermen filed a motion for partial summary judgment, arguing that the Lease was invalid as a matter of law because the Texas Wildlife Conservation Act gave the TPWD exclusive authority to regulate oyster-production activities in Texas. The trial court granted declaratory relief to the Oystermen, declaring (1) TPWD had the exclusive authority to regulate the cultivation and harvesting of oysters; (2) the Navigation District

did not have the legal authority to issue the Lease to STORM; and (3) the Lease was void and unenforceable against the Oystermen. The trial court also declared that the Oystermen were not trespassers as a matter of law and ordered STORM to take nothing on its counterclaims.

On appeal to the Houston Court of Appeals, STORM argued that the trial court erred in its declarations, and asserted that the Oystermen improperly prosecuted their case under the Uniform Declaratory Judgment Act ("UDJA"). The Court, reviewing the issue of declaratory relief *de novo*, held that the trial court properly determined Lease's validity under the UDJA, and that such declarations were correct as a matter of law.

Rio Grande City Consol. Indep. Sch. Dist. v. Puentes, 13-19-00033-CV, 2020 WL 6878736 (Tex. App.—Corpus Christi Nov. 24, 2020, no pet. h.).

This case involves a contract dispute over the design and construction of Rio Grande City High School, and turns on whether the "economic loss rule" forecloses the Rio Grande City Consolidated Independent School District's ("RGCCISD") negligence claim. The Corpus Christi Court of Appeals employed the decision in *Sharyland Water Supply Corporation vs. the City of Alton* to decide the question of economic loss.

RGCCISD contracted with Delfino Garza, Jr. d/b/a Design Group International ("DGI") to design and construct the school facilities. DGI then executed an agreement with Edward Puentes, P.E., David Cash, P.E., and DBR Engineering Consultants, Inc. ("DBR") for engineering services. RGCCISD was not a party to DGI's contract with DBR, but sued DBR for, among other things, breach of contract. DBR filed a motion for summary judgment asserting in summary that RGCCISD's tort claims are barred by the economic loss rule.

Under the economic loss rule, parties are precluded from recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy.

In *Sharyland*, Alton and Sharyland entered into a Water Supply Agreement under which Alton conveyed its water system to Sharyland, and in exchange, Sharyland provided potable water to Alton residents and maintained the system. Alton thereafter contracted with a construction company to build a sanitary sewer system.

Sharyland alleged that it suffered significant injury because Alton's sanitary sewer residential service connections were negligently installed by the construction company in violation of state regulations and industry standards, and sued Alton for breach of contract. The Texas Supreme Court stated in its final ruling, "[c] onstruction defect cases…usually involve parties in a contractual chain who have had the opportunity to allocate risk, unlike the situation faced by Sharyland… The [economic loss rule] cannot apply to parties without…contractual privity, merely because one of those parties had a construction contract with a third party, and when the contracting party causes a loss unrelated to its contract."

Embracing *Sharyland*, the Court affirmed the trial court's judgment.

In re Plains Pipeline, L.P., 08-19-00224-CV, 2020 WL 6375332 (Tex. App.—El Paso Oct. 30, 2020, no pet. h.).

Here, a groundwater exploration company ("Winkler") sued a petroleum tank farm ("Plains") seeking declaratory judgment to establish its right to use the surface estate of Plains. Plains holds a lease on a 160-acre surface estate (the "Property"), which gives Plains the right to store, handle, treat, and transport oil, gas, and other minerals, including the right to construct, maintain, and operate oil tanks and pipelines on the premises.

To resolve these differences, Winkler sued Plains seeking a declaratory judgment stating that as owner of the dominant groundwater estate, Winkler is entitled to develop the groundwater estate by making use of the surface of the Property, and that there are no other reasonable and efficient means of producing groundwater off the Property.

Winkler sought by motion a pre-trial inspection of the Property under Texas Rule of Civil Procedure 196.7 ("TRCP 196.7"), which would consist of seven test wells. After a showcase of procedural filings and hearings, the district court found that Winkler's test wells would cause minimal interference and burden to Plains, and that the information gleaned from the inspection outweighed any burden to Plains. The district court ordered that Winkler be permitted to drill the seven test holes. Plains filed a motion for writ of mandamus arguing that the district court abused its discretion in granting Winkler the right to drill its test wells.

Plains argued that the Texas Water Code gives the surface lessee the exclusive right to possess and use the groundwater beneath the property. Winkler, however, claimed that the groundwater rights had previously been severed from the surface estate and that it holds the groundwater rights by virtue of a groundwater lease it received in 2014 for groundwater under the 160-acre surface estate. Winkler also argued that it has an implied easement in the surface estate that requires Plains to reasonably accommodate its interests.

The El Paso Court of Appeals held that a TRCP 196.7 order by a trial court is not an abuse of discretion if (1) the request is relevant and (2) the discovery sought cannot be obtained from a more convenient, less burdensome, or less expensive source, and (3) if the burden of the proposed inspection does not outweigh its likely benefits.

In a lengthy analysis of the proposed inspection's relevance, burden, expense, and likely benefit to the ongoing dispute, the Court held that the trial court did not abuse its discretion in granting the drilling of seven test wells.

Litigation Cases

Fifth Circuit vacates district court decision that held Texas Water Code was preempted by Section 1926(b) Federal Law protections.

In 2018, the United States District Court for the Western District of Texas held in

Crystal Clear Special Util. Dist. v. Marquez that protections afforded by 7 U.S.C. § 1926(b) (protecting federally indebted water associations from municipal expansion) preempted Texas Water Code Section 13.254(a-6) (moved to § 13.2541 effective September 1, 2019) thus prohibiting the Public Utility Commission ("PUC") from taking up petitions to decertify property from the holder of a certificate of convenience and necessity (CCN) that borrowed money under a federal-loan program. 316 F. Supp. 3d 965 (W.D. Tex. 2018).

On appeal, the Fifth Circuit vacated the district court's *Crystal Clear* decision based on the Fifth Circuit's intervening decision in *Green Valley Spec. Util. Dist. v. City of Schertz*, Tex., 969 F.3d 460 (5th Cir. 2020). In *Green Valley*, decided August 7, 2020, the Fifth Circuit affirmed the ruling that it lacked jurisdiction to determine the preemption issue raised in that case and did not issue an express opinion. Nonetheless, the court rejected the *Crystal Clear* holding that Texas Water Code Section 13.254(a-6) is always preempted by Section 1926(b).

Since *Crystal Clear*, the PUC has refused to release property under the streamlined expedited release process from a federally indebted CCN holder. With *Crystal Clear* vacated, the PUC is no longer restricted, and has begun to process release petitions again. *Crystal Clear* has now been remanded back to district court for decision in line with *Green Valley*—we wil see how the district court proceeds and keep you posted.

Modified contract with City still held to waive Governmental Immunity.

In *City of Mason v. Blue Oak Eng'g, LLC*, the City and Blue Oak entered into a contract in 2015 for services related to a landfill permit. 04-20-00227-CV, 2020 WL 7365452, at *1 (Tex. App.—San Antonio Dec. 16, 2020, no pet. h.). Two years into the contract, Blue Oak advised the City that it would be unable to obtain the specific landfill permit stated in the contract but would pursue another landfill permit. The original 2015 contract provided for a total estimated compensation due to Blue Oak of $142,130. Blue Oak continued obtaining a landfill permit and the City paid it approximately $300,000. Blue Oak then billed the City for an additional $62,000, which the City refused to pay. Blue Oak sued the City for breach of contract and quantum meruit to recover the unpaid amount.

The City filed a Plea to the Jurisdiction arguing it had not waived immunity to the breach of contract claim pursuant to Section 271.152 of the Texas Local Government Code. The trial court denied the City's Plea. In order for immunity to be waived under Section 271.152, five elements must be met: 1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. *City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011). In its Plea, the City argued the contract at issue did not meet this test as the "essential terms" of the original contract limit its scope to the particular landfill permit stated for the estimated payment stated in the contract, and therefore the work for which Blue Oak now sought repayment, which involves a different permit type and a payment amount beyond the estimate, cannot fall within the scope of the contract. Both the trial and appellate Courts rejected the City's argument and held the dispute does not implicate jurisdiction. Entities should be aware that under this ruling even fundamentally modified contracts can still be subject to the waiver of immunity in Section 271.152.

As a matter of first impression SCOTX holds Charter School District entitled to governmental immunity.

In *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, the Texas Supreme Court held for the first time open-enrollment charter schools and their charter-holders have governmental immunity from suit and liability to the same extent as public schools. 602 S.W.3d 521 (Tex. 2020). This case began when a landlord/developer filed suit against a charter school district for anticipatory breach of lease executed by district superintendent for development of new charter school.

Generally, charter schools operate under a contract (the charter) with the Commissioner of Education. Under each charter, an open-enrollment charter school must meet the Commissioner's "financial, governing, educational, and operational standards." The Court reasoned that although most charter-holders are private, nonprofit organizations, they nonetheless must adhere to state law and the Commissioner's regulations governing public schools or risk revocation of its charter or contracts.

These facts, in conjunction with the fact that, like public school districts, open-enrollment charter schools are "largely publicly-funded," provided the Court's reasoning that charter schools act as an arm of the State government and are therefore entitled to governmental immunity. The Court further argued that "extending governmental immunity to open-enrollment charter schools also satisfies governmental immunity's purposes," stating that "diverting charter school funds to defend lawsuits and pay judgments affects the State's provision of public education and reallocates taxpayer dollars from the legislature's designated purpose."

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA finalizes changes to the Lead and Copper Rule. On December 22, 2020, EPA released the pre-publication version of the Lead and Copper Rule under the Safe Drinking Water Act. The final rule deviates from the proposed rule in numerous ways, and for that reason, only a high-level overview of the changes is addressed here.

First, the final rule narrows the scope of lead sampling in schools and childcare facilities—community water systems must conduct sampling at 20% of elementary schools (previously, the rule proposed all K-12 schools) and 20% of childcare facilities per year over a single five-year cycle. Public water systems must also conduct sampling upon request by any childcare facility or school (including secondary schools). Second, the final rule expands certain public education requirements: systems must include instructions for accessing the lead service line ("LSL") inventory and the results of all tap sampling in their Consumer Confidence Reports, and they must also translate public education materials into other languages upon customer request. The final rule also expands the "find-and-fix" steps for when an individual sample reflects lead concentrations over 15 µg/L, changes certain sampling procedures in individual homes, and adjusts the sample site collection tiering criteria.

The three-year deadline to complete LSL inventories remains the same, meaning that systems should expect to finalize inventories by within 3 years of the final rule publication. Likewise, while the final rule made minor changes to LSL replacement rules (like allowing systems up to 180 days to make a LSL replacement after a consumer replaces private lines), the main LSL replacement rate (3%) for systems above the action level remains the same. The final Lead and Copper Rule will take effect within 60 days after publication in the Federal Register.

EPA issues draft guidance applying *County of Maui v. Hawaii Wildlife Fund*. On December 4, 2020, EPA issued a draft guidance memorandum clarifying how regulated entities should comply with the Supreme Court's *Maui* decision, an opinion issued in April dealing with Clean Water Act permits for discharges into groundwater. *Maui* held that a National Pollutant Discharge Elimination System ("NPDES") permit is required if a discharge into groundwater is a "functional equivalent" of a direct discharge into navigable waters. The *Maui* decision articulated seven factors to determine whether a discharge into groundwater meets the "functional equivalent" test. EPA's draft guidance provides context for applying *Maui's* test under existing NPDES framework and identifies an eighth factor.

EPA's memo notes that *Maui* did not modify the two threshold requirements that trigger a NPDES permit obligation: (1) there must be an actual discharge of a pollutant into a water of the United States, and (2) such discharge must be from a point source. The memo provides guidance for applying these requirements in the groundwater context—for example, hydrogeology or the nature of the aquifer may prevent an "actual discharge" from reaching a water of the United States. The memo notes that even if the two threshold requirements are met, factors like time and distance traveled can affect whether a discharge into groundwater is a "functional equivalent" of a direct discharge.

EPA's memo also identifies an eighth factor to consider in conducting a "functional equivalent" analysis—the design and performance of the system or facility from which the pollutant is released. EPA explained that this factor may affect the composition and concentration of pollutants, the transit time of pollutants, the distance travelled by pollutants, and the amount of pollutant that a facility discharges. EPA will accept comments on the draft guidance until January 11, 2021.

EPA issues an interim strategy memorandum to address PFAS in NPDES permits. On November 22, 2020, EPA published a memo outlining the agency's strategy to address Per- and Polyfluoroalkyl Substances ("PFAS") in federally issued National Pollutant Discharge Elimination System ("NPDES") permits. The memo details three recommendations for EPA regional administrators to follow while the agency's Office of Water continues to develop a regulatory strategy. Though the memo applies only to jurisdictions where EPA authorizes NPDES permits (the District of Columbia, Massachusetts, New Hampshire, and New Mexico), state-level NPDES authorities—including the TCEQ—may refer to the memo for guidance.

First, the memo recommends that NPDES permit writers include phased-in PFAS monitoring and best management practices for point source wastewater discharges where PFAS are "expected to be present." Second, the memo proposes the same monitoring and best management practices for municipal separate storm sewer systems ("MS4") and industrial stormwater dischargers

where PFAS are "expected to be present." Third, the memo recommends that the EPA's Office of Water publish a permitting compendium in the third quarter of 2021. The memo notes that any PFAS monitoring requirements in NPDES permits should use a "phased-in" approach that is triggered when the EPA publishes official monitoring methods for PFAS, which it expects will take place in 2021.

This interim guidance will apply while EPA develops analytical methods for detecting PFAS in drinking water, assesses PFAS treatment techniques, and "evaluat[es] statutory and regulatory mechanisms to manage adverse human health and environmental impacts from PFAS exposure."

Final EPA Guidance Document Procedures Go Into Effect. In the October 2020 edition of *The Lone Star Current*, we reported on EPA's proposed rulemaking 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. EPA adopted a final rule that went into effect on November 18, 2020.

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.

In addition, the final rule defines the term "active guidance document" to mean a guidance document in effect that EPA expects to cite, use, or rely upon. Any active guidance document not posted to an online EPA portal is considered to be rescinded under the rule. However, the final rule adds a procedure under which the public can petition the EPA for the reinstatement of a rescinded guidance document.

EPA Announces Decision to Retain Current Particulate Matter Emissions Standards. On December 7, 2020, EPA announced that it completed its five-year review of the Primary and Secondary National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM). PM is a criteria air pollutant under the Clean Air Act. On December 18, 2020, EPA issued a final action to retain the current primary standards meant to protect against fine particle exposures (i.e., annual and 24-hour PM2.5 standards), the primary standard meant to protect against coarse particle exposures (i.e., 24-hour PM10 standard), and the secondary PM2.5 and PM10 standards.

EPA Administrator Andrew Wheeler supported the agency's decision by emphasizing that PM levels across the country had improved in recent years and the decision is consistent with the Clean Air Scientific Advisory Committee's (CASAC) consensus advice.

EPA last revised the PM standards in 2012 when the agency tightened the primary standard for PM2.5 from 15 micrograms per cubic meter to 12 micrograms per cubic meter. EPA also set the 24-hour fine particle standards at 35 micrograms per cubic meter in 2012. The 24-hour limit for PM10 has stayed at 150 micrograms per cubic meter since 1987. The recently announced final action will not change any of these standards. According to EPA, currently, 16 counties in the U.S. are in nonattainment of the primary PM2.5 NAAQS and 23 counties are currently in nonattainment of the primary PM10 NAAQS.

EPA Releases Interim Guidance on Destroying and Disposing of PFAS. On December 18, 2020, EPA released interim guidance on destroying and disposing of certain PFAS and PFAS-containing materials as part of its PFAS Action Plan. Please refer to the April and July 2019 editions of *The Lone Star Current* for more information about EPA's PFAS (per- and polyfluoroalkyl substances) Action Plan, which seeks to regulate the "forever chemicals" and designate them as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. The interim guidance provides the current state of the science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products, including aqueous film-forming foam (AFFF) for firefighting. These techniques and treatments include incineration, landfill disposal, and underground injection technologies.

Specifically, the interim guidance addresses PFAS and PFAS-containing materials, including:

- AFFF;
- Soil and biosolids;
- Textiles, other than consumer goods, treated with PFAS;
- Spent filters, membranes, resins, granular carbon, and other waste from water treatment;
- Landfill leachate containing PFAS; and
- Solid, liquid, or gas waste streams containing PFAS from facilities manufacturing or using PFAS.

However, the interim guidance is not intended to address destruction and disposal of PFAS-containing consumer products, such as non-stick cookware and water-resistant clothing. EPA announced that it will accept comments on the interim guidance for 60 days following publication in the *Federal Register*. EPA will then consider and incorporate comments, as appropriate, into a revised document. EPA has not published notice in the *Federal Register* at the time of this writing.

EPA Publishes Final Rule Reforming New Source Review Applicability Regulations. On November 24, 2020, EPA published a final rule revising the agency's New Source Review (NSR) applicability regulations to clarify when the requirement to obtain a major NSR permit applies to a source proposing to undertake

a physical change or a change in the method of operation (i.e., a project) under the major NSR preconstruction permitting programs. Under these programs, an existing major stationary source proposing to undertake a project must determine whether that project will constitute a major modification subject to the major NSR preconstruction permitting requirements by following a two-step applicability test. The first step involves determining whether a proposed project will cause a significant emissions increase of a regulated NSR pollutant and if it would, then the second step determines whether there will be a significant net emissions increase of the same pollutant.

Under the final rule, facilities will be able to include both emissions increases and decreases in Step 1 (a method EPA refers to as "Project Emissions Accounting"), which some critics argue will enable facilities to avoid triggering NSR requirements and allow them to make modifications that will significantly increase source wide emissions. In response to such criticism, EPA has stressed that the rule incentivizes installation of new technologies that can both improve operator efficiency and reduce air pollution.

The final rule became effective December 24, 2020 and will apply to EPA and permitting authorities that have been delegated NSR federal authority. State and local air agencies that implement the NSR programs through EPA-approved State Implementation Plans (SIPs) are not required to modify their SIPs to comply with the final rule, but have the discretion to adopt the changes.

EPA Finalizes Clean Air Act Cost-Benefits. On December 9, 2020, EPA finalized a procedural rule to improve the rulemaking process under the Clean Air Act (CAA) cost-benefits rule by establishing requirements for evaluating the benefits and costs of regulatory decisions. The final rule codifies best practices for benefit-cost analysis (BCA) in rulemaking and, according to EPA, will provide clarity for states, local communities, industry, and other stakeholders regarding EPA's rulemaking considerations. The primary requirements include: (1) EPA preparing a BCA for all significant proposed and final regulations under the CAA; (2) EPA developing BCAs in accordance with best practices from the economic, engineering, physical, and biological sciences; and (3) EPA increasing transparency in how it presents the costs and benefits resulting from significant CAA regulations.

EPA Rescinds "Once In, Always In" Policy for Major Sources of HAPs in Final Rule. On November 19, 2020, EPA published a final rule rescinding the agency's "Once In, Always In" policy for major sources of hazardous air pollutants (HAPs). More specifically, the rule finalizes amendments to the General Provisions that apply to National Emission Standards for Hazardous Air Pollutants (NESHAP). According to EPA, these amendments implement the plain language reading of the "major source" and "area source" definitions of section 112 of the Clean Air Act and provide that a major source can be reclassified to area source status at any time upon reducing its potential to emit HAPs to below the major source thresholds of 10 tons per year (tpy) of any single HAP and 25 tpy of any combination of HAPs. The rule also finalizes amendments to clarify the compliance dates, notification, and recordkeeping requirements that apply to sources choosing to reclassify to area source status and to sources that revert back to major source status, including a requirement for electronic notification.

The final rule goes into effect on January 19, 2021.

EPA Sets Greenhouse Gas Standards for Aircraft. On December 23, 2020, EPA issued a final rule to regulate greenhouse gas (GHG) emission standards emitted by aircraft, including certain new commercial airplanes and large passenger jets.

The new 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. Before this rule, aircraft were the single largest GHG-emitting transportation source not subject to GHG standards in the U.S., according to EPA.

In developing the new GHG standards for aircraft, 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 new GHG standards apply to new type design airplanes and in-production airplanes on or after January 1, 2028. The standards do not apply to already manufactured airplanes that are currently in use.

Michael Regan nominated to lead EPA. On December 17, 2020, President-elect Joe Biden picked Michael Regan—the head of North Carolina's environmental department—to serve as agency head for the EPA. Regan worked with EPA's Office of Air for nearly ten years under the Clinton and George W. Bush administrations. After leaving the EPA, Regan worked as a director with the Environmental Defense Fund, focusing on climate and energy issues. Since 2017, Regan has served as the head of North Carolina's Department of Environmental Quality ("NCDEQ"), where he has led major efforts including a cleanup of the Cape Fear River to address PFAS contamination and a multi-year negotiation with Duke Energy to mitigate a 2014 coal ash spill. Regan also formed the NCDEQ's Environmental Justice and Equity Advisory Board, which aims to ensure that the agency fully considers the needs of communities that face disproportionate levels of environmental harm. If confirmed by the Senate, Regan would be the first black man to lead the EPA.

United States Fish and Wildlife Service ("FWS")

FWS publishes a final rule defining "habitat" under the Endangered Species Act. On December 16, 2020, FWS joined the National Marine Fisheries Service and the National Oceanic and Atmospheric Administration to publish a final rule defining "habitat" for use in critical habitat designations under the Endangered Species Act ("ESA"). The new definition reads: "For

the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species."

The agencies note that this definition is broad enough to cover both "occupied areas" and "unoccupied areas," which are terms included in the ESA's statutory definition of "critical habitat." The preamble to the final rule explains that the agencies added the term "periodically" to include ephemeral and seasonal habitats. The definition also references "one or more life processes" so that "habitat" can include areas that species use during a particular lifecycle phase (such as spawning habitat) or during a particular season (such as migratory habitat).

Importantly, the agencies note that the definition excludes areas that "do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur." However, the preamble indicates a degree of flexibility in habitat determinations: "[I]f areas are initially determined not to be habitat, they may be subsequently determined to be habitat." Moreover, the preamble notes that if "conditions change or new information becomes available indicating that areas . . . not previously considered to be habitat have the necessary resources and conditions at that time in the future, critical habitat can be revised."

The final rule includes language limiting the definition only to the area of critical habitat designations, which will prevent the definition from causing unintended consequences in other sections of the ESA or in other federal programs. The definition will apply only to relevant rulemakings published after the rule's effective date of January 15, 2021.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ opens comment period for renewal of TPDES Stormwater Multi-Sector General Permit. The public comment period on TCEQ's updated Stormwater Multi-Sector General Permit ("MSGP") opened on December 11, 2020 and will close on January 10, 2021. TCEQ will hold a virtual public meeting on the proposed MSGP on January 11, 2021.

The updates to the previous version of the MSGP included both procedural changes and substantive changes. The proposed revisions to the MSGP include several procedural changes to reporting requirements (such as requiring a waiver for paper submissions), add several requirements for Notice of Intent ("NOI") and a Notice of Change ("NOC") forms, and require that facilities post proof of permit coverage on site. The proposed MSGP also requires a permittee to file a Delegation of Signatory form in the State of Texas Environmental Reporting System ("STEERS") if signatory authority is delegated by an authorized representative. The proposed MSGP also includes certain substantive changes, like adding best management practices for facilities that handle pre-production plastic and lowering benchmark monitoring values for biological oxygen demand and total suspended solids.

After the comment period closes, TCEQ will make necessary changes and finalize the updated MSGP before the current version expires on August 14, 2021.

TCEQ appoints Laurie Gharis as Chief Clerk. On November 18, 2020, TCEQ appointed Laurie Gharis as the TCEQ's Chief Clerk. Prior to this appointment, Gharis served as manager of the agency's Watermaster Program. Before joining TCEQ, Gharis directed the Wisconsin Center for Environmental Education at the University of Wisconsin. She holds a Ph.D. in Forestry and Environmental Resources and a Master's in Public Administration from North Carolina State University, and a B.S. from Texas A&M University.

TCEQ Proposes Rulemaking to Clarify Exemptions Under New Recycling Rules. On October 7, 2020, the TCEQ Commissioners approved a proposed rulemaking to repeal and replace 30 Texas Administrative Code §§ 328.203 and 328.204, concerning Waste Minimization and Recycling. Sections 328.203 and 328.204 comprise TCEQ's new governmental entity recycling rules, which went into effect on July 2, 2020. The new rules generally require governmental entities to establish a recycling program and implement purchasing preference policies for recyclable materials.

The proposed rulemaking is aimed at restructuring the rules to provide additional clarity to Chapter 328; specifically, clarifying that the recycling rule exemptions also apply to the purchasing preference policy requirement, and not just the recycling program requirement. The proposed rulemaking will essentially flip the order of the current rules in order to provide this clarity, but it will not substantively change the rule language or requirements.

TCEQ anticipates adopting a final rule in March 2021. Please refer to the October 2020 edition of *The Lone Star Current* for further details about TCEQ's new governmental entity recycling rules.

TCEQ adopts final rule allowing for the use of electronic mail for application deficiency notices and responses. On October 7, 2020, the TCEQ Commissioners adopted a final 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. Before the rulemaking, section 281.18 required that notices of application deficiencies be sent to the applicant via certified, return receipt mail. 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 indicated that applicants will benefit from a more efficient permit processing time, especially those seeking new permits or amendments to existing permits.

TCEQ Adopts Rulemaking to Implement HB 1331, HB 1435, and HB 1953. On October 7, 2020, the TCEQ Commissioners adopted

a final rulemaking to implement new legislation from this past session related to municipal solid waste (MSW). Specifically, the rulemaking makes changes to 30 Texas Administrative Code (TAC) Chapters 305 and 330 to implement HB 1331, HB 1435, and HB 1953.

Pursuant to **HB 1331**, the rulemaking amends 30 Texas Administrative Code (TAC) §§ 305.53(a)(7) and 330.59(h)(1) to increase the application fee for a permit, or major permit amendment, for an MSW facility from $100 to $2,000. 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.

Pursuant to **HB 1435**, the rulemaking amends 30 TAC § 330.73(c) 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.

Pursuant to **HB 1953**, 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 repeals 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.

TCEQ Renews Oil and Gas General Operating Permits and Requests Public Comment on Revisions. On October 15, 2020, TCEQ issued renewals to Oil and Gas General Operating Permits (GOPs) Numbers 511-514. Under the renewed GOPs, current permit holders are required to submit an application for a new authorization to operate (ATO), if any of the emission units, applicability determinations, or the basis for the applicability determinations are affected by the revisions in the renewed GOPs. If the revisions in the GOPs do not affect a particular site, a new ATO is not required. The renewed GOPs contain revisions based on recent federal rule changes, which include updates to 40 Code of Federal Regulations Part 60, Subpart OOOOa published in the September 14, 2020 and September 15, 2020 *Federal Register*. The revisions also correct typographical errors and update language for administrative preferences. TCEQ opened a comment period on the revisions, which ended on December 16, 2020. TCEQ also held a remote public hearing on December 11, 2020 concerning the revisions to the GOPs.

Public Utility Commission of Texas ("PUC")

PUC Compares Electricity Utility Distribution Spending and Reliability. Each year, the Public Utility Commission (PUC) releases a report tracking the reliability-related spending of investor-owned electric utilities (IOUs) providing distribution service across the state of Texas. This year's report covers the ten-year period from 2010-2019, providing data on (1) distribution system spending; (2) all investor-owned electric distribution utilities serving customers in Texas; (3) variations in spending and reliability data in graphical format; and (4) outage comparisons between utilities. Outage comparisons use the System Average Interruption Duration Index (SAIDI) and System Average Interruption Frequency Index (SAIFI) calculations to show the duration and frequency of interruptions.

The Commission's report can be found at: http://interchange.puc.texas.gov/Documents/46735_26_1089530.PDF

Thomas Gleeson Appointed New PUC Executive Director. Public Utility Commission (PUC) Executive Director John Paul Urban III has resigned, effective immediately, the agency announced Wednesday, December 9, 2020. After serving as the PUC's Legislative Director from 2011 to 2014, Urban returned two years ago as Executive Director.

At the December 17, 2020 open meeting, the Commissioners announced that Thomas Gleeson would be promoted to be the new Executive Director. Thomas has been with the PUC since 2008 in various roles. From 2015 to 2018, he served the Director of Finance and Administration, and from 2018 until now, he has served as the Chief Operating Officer.

The PUC Prepares for 2021 Legislative Session. The Public Utility Commission (PUC) has acknowledged that this is not the year for utility issues to take center stage at the Legislative Session, so it seems that expectations are low for any significant changes in 2021. In the PUC's Biennial Report to the 87th Legislature (filed on December 10, 2020 in Docket No. 50475), the PUC provided a report on significant actions taken over the past two years, described emerging issues, and summarized its recommendations to the Legislature for potential water, electric, and telecommunications legislation. Based on this report and comments made by the Commissioners at the open meeting on December 17, 2020, the PUC recommends legislation on the following:

- Sale of Electricity at Charging Stations: As the cost of electric vehicles has dropped, more consumers have purchased them, with sales rates doubling year-over-year. With increased adoption of electric vehicles over fuel-based vehicles, there is a growing need for public-use charging stations to be located off of highways and in places such as large retail shopping centers or garages near office buildings. The sale of electricity through these charging stations could potentially bring the companies owning them under the definition of an "electric utility."

The PUC proposes that the Legislature clarify that the use of an electric vehicle charging station is not an electric utility or a retail electric provider.

- Texas Universal Service Fund (TUSF) Shortfall: The TUSF is funded through a surcharge based on an estimate of intrastate telecommunications service usage. A surcharge is assessed on the estimated intrastate voice service portion of telecom companies' taxable receipts. In fiscal year 2019, wireless service providers reviewed their service packages and determined that a much smaller part of their packages was devoted to providing voice service than previously estimated. As a result, a smaller amount of taxable receipts is eligible for TUSF surcharge assessment. This has created an unanticipated, marked shortfall of TUSF revenues. Therefore, to maintain the solvency of the TUSF, either TUSF support must be reduced or collections must be increased. The PUC requests guidance from the Legislature regarding the State's policy on the continuation of TUSF support and funding.
- Water: Since the transfer of economic regulation of water and sewer utilities, the PUC has identified many recommended revisions to the Texas Water Code. These revisions would clarify existing statutory ambiguities and, where appropriate, harmonize the regulation of water and sewer utilities with the PUC's regulation of the electric industry. The PUC believes that a comprehensive review of the Texas Water Code, as it relates to economic regulation, is warranted.
- Filing Fees: The PUC is requesting the statutory authority to charge fees to certain parties that make paper filings with the PUC at a level not to exceed the costs incurred by the agency.

We will provide updates on how the 87th Legislature acts on the PUC's recommendations later this year.

PUC Staff Recommends Elimination of TUSF Support for Certain Providers. The PUC has authority under PURA § 56.023(p) and (r) and 16 Texas Administrative Code (TAC) § 26.409 to determine whether TUSF support should be eliminated. When the number of access lines served by eligible telecommunications providers (ETPs) within an exchange decrease by at least 50% from the number served as of December 31, 2016, Staff is required to review the eligibility of the ETPs for receipt of TUSF. Once the PUC has identified exchanges that have met this threshold, the PUC must then determine whether TUSF support should be eliminated, applying the following criteria: (1) the total number of access lines in the exchange served by competitive ETPs receiving TUSF support; (2) the number of competitors providing comparable service in the exchange; and (3) whether continuing the TUSF support is in the public interest.

In exercising this review, the PUC Staff identified 10 exchanges where access lines decreased by at least 50%, and opened dockets to review each exchange (Dockets 51280 through 51289). As a result, Staff has recommended continuing TUSF support for the following wire centers: Briggs (Docket 51280), McDade (Docket 51284), Paige (Docket 51285), Telephone (Docket 51287), and Wallis (Docket 51288). In most of these cases, Staff pointed out either that ETPs are the only providers of service, or they provide unique services in the area. Staff also explained that these ETPs serve rural areas and provide access to 9 1 1, and that service would not be economically viable without TUSF support.

Staff recommended eliminating TUSF funding in the following wire centers: Falfurrias (Docket 51281), Jackson (Docket 51282), Lyford (Docket 51283), and Water Valley (Docket 51289). In many of these cases, Staff found there are no ETPs receiving TUSF support in the area, there are no access lines at the exchange, and that continued support to the ETPs would not be in the public interest. All of these dockets are pending further action by the Commission. In the remaining case involving the Santa Rosa Wire Center (Docket 51286), Staff has yet to file its recommendation.

PUC Audit of TUSF. At the end of July, Public Utility Commission (PUC) Chairman Walker directed Staff to audit companies receiving Texas Universal Services Fund (TUSF) monies to determine if they are using the funds correctly and to investigate which companies are actually laying down fiber using TUSF funds.

In its general investigative project to determine whether recipients of TUSF revenues are using such funds correctly (Docket No. 51433), the PUC Staff asked 55 questions of all such companies, inquiring into the use of TUSF funds, TUSF disbursements, revenues and expenses, accounting, allocation of expenses, services provided, advertising, the companies' plans for continuing to provide services given the imminent reduction to the TUSF, and much more. Responses were due by December 3, 2020. Thus far, approximately 65 entities have responded.

As would be expected, the respondents are small companies or cooperatives serving rural areas. Their responses are generally the same, indicating that their trade groups were probably instrumental in drafting some of the responses. For instance, the last two questions were premised upon "the imminent reduction in the TUSF," and asked the respondents to provide their plans for continuing basic local telecommunications services and non-regulated services that use the same plant assets as basic local telecommunications services. The respondents noted that until propounding the requests for information, the PUC had not made it clear that reductions are imminent, and the respondents were uninformed as to how the reductions would work: how much support will be cut; will cuts vary depending on type of providers or size; will support for all programs/service be cut, or just some; when will support cuts begin; for how long will support be cut; and will the providers be allowed an opportunity to recover lost support in a future proceeding? The companies also reminded Staff that much of the requested information is already on file with the PUC in annual reports that are very detailed in order to provide enough information to avoid the need for burdensome traditional regulatory rate cases at the PUC.

The companies' responses generally illustrate that they use long-

standing, well-vetted, mandatory regulated processes to ensure that only their regulated, intrastate telecommunications plant in service have any impact on their state returns or TUSF support. The companies' responses to Staff's questions are almost all voluminous, spanning hundreds of pages of information, explanations, and attachments.

The PUC Staff will now begin the arduous task of sifting through the tens of thousands of pages of responses to glean conclusions to report to the Commissioners. The PUC will likely try to present an analysis on its audit of TUSF recipients so that the TUSF shortfall issue can be properly addressed at the 87th Legislative Session that will soon commence at the beginning of 2021; however, this may be a tall task in such a short timeframe.

SPCOA Update. The number of cases in which companies are filing to relinquish their Service Provider Certificates of Operating Authority (SPCOA) are continuing to decline. Scientel Solutions, LLC (Scientel) out of Illinois filed an application for relinquishment of its SPCOA, stating that it is changing its service offerings (Docket No. 51448). Its application indicates that it never had any customers in the state and thus never provided any services. Scientel's application was approved on December 21, 2020.

In other dockets, Voxbeam Telecommunications Inc. (Docket No. 51235) received final approval of its relinquishment application on December 8, 2020. Also, O1 Communications Inc.'s application for relinquishment (Docket No. 50748), as supplemented and amended, has been recommended for approval by PUC Staff.

TNMP Parent to Merge with AVANGRID Companies; Requires PUC Approval. On November 20, 2020, TNMP, NM Green Holdings, Inc. (Green Holdings), and Avangrid, Inc. (Avangrid) (collectively, Joint Applicants) filed their Joint Report and Application for Regulatory Approvals with the Public Utility Commission of Texas (PUC) in Docket No. 51547, detailing TNMP's proposed new ownership.

Avangrid's energy business features being the third-largest wind power operator in the United States, including projects in Texas. The merged company will serve more than 4 million electric and natural gas customers of 10 regulated utilities across New York, Connecticut, Maine, Massachusetts, New Mexico, and Texas. Therefore, the transaction is subject to PNM Resources shareholder approval, regulatory approvals from multiple federal and state regulatory bodies, including the PUC, and other customary closing conditions.

In their filing, the Joint Applicants described how the proposed transaction will benefit TNMP customers and Texas, providing:

- $8.6 million rate credit to electric delivery rates payable over three years after the closing;
- Better efficiency and cost-effective access to capital;
- Financial strength;
- Retention of local control and management, with the addition of extensive support; and
- Other commitments that will become PUC-enforceable.

On December 14, 2020, the administrative law judge (ALJ) granted the intervention of Cities Served by TNMP (Cities), the Office of Public Utility Counsel (OPUC), and Texas Industrial Energy Consumers (TIEC). Additionally, on December 14, TNMP filed a procedural schedule that the parties approved, which provides that intervenor testimony will be filed in February and the hearing on the merits will take place on March 24-26, 2021 at the State Office of Administrative Hearings (SOAH).

However, at the December 17, 2020 PUC open meeting, the Commissioners voiced their preference to keep the proceeding before the PUC instead of SOAH. The Joint Applicants have since filed a Motion to Suspend the Schedule Filing Requirement in order to suspend the requirement for a SOAH hearing. If the parties do not settle the case, the PUC will schedule a hearing to take place at an open meeting in late March or early April, 2021.

TNMP Advanced Meter System Update Recommended for Approval. As we have previously reported, on October 2, 2020, Texas-New Mexico Power Company (TNMP) filed a request at the Public Utility Commission (Commission) for approval to change the deployed advanced meter technology in its previously approved Advanced Metering System (AMS) Deployment Plan (Docket No. 51387). TNMP intends to upgrade the communication technology for 68% of its AMS meters in certain areas from cellular to radio frequency mesh (RF Mesh) because its current AT&T cellular 3G network will be completely decommissioned in February 2022.

On November 9, 2020, PUC Staff recommended approval of TNMP's application. On November 17, 2020, TNMP and PUC Staff filed a Joint Notice of Approval and Proposed Order, with Cities being unopposed to the filing.

Because this is just considered an update to TNMP's previously approved AMS Deployment Plan, it proceeds on an expedited schedule and was supposed to be administratively approved within 45 days of the application (November 16, 2020). However, in Order No. 7, the PUC's administrative law judge (ALJ) extended the deadline for the Commission's approval until January 14, 2021.

ETT Settles for Rate Decrease to Avoid Filing Full Rate Proceeding. On December 4, 2020, Electric Transmission Texas, LLC (ETT) filed an application for a good cause extension of its rate filing deadline, with support from the Staff of the Public Utility Commission of Texas (PUC or Commission), Office of Public Utility Counsel (OPUC), Texas Industrial Energy Consumers (TIEC), and the Gulf Coast Coalition of Cities (Cities) (collectively Parties).

Under the Commission's rules, ETT is required to file a rate case at the PUC on or before the later of: (a) 48 months from the order in the utility's most recent rate proceeding or "other proceeding in which the PUC approved a settlement agreement reflecting a rate modification that allowed the electric utility to avoid the filing of such a rate case"; or (b) the date listed in the rule, which

for ETT is February 1, 2021. Because by February 1, 2021 it will have been longer than 48 months since a proceeding where the PUC has approved rates for ETT, the utility would be required to file a full rate case by February 1, 2021. In order to avoid the need for litigation of a full rate case proceeding, the utility has worked with the Parties to reach an agreement on its rates.

On December 9, 2020, ETT and the Parties reached an agreement and filed a request for a good cause waiver of the requirement for the utility to file a full rate review proceeding by February 1, 2021. The Stipulation provides:

- A revenue requirement of $311 million, which is a decrease of $8.3 million from ETT's actual revenue of approximately $319.3 million for the twelve-month period ending September 30, 2020;
- ETT will make a tariff filing to implement rates that reflect the new revenue requirement with an effective date of February 1, 2021, if the agreement is approved by the PUC;
- ETT has agreed to forgo recovery of rate case expenses associated with preparation of its rate case and the Stipulation in this or any subsequent docket;
- The Signatories have agreed that a PUC order approving the Stipulation would constitute an order approving a settlement agreement reflecting a rate modification that allowed the electric utility to avoid the filing of a full rate case proceeding by February 1, 2021.

At the December 17, 2020 open meeting, the PUC approved the stipulation.

Railroad Commission of Texas ("RCT")

Republican Jim Wright Elected Railroad Commissioner. In the 2020 general election, Republican Jim Wright defeated Democrat Chrysta Castañeda in the election for a seat at the Texas Railroad Commission (RRC), the state agency that regulates oil and gas production, as well as gas utility rates. The RRC consists of three commissioners who are elected for statewide, six-year, staggered terms.

"Agency Highlights" *is prepared by Lauren Thomas in the Firm's Water Practice Group; Sam Ballard in the Firm's Air and Waste Practice Group; and Patrick Dinnin in the Firm's Energy and Utility, Litigation, and Compliance and Enforcement Practice Groups. If you would like additional information or have questions related to these cases or other matters, please contact Lauren at 512.322.5850 or lthomas@lglawfirm.com, Sam at 512.322.5825 or sballard@lglawfirm.com, or Patrick at 512.322.5848 or pdinnin@lglawfirm.com.*

Lloyd Gosselink Rochelle & Townsend, P.C. wrapped up its first season of Listen In With Lloyd Gosselink: A Texas Law Firm in December, completing seven episodes featuring various topics/attorneys throughout the Firm's practice groups. You can listen to Season One by visiting lg.buzzsprout.com or on our website at lglawfirm.com.

Launching early this year, Season Two will be out and available on your favorite streaming platforms and all your smart devices. Follow us on Twitter, LinkedIn, and Facebook to be notified when the latest episode is out.

We are interested in the topics you want to hear. Please send your requests to editor@lglawfirm.com to let us know topics of interest to you. You can also send us an email at that same address to be added to the podcast distribution list. The episode lineup from 2020 and projected topics for 2021 are below:

2020 Season One

- A Litigator's Perspectives on COVID-19 | Joe de la Fuente and James Parker
- Lead & Copper Rule | Lauren Thomas and Nathan Vassar
- PUC & Rate Cases | Chris Brewster and Jamie Mauldin
- Dos and Don'ts of Interviewing & Hiring Legally | Sheila Gladstone
- Navigable Waters Protection Rule: Waters Of The United States (WOTUS) | Lauren Thomas and Nathan Vassar
- The Texas Legislature | Ty Embrey

2021 Season Two (listed in no particular order):

- CCN Corner – Providing Updates on Certificates of Convenience and Necessity | David Klein
- Vested Rights Act and Utilities | Stefanie Albright and James Parker
- Good Governance and Ethics | Lauren Kalisek
- Working and Retiring at Lloyd Gosselink | Georgia Crump and Jamie Mauldin
- PFAS | Lauren Thomas and Sam Ballard

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