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THE LONE STAR CURRENT

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A REGULAR SESSION LIKE NO OTHER - RECAP OF THE REGULAR SESSION OF THE 87TH TEXAS LEGISLATURE

by Ty Embrey

The Regular Session of the Texas Legislature ended on May 31st when the Legislature adjourned *Sine Die*. The Regular Session of the 87th Texas Legislature was one of the most unusual Regular Sessions the citizens of Texas have ever seen. The Legislature operated the entire session under the conditions created by the Covid-19 pandemic and many normal legislative activities were impacted by the pandemic in some way. The state experienced a major winter storm event, Winter Storm Uri, in February that caused a substantial number of deaths and significantly impacted the electric grid in Texas. The Legislature invested a large amount of time and effort during the Regular Session to try and address the issues that Winter Storm Uri brought to light.

The Regular Session did kick off on January 12th with the election of a new Speaker of the Texas House, Dade Phelan. Speaker Phelan is a Republican from Beaumont who has served as a state representative for over 8 years. A total of 7148 bills and joint resolutions were filed during the Regular Session, 21 bills were vetoed by Governor Abbott, and 1083 bills and joint resolutions became effective as Texas law.

This article summarizes the major legislation that addressed reliability and weatherization issues for utilities, groundwater, water utilities, solid waste and open government issues.

I. Utilities – Response to Winter Storm Uri, Weatherization and Reliability

The Legislature passed a significant package of bills in response to Winter Storm Uri and in an effort to address reliability and weatherization issues to prevent many of the issues faced by Texas citizens in February. The bills below are the major pieces of legislation that accomplished that objective:

SB 3 (Schwertner) - Relating to preparing for, preventing, and responding to weather emergencies, power outages, and other disasters. SB 3 is the Texas Legislature's effort to improve the reliability and weatherization efforts for water, gas, and electric utilities in Texas in response to Winter Storm Uri. There were numerous new requirements placed on electric and gas utilities. SB 3 created a new Texas Energy Reliability Council that is tasked with preparing a report on an annual basis on the reliability and stability of the electricity supply chain in this state. SB 3 also created the State Energy Plan Advisory Committee to study the Texas energy market and prepare a report that is due to the Texas Legislature by September 1, 2022. In regards to water and wastewater utilities, SB 3 requires affected utilities, which SB 3 defines as retail public utilities, exempt utilities, or providers or conveyors of potable or raw water service, to ensure the emergency operation of their water system during an extended power outage at a minimum water pressure of 20 pounds per square inch, or at a water pressure level approved by the Texas Commission on Environmental Quality ("TCEQ"), as soon as safe and practicable following the occurrence of a natural disaster; and adopt and submit to TCEQ for its approval: (A) an emergency preparedness plan that demonstrates the utility's ability to provide the emergency operations described by Subdivision (1); and (B) a timeline for implementing the emergency preparedness plan. SB 3 provides specific information regarding TCEQ review of each utility's emergency preparedness plan and what information should be included in such a plan. SB 3 establishes that a retail public utility that

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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

Thomas Brocato and Taylor Denison will be presenting "Legal Fallout from Winter Storm Uri" at the Texas Public Power Association 2021 Annual Meeting on July 27 in San Antonio.

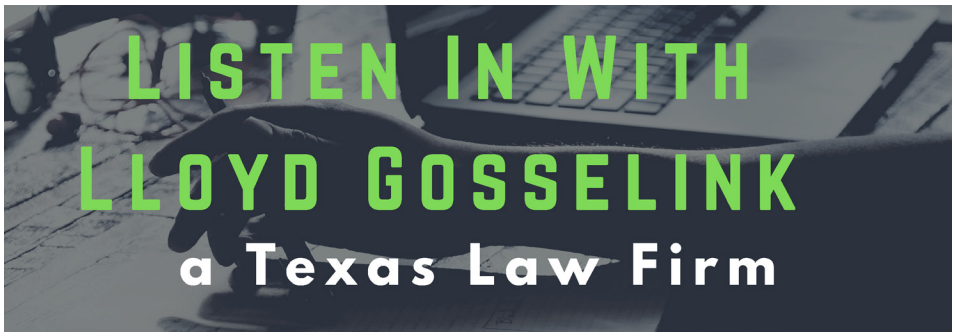
Sheila Gladstone will be discussing the "Fair Labor Standards Act, Overview and Update" at the Texas City Attorneys Association Summer Conference on August 5 in Austin.

Maris Chambers will give an "Update on Certificate of Convenience and Necessity Case Law" at the Texas City Attorneys Association Summer Conference on August 5 in Austin.

Robyn Katz will discuss "Animal Issues" including dangerous dog ordinances, compliance with Texas Supreme Court cases, and best practices for drafting ordinances at the Texas City Attorneys Association Summer Conference on August 5 in Austin.

Sheila Gladstone will present "Fire, Aim, Ready? Panel Discussion Navigating Concealed Carry" at the Rural Telecom TxConnect Membership Summit on August 16 in San Antonio.

Sheila Gladstone will give an "Employment Law Update" at the Community Supervision and Corrections Chief's Conference on September 27 and the Community Supervision and Corrections Division HR Forum on September 29 in Galveston.



Lloyd Gosselink Rochelle & Townsend, P.C.'s podcast **Listen In With Lloyd Gosselink: A Texas Law Firm**, has completed its second season of episodes! In Season 2, we interviewed some new and returning guest speakers. During the show, you will hear our firm's attorneys share timely topics for our practice areas. You can listen to Season One and Two by visiting our website at lglawfirm.com, lg.buzzsprout.com, or your favorite streaming platforms.

Click on the episodes to listen now:

- Ep. 7 – The Texas Legislature (COVID-19 Update) ft. Ty Embrey
- Ep. 6 – Regulation of Per- and Polyfluoroalkyl Substances (PFAS) ft. Sara Thornton and Lauren Thomas
- Ep. 5 – Governmental Immunity and Contract Provisions ft. Stefanie Albright and James Parker
- Ep. 4 – Ethics and Leadership in Challenging Times ft. Lauren Kalisek
- Ep. 3 – Federal Policy Updates in the New Administration ft. Sara Thornton, Nathan Vassar, and Lauren Thomas
- Ep. 2 – Employment Law during COVID-19: How to Implement a COVID-19 Vaccination Policy ft. Sarah Glaser and Emily Linn
- Ep. 1 – Working and Retiring at Lloyd Gosselink ft. Jamie Mauldin and Georgia Crump

Season Three is coming later this year! Interested in a topic and would like to hear from our expert attorneys in a practice area, email us at editor@lglawfirm.com.

MUNICIPAL CORNER

The zoning authority of a municipality is likely subservient to the reasonable exercise of an open-enrollment charter school in choosing a building location. Tex. Att'y Gen. Op. KP-0373 (2021).

The Honorable Larry Taylor, Chair of the Senate Committee on Education, requested an opinion by the Attorney General ("AG") to assess the authority of a municipality to place certain planning and zoning requirements upon facilities constructed by open-enrollment public charter schools that are not otherwise applied to facilities constructed by independent school districts. The AG opined that the permitting process may not be used to deny public schools the right to choose reasonable locations for their buildings, and that a municipal zoning ordinance treating open-enrollment charter schools differently than other public schools is likely inconsistent with state law.

The AG first addresses a municipality's authority to regulate the location of public schools, including open-enrollment charter schools. The AG's analysis references the Legislature's constitutional duty to establish free public schools pursuant to Art. VII, Section 1 of the Texas Constitution and further explains how the Legislature has delegated this duty in part to independent school districts and in part to open-enrollment charter schools. Pursuant to this delegation, the AG explains the Texas Supreme Court "has determined that the school district's authority to locate school facilities overrides the police power of municipalities to zone them out in order that the legislative purpose in delegating this authority to the school might not be frustrated." *City of Addison v. Dallas Indep. Sch. Dist.*, 632 S.W.2d 771, 773 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (discussing *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670 (1973)). The AG further cites *Austin Independent School District v. City of Sunset Valley* to emphasize the Texas Supreme Court's conclusion that while a school district may be subject to municipal safety regulations and building codes, a city could not use its zoning power to exclude school buildings from the city's boundaries. 502 S.W.2d 670, 672 (Tex. 1973). The AG explained that while an open-enrollment charter school is generally not treated as a school district, a court would likely conclude for the same reasons applied to traditional public schools that the zoning authority of a municipality is subservient to the reasonable exercise of an open-enrollment charter school in choosing a building location.

The AG next discusses whether municipal zoning ordinances may treat open-enrollment charter schools differently from other public schools or whether they must instead treat all types of public schools similarly. Citing Sections 12.103 and 12.105 of the Texas Education Code, the AG first establishes that open-enrollment charter schools are part of the public-school system and that the Legislature has provided that open-enrollment charter schools are generally subject to the municipal zoning ordinances applicable to public schools. Reading these sections together and interpreting them in the context of the Act as a whole, the AG suggests it was the Legislature's intent that municipalities apply their zoning ordinances to open-enrollment charter schools in the same way they do to traditional public schools.

The AG lastly turns to the question of whether an ordinance requiring a special use permit or other permission or consent from a municipality prior to construction usurps State authority to select and approve locations for open-enrollment public charter schools. The AG states that while the Commissioner of Education grants the authority to operate an open-enrollment charter school, there is nothing specifying that the Commissioner, the Texas Education Agency, or any other state entity shall select the location for an open-enrollment charter school. Citing its previous opinions, the AG clarifies that a municipality may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of "aesthetics and the maintenance of property values" so long as those regulations and ordinances do not effectively deny the district the ability to reasonably choose a building site. Tex. Att'y Gen. Op. No. GA-0697 (2009) at 3; see also Tex. Att'y Gen. Op. No. JM-514 (1986) at 2. The AG thus states that any such ordinances would have to be evaluated on a case-by-case basis, but ultimately concludes that the permitting process may not be used to effectively deny public schools, including open-enrollment charter schools, the right to choose reasonable locations for their buildings.

This opinion provides helpful guidance to municipalities regarding the extent to which they can regulate public school districts within their boundaries. The opinion also clarifies that while open-enrollment charter schools are generally not treated as school districts, a court would likely conclude that the zoning authority of a municipality is subservient to an open-enrollment charter school's reasonable choice of a building location.

"Municipal Corner" *is prepared by Reid Barnes. Reid is 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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is required to possess a certificate of public convenience and necessity ("CCN") or a district or affected county that furnishes retail water or sewer utility service shall not impose late fees or disconnect service for nonpayment of bills that are due during an extreme weather emergency until after the emergency is over and shall work with customers that request to establish a payment schedule for unpaid bills that are due during the extreme weather emergency. SB 3 defines an extreme weather emergency as a period when the previous day's highest temperature did not exceed 28 degrees Fahrenheit and the temperature is predicted to remain at or below that level for the next 24 hours according to the nearest National Weather Service reports. The bill also establishes monetary penalties if a utility violates the billing deferment and service cut-off provisions of SB 3.

HB 1520 (Paddie) – Relating to certain extraordinary costs incurred by certain gas utilities relating to Winter Storm Uri and a study of measures to mitigate similar future costs; providing authority to issue bonds and impose fees and assessments. HB 1520 amends Chapter 1232.002, Government Code, to provide a method of financing for "customer rate relief bonds authorized by the Railroad Commission of Texas." The bill would enable a securitization process to occur by amending Chapter 1232 Government Code, to allow for the issuance of bonds, approved by the Railroad Commission. HB 1520 makes no reference to disaster or exceptional circumstances.

SB 2154 (Schwertner) – Relating to the membership of the Public Utility Commission of Texas. SB 2154 increases the number of PUC Commissioners from the current number of 3 Commissioners to 5 Commissioners. SB 2154 also requires the PUC Commissioners to be residents of Texas and adds professional engineers to the list of professions that the Governor can draw from when making Commissioner appointments. SB 2154 reduces the time period of ineligibility to serve as a Commissioner if the person has worked for a public utility or worked as an executive officer of a state agency or was a member of the Texas Legislature from two years to one year. The bill also establishes that only 2 of the 5 Commissioners must be well informed and qualified in the field of public utilities and utility regulation in comparison to current law that requires all 3 Commissioners to have such qualifications.

SB 2 (Bettencourt) – Relating to the governance of the Public Utility Commission of Texas, the Office of Public Utility Counsel, and an independent organization certified to manage a power region. SB 2 amends Section 39.151 of the Utilities Code and establishes that rules adopted by ERCOT under delegated authority by the PUC may not take effect before receiving PUC approval. This legislation also requires that all ERCOT members reside within Texas. It specifies that the board member set for independent generators must be "elected by a majority vote of the members of this market segment who each own and control five percent or more of the installed generation capacity located in the power region." Also, the presiding officer of ERCOT is to be selected by the Governor, with consent of the Senate. All protocols must receive commission approval.

II. Groundwater

SB 601 (Perry) – Relating to the creation and activities of the Texas Produced Water Consortium. This bill creates the Texas Produced Water Consortium with the purpose of aggregating information resources to study the economics and technology related to beneficial uses of produced water. The Consortium shall produce a report by September 1, 2022 that includes (1) suggested legislative changes to better enable beneficial use of produced water, (2) an economically feasible pilot project for state participation in a produced water facility, and (3) an economic model for using produced water in an economic and efficient way. The Consortium shall be governed by a board with representatives from the Railroad Commission, the State Energy Conservation Office, TCEQ, the Texas Economic Development and Tourism Office, and the Texas Water Development Board. This bill provides that Texas Tech University will host the Consortium and will be tasked with soliciting participation from the oil and gas industry and companies that own or manage the infrastructure to store and transport produced water. Lastly, the bill provides the Consortium shall solicit sponsorships from private entities for funding, and in exchange private entities may receive access to data produced by the Consortium.

Bills that failed to pass:

SB 152 (Perry) – Relating to the regulation of groundwater conservation districts. SB 152 was the omnibus groundwater legislation for the Regular Session. This bill would create additional procedural rights for certain landowners and groundwater rights holders in dealing with groundwater conservation districts ("GCDs"). First, the bill amends section 36.066 of the Water Code (relating to suits against GCDs) to change the language for awarding attorney's fees and other costs from "shall" to "may," thus eliminating any guarantee of fee and cost reimbursement for a GCD that successfully brings or defends a lawsuit. Second, the bill would add a section titled "Petition to Change Rules" that authorizes a person with groundwater ownership and rights to petition their local GCD to adopt or modify a rule. This section contains several requirements for such a petition, including an explanation of why a change to the GCD's rules is consistent with certain provisions of the Water Code and a requirement that the petitioner provide written notice to each person with groundwater rights in the area that would be affected by the change. This section also sets deadlines for a GCD to consider such a petition and requires the GCD to provide explanation for any action it takes on the petition. Finally, the bill adds a section that requires a person who submits a groundwater permit or a permit amendment to provide notice by certified mail to "each person with a real property interest in the groundwater beneath the land within the space prescribed by the district's spacing rules for the proposed or existing well." If a person receives notice under this section, they also have a "justiciable interest" that would allow them to participate in any hearings before the GCD.

HB 2095 (Wilson) – Relating to water research conducted by The University of Texas Bureau of Economic Geology. HB 2095 requires the University of Texas Bureau of Economic Geology to

collect monitoring data related to surface water and groundwater and their integration. The bill provides that the bureau may also collect data related to soil or atmospheric moisture, if appropriate. The bureau will use the data collected to create a system of comprehensive surface water and groundwater models, including models of the integration of surface water and groundwater. Additionally, the bureau shall make the results available to state agencies and state institutions of higher education. The bureau may cooperate with Texas A&M University, Texas Tech University, a state agency, or a private entity to carry out these duties.

HB 2851 (Lucio III) – Relating to the consideration of modeled sustained groundwater pumping in the adoption of desired future conditions in groundwater conservation districts. HB 2851 would add an additional consideration by the GCDs in each Groundwater Management Area ("GMA") of the modeled sustained groundwater pumping amount when the GCDs are making decisions on the desired future conditions ("DFCs") for each aquifer in the GMA. HB 2851 would define "modeled sustained groundwater pumping" as the maximum amount of groundwater that the executive administrator, using the best available science, determines may be produced annually in perpetuity from an aquifer. HB 2851 does prohibit the executive administrator of TWDB from calculating the modeled sustained groundwater pumping for an aquifer or an aquifer that wholly or partly underlies an aquifer with a recharge rate such that an owner of land that overlies the aquifer qualifies or has previously qualified under federal tax law for a cost depletion deduction for the groundwater withdrawn from the aquifer for irrigation purposes.

III. Water and Water Utilities

HB 837 (Lucio III) – Relating to the procedure for amending or revoking certificates of public convenience and necessity issued to certain retail public utilities. This bill amends sections 13.254, 13.2541, and 13.255 of the Texas Water Code, which authorizes certain landowners to remove their property from a certificated service area by way of expedited release (13.254) or streamlined expedited release (13.2541), and authorizes municipalities and franchise utilities to acquire single certification, potentially rendering the property of a neighboring retail public utility useless or valueless (13.255). Each of these sections requires compensation be paid to the decertified or adversely affected retail public utility whose CCN may have been impacted by such proceedings. HB 837 adds language to each of these sections requiring the petitioning party (landowner, municipality, or franchise utility) to submit a report to the PUC verifying that such compensation has actually been paid.

HB 872 (Bernal, Howard, Lopez, Minjarez, Hernandez) – Relating to the disclosure of certain utility customer information. HB 872 amends the Texas Public Information Act to make certain government-operated utility customer information confidential and excepted from disclosure. Specifically, information maintained by a government-operated utility would be excepted from disclosure if it: (1) discloses whether utility services have been disconnected or are eligible for disconnection, or (2) is collected as part of an advanced metering system for usage, services, and billing, including amounts billed, unless that information is being requested by the customer or their designated representative.

HB 3476 (Schofield) – Relating to certificates of public convenience and necessity issued to water utilities inside the boundaries or extraterritorial jurisdiction of certain municipalities. When a municipality consents to a CCN for a service area within its extraterritorial jurisdiction, the municipality will not be able to require the water and sewer facilities to be built according to its own standards. Instead, when the PUC issues a CCN to such facilities, it must require the facility to be built according to the PUC's own standards.

SB 997 (Nichols) – Relating to procedural requirements for the review of a contractual rate charged for the furnishing of raw or treated water or water or sewer service. This bill amends Texas Water Code Section 12.013 and adds new Section 13.0431 to (1) codify existing common law requirement that the PUC must first determine that a contract rate adversely affects the public interest before holding a hearing to prescribe reasonable rates, (2) provide that a PUC determination that a contract rate adversely affects the public interest is a final decision subject to judicial appeal, and (3) in cases where the courts uphold the PUC's decision, require the PUC to allow the parties 60 days to attempt to negotiate a new contract prior to proceeding to a PUC rate hearing. The law will take effect on September 1, 2021.

Bills that Failed to Pass:

HB 1926 (Wilson) - Relating to the extension of water or sewer service by certain retail public utilities at the request of a developer. HB 1926 would have required a water supply or sewer service corporation or a special utility district provide a written statement to a developer's request for an extension of retail water or sewer utility service for either (1) subdivided land or (2) more than two service connections within the certified area of the corporation. The written statement must include information on whether the corporation or district can provide the requested service and the infrastructure that the developer is required to supply to accommodate the service. The bill allows a developer to petition PUC if the corporation or district refused to extend service based on a conclusion that the developer failed to comply with the service extension policy or did not provide a written statement with the required information within 90 days of the request being submitted. A corporation or district may also petition PUC if the developer refuses to comply with the service extension policy. The bill provides that PUC shall evaluate whether the service extension policy is reasonable as applied to the developer and may hold an informal hearing.

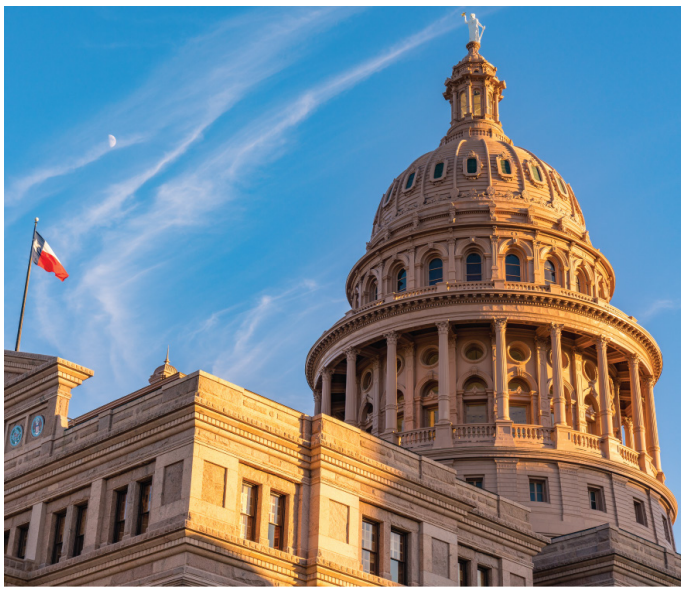
IV. Solid Waste

Bills that failed to pass:

HB 753 (Cain, Gates) – Relating to municipal solid waste management services contracts; limiting the amount of a fee. This bill would have added to the Health & Safety Code Section

363.120, which would have limited the fee a municipality can charge for a solid waste franchise to 2% of the gross receipts of the franchisee in the municipality. The restriction would have only applied to contracts entered into on or after September 1, 2021. The bill would have also added a provision to the Health & Safety Code Section 364.034(f). Currently, (f) prohibits a municipality from granting an exclusive franchise for collection and removal of domestic septage, grease trap waste, grit trap waste, lint trap waste, and sand trap waste. The bill would have also prohibited a municipality from entering into an exclusive franchise for commercial, industrial, or multi-family residential waste.

HB 631 (Darby) – Relating to local government and other political subdivision regulation of certain solid waste facilities. Currently, Health & Safety Code Section 361.095 exempts hazardous waste facilities from requirements to obtain permits from local governments and other political subdivisions. This bill would have added a more limited exemption for municipal solid waste ("MSW") facilities. The MSW exemption would have prevented TCEQ from requiring a local permit as a prerequisite to a permit being issued by TCEQ, but did not exempt the MSW facility from the requirement for the local permit. The bill would have also prohibited local governments and other political subdivisions from adopting rules or ordinances that conflict with or are inconsistent with the MSW rules and permits. Under the bill, an ordinance that is more restrictive than a TCEQ rule would likely be considered inconsistent with TCEQ rules. The bill would not restrict a city or county from enacting a siting ordinance.



SB 1482 (Zaffirini) – Relating to the issuance of a permit for a MSW landfill facility located in a special flood hazard area. This bill would have added Health and Safety Code Section 361.1232, which would have limited MSW landfills in special flood hazard areas. This bill defined the terms "facility" and "special flood hazard area," and prohibited TCEQ from issuing a permit for a new MSW landfill facility, or a lateral expansion of an existing facility, that is contingent on the removal of a part of the facility from a special flood hazard area. This bill prohibited TCEQ from issuing a permit for a new MSW landfill facility, or a lateral expansion of an existing facility, if part of the facility is or will be located in a special flood hazard area, unless the applicant has obtained from FEMA a letter of map change demonstrating that the entire facility has been removed from the special flood hazard area. This bill required TCEQ to coordinate with all applicable regional and local governments to verify that all required map changes to the Flood Insurance Rate Map have been acquired from FEMA and all necessary permits have been issued for the facility by the governmental entities or agencies with jurisdiction over the facility.

V. Open Government

HB 1082 (King, Phil, Hernandez, Harless, Deshotel, Shaheen) – Relating to the availability of personal information of an elected public officer. This bill reenacts and amends Section 25.025 of the Tax Code and Sections 552.117 and 552.1175 of the Government Code (all relating to personal contact information exceptions for public information requests) to add any "elected public officer" to the list of protected officials. These changes will apply only to public information requests received after September 1, 2021.

HB 1118 (Capriglione) – Relating to state agency and local government compliance with cybersecurity training requirements. HB 1118 establishes stricter cybersecurity requirements for state and local entities. First, to receive a grant under Chapter 772 of the Government Code, a local government must submit written verification of their compliance with cybersecurity training requirements. If a grantee fails to comply with cybersecurity requirements, this bill requires them to repay their grant and prevents them from applying for a new Chapter 772 grant for two years. The bill also adds a requirement that local governments train appointed and elected officials in cybersecurity. Finally, the bill requires state agencies to include a certification of their compliance with cybersecurity training requirements in their strategic plans.

HB 1154 (Jetton, Metcalf, Bell, Cecil) – Relating to the requirements for meetings held and Internet websites developed by certain special purpose districts. HB 1154 adds a section to the Government Code that requires certain special purpose districts—political subdivisions with geographic boundaries defining their jurisdictions—to post certain information on publicly accessible websites. These posting requirements apply to a special purpose district that meets four requirements: (1) it is authorized to impose *ad valorem* taxes, (2) it imposed an *ad valorem* tax in the previous year, (3) it has outstanding bonds, or it had gross receipts from operations, loans, taxes, or contributions in excess of $250,000 or cash and temporary investments in excess of $250,000 in the previous year, and (4) it encompasses a population of 500 or more people. The bill provides that a special purpose district that meets these requirements must post a variety of information online, including names of the members of its governing body, *ad valorem* tax rates, sales and use tax rates (if applicable), notices for meetings, and meeting minutes. These requirements do not apply to municipalities, counties, junior

college districts, independent school districts, or any political subdivision with a statewide jurisdiction. The bill also amends Section 49.0631 of the Water Code to require utilities that fall under these requirements to list their informational websites on customer water bills. This law will take effect on September 1, 2021.

HB 1322 (Zaffirini) – Relating to a summary of a rule proposed by a state agency. HB 1322 requires state agencies to publish a brief explanation of a proposed rule on the agency's website or another accessible website. The explanation must include a plain-language summary.

HB 2723 (Meyer, Shine, Button) – Relating to public notice of the availability on the Internet of property tax-related information. HB 2723 requires the comptroller to develop and maintain an easily accessible Internet website that lists each property tax database and includes a method to assist a property owner in identifying the appropriate property tax database for the owner's property. The bill requires the website to be addressed as PropertyTaxes.Texas.gov and to include a separate link to the Internet location of each property tax database. Additionally, the bill requires certain governmental entities to include language in certain notices informing individuals that they can find a link to their local property tax database at VisitPropertyTaxes.Texas.gov. The language must provide that the information on the website is easily accessible and includes information about proposed tax rates that will determine how much individuals pay in property taxes and information regarding public hearings of each entity that taxes their property.

This bill may apply to notices of proposed tax rates for taxing units with low tax levies. The bill also applies to notices of a public hearing for which the proposed tax rate exceeds either one or both of the no-new-revenue tax rate and the voter-approval tax rate of the taxing unit; notices of a meeting to vote on a proposed tax rate that does not exceed the lower of no-new-revenue or voter-approval tax rate; and notices of a meeting where the board of a district will consider adopting an *ad valorem* tax rate for certain purposes.

Bills that failed to pass:

SB 861 (Paxton) – Relating to remote meetings under the open meetings law. SB 861 would have allowed all governmental bodies to hold open or closed meetings from one or more remote locations by telephone calls and videoconference meetings. The bill provided that a telephone conference call or videoconference meeting is subject to the same notice requirements as a face-to-face meeting in addition to the specific requirements for notice provided in the bill. The bill required that notice of a meeting (1) include the statement, "telephone conference call" or "videoconference" call in lieu of the place of the meeting, (2) list each physical location where members of the public may listen to or participate in the meeting, (3) include access information for the meeting, and (4) include instructions for members of the public to provide testimony, if applicable. A notice must also state the location where meetings of the governing body are usually held, and the location designated in the notice of the meeting must provide two-way communication during the entire meeting. SB 861 required that any method of access provided to the public be widely available at no cost to the public. In addition, the bill provided that each part of the meeting required to be open to the public must be visible to the public and audio and visual communication be clear while a participant is speaking. The bill required that any materials that would have been distributed to the public in a face-to-face meeting must be available electronically. The bill stated that a governmental body may have quorum as long as a sufficient number of members remain audible and visible, if applicable, to each other and to the public during the open portion of the meeting. Lastly, the bill updated the education, health and safety code, and transportation code to allow visual and audio meetings and provide requirements for notice.

HB 2103 (Bowers) – Relating to the authority of certain water planning entities to hold an open or closed meeting by telephone conference call or videoconference call. HB 2103 would have allowed the Interregional Planning Council, a regional water planning group, or a flood planning group and any of their committees or subcommittees to hold an open or closed meeting by telephone conference call or video conference call.

Conclusion

The Texas Legislature had to make it over many significant hurdles to get to the end of the Regular Session on May 31. Governor Abbott and others believe additional work is needed on several issues, including election reform issues, so the Governor called the Texas Legislature into a Special Session that began on July 8th. Each Special Session called by the Texas Governor can last up to 30 days under the Texas Constitution. Legislators will also be called into another Special Session before the end of 2021 to address redistricting issues.

There are several other legislative efforts that will begin later in 2021 that will impact the 2023 Regular Session. Ten legislators and two members of the public serve on the Sunset Advisory Commission ("SAC") and SAC will perform reviews of TCEQ, PUC, TWDB, and ERCOT among multiple other state agencies to ultimately provide recommendations to the entire Texas Legislature. In addition, the state legislators will start working on preparing the list of issues and subject matters the legislators would like to study and hold public hearings on during the legislative interim time period. The legislators will use the information they gain during their interim committee work to prepare legislation for the next Regular Session of the Texas Legislature, which will begin in January 2023.

Ty Embrey is the Chair of the Firm's Governmental Relations Practice Group and a member of the Firm's Water, Districts, and Air and Waste Practice Groups. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com.

THE DELAY IS FINALLY OVER: EPA ISSUES FINAL FEDERAL PLAN PURSUANT TO LANDFILL EMISSION GUIDELINES RULE

by Sam Ballard

Ladies and Gentlemen, the wait is finally over! The moment you've all been waiting for: the implementation of EPA's final federal plan pursuant to the 2016 Landfill Emission Guidelines ("EG") Rule.

Since the agency first announced the EG Rule in 2016, it repeatedly delayed implementing a federal plan, and those delays were the subject of significant and protracted litigation. But with the change in the federal administration, EPA finally decided it was time to issue the final federal plan (the "Plan") on May 21, 2021. Now, the question is what impacts the Plan will have on the solid waste sector after it goes into effect on June 21, 2021.

Generally, the EG Rule is aimed at regulating air emissions from existing municipal solid waste ("MSW") landfills. The Plan applies to any MSW landfills that have accepted waste since November 8, 1987, and that commenced construction on or before July 17, 2014, and have not been modified or reconstructed since July 17, 2014. EPA estimates the Plan will cover about 1,600 landfills across the country. These landfills are located in 41 states and the U.S. territories of Puerto Rico and the Virgin Islands.

In addition, the Plan applies to landfills in states where an EPA-approved state plan is not in effect, including Texas. MSW landfill owners and operators subject to the Plan will have 30 months to install gas collection and control systems if the landfill meets the new landfill gas emissions threshold of 34 metric tons of nonmethane organic compounds or more per year. The Plan also implements the compliance schedules, testing, monitoring, reporting and recordkeeping requirements that were established in the 2016 Emission Guidelines for MSW landfills. The newly updated federal standards align with the 2016 New Source Performance Standards ("NSPS") and 2020 National Emission Standards for Hazardous Air Pollutants ("NESHAP") for MSW landfills.

EPA originally required states to submit their own plans in accordance with the EG Rule for review and approval by May 30, 2017, but the agency pushed that deadline out to August 29, 2019. On February 29, 2020, EPA found that 42 states, including Texas, had failed to submit a state plan. This finding did not establish sanctions for the states that failed to submit state plans or set deadlines for imposing sanctions. EPA only received plans from six states by the deadline: Arizona, California, Delaware, New Mexico, West Virginia, and Oregon.

In May 2019, a California federal court ordered EPA to promulgate a federal plan by November 6, 2019 for the states that failed to submit their own plans by the deadline. However, EPA issued a rule in August 2019 pushing its federal plan deadline out to August 30, 2021 and requested that the California federal court allow it to do so. A number of groups, including eight states (California, Pennsylvania, Illinois, Maryland, New Mexico, Oregon, Rhode Island, and Vermont) and the Environmental Defense Fund ("EDF"), opposed EPA's delay in the courtroom, arguing that EPA's delay would effectively circumvent the prior federal order. The California federal court sided with the opponents in November 2019 and denied EPA's request to delay the deadline any further, ruling that the agency was attempting to "sidestep" its prior order.

EPA subsequently appealed the California federal court's ruling in the U.S. Court of Appeals for the D.C. Circuit, arguing that it had the discretion to delay the deadline for implementation of the Plan. However, a coalition of nine states (including the eight states previously identified and New Jersey) and the EDF filed a brief in August 2020 in the D.C. Circuit Court, arguing that EPA deployed a series of tactics to delay implementing the standards, without ever providing a valid reason for doing so. The opponents requested that the court both vacate the delay and require EPA to immediately implement the Plan, asserting that any further delays would have adverse environmental and public health effects.

Following the change in the federal administration, on March 4, 2021 EPA requested that the D.C. Circuit Court vacate the agency's prior rule, which had extended the deadline for implementation of the Plan. EPA made the request to vacate pursuant to President Biden's January 20, 2021 *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, which prompted EPA to move forward with pending environmental projects. The D.C. Circuit Court granted EPA's request to vacate on April 5, 2021, effectively ending the EG delay saga.

In the meantime, in the spring of 2020, TCEQ announced plans of its own to issue 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 EG Rule. 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 also announced plans for a separate, concurrent rulemaking to replace the existing standard air permit for MSW landfills with a non-rule standard permit that would be issued to reflect the changes in the federal regulations. TCEQ may issue these rulemakings following the recent issuance of the Plan.

So whether it is a state EG Plan or the federal Plan, this new rule will affect most existing landfills and, as such, it is essential that MSW landfill owner/operators consult with their engineering and compliance teams about the potential impacts.

But wait, Ladies and Gentlemen, there is more! On March 26, 2020, EPA issued a final rule update for the residual risk and technology review ("RTR") to the NESHAP

Subpart AAAA for MSW landfills. The rule update was promulgated pursuant to section 112(d) of the Clean Air Act and will become fully effective on September 28, 2021. These updated NESHAP AAAA rules have additional and new requirements for all MSW landfills that are a major source for Hazardous Air Pollutants ("HAPs") and/or have 50 megagrams per year or more of non-methane organic compounds ("NMOCs"). Some of the new requirements will affect surface emissions monitoring, gas system monitoring, and exceedance corrective actions. As this rule is also fast approaching, developing an implementation strategy is recommended.

Sam Ballard is an Associate in the Firm's Air and Waste Practice Group. Sam would like to thank Matt Stutz, engineer at Weaver Consultants Group, for his contributions to this article. You can reach Sam at 512.322.5825 or sballard@lglawfirm.com. You can reach Matt at 817.735.9770 or mstutz@wcgrp.com.

PUC COMMISSIONERS ESTABLISH A BRIGHT LINE RULE ON STREAMLINED EXPEDITED RELEASE

by Maris Chambers

In the aftermath of Winter Storm Uri, personnel and policies at the Public Utility Commission of Texas ("PUC") have been in a state of flux. One area of policy developing under the stewardship of the new Commissioners concerns landowner petitions for decertification from water and/or wastewater certificates of convenience and necessity (each, a "CCN"). In particular, Commissioners Lake and McAdams recently established a bright line rule governing the determination of whether a water or sewer service provider has committed or dedicated facilities to a tract of land such that the tract of land will be considered to be receiving service for purposes of streamlined expedited release pursuant to Texas Water Code ("TWC") § 13.2541(b) and 16 Administrative Code ("TAC") § 24.245(h).

Commissioners Lake and McAdams made the above-referenced policy clarification during PUC's open meeting on May 21, 2021, while discussing the recommended approval of a petition for streamlined expedited release filed by Carnegie Development, LLC ("Carnegie") in Docket No. 51352 (the "Petition"). The Petition requested the release of approximately 195 acres of land (the "Land") from the water CCN service area held by Crest Water Company ("Crest") in Johnson County, Texas. While it was under review by PUC Staff, Crest intervened in the Docket and filed a motion to dismiss the Petition, arguing that the Land was ineligible for expedited release because of a prior Commission decision finding that (1) Carnegie had "requested service from Crest to serve the very same 195-acre tract," and (2) "Crest had the financial, managerial and technical ability to serve the [Land]." *Petition of Carnegie Development, LLC to Amend James A. Dyche d/b/a Crest Water Company Certificate of Convenience and Necessity in Johnson County by Streamlined Expedited Release*, Docket No. 51352, James A. Dyche d/b/a Crest Water Company's Motion to Intervene and Motion to Dismiss (Sept. 30, 2020) (referring to the *Application of Crest Water Company to Amend a Certificate of Convenience and Necessity in Johnson County*, Docket No. 48405 (Mar. 25, 2019), which amended Crest's water CCN to include the 195-acre tract owned by Carnegie).

Nevertheless, PUC Staff recommended that the Commissioners approve the Petition as it met the applicable requirements of TWC § 13.2541(b) and 16 TAC § 24.245(h). Commission Staff's Recommendation on Final Disposition at 2 – 3 (Nov. 12, 2020). (Recommendation). Those provisions entitle the owner of certain qualifying tracts of land to petition PUC for expedited release of all or a portion of that land from the current CCN holder's certificated service area if, among other things, the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN. TWC § 13.2541(b); 16 TAC § 24.245(h). As such, landowners exercising this option must demonstrate that the land sought to be released from the applicable CCN is not currently receiving water and/or sewer service, as applicable. *Id.* While the term "receiving service" is not defined by statute, using its plain meaning, courts have interpreted "receiving service" to mean taking possession or delivery of, or knowingly accepting services. *Johnson Cty., Special Util. Dist. v Pub. Util. Comm'n.*, No. 03-17-00160-CV, 2018 WL 2170259, at *8 (Tex. App.—Austin May 11, 2018, pet. denied) (mem. op.) (interpreting the predecessor of TWC § 13.2541(b), TWC § 13.254(a-5)).

PUC Staff's recommendation to the Commissioners acknowledged that Crest had previously sought and received a CCN amendment to add the Land to its certificated service area, but explained that, in response to discovery, Crest was unable to produce evidence of (1) the existence of any contracts or bills for retail water service provided to the Land; (2) the presence of existing facilities located on or within the Land, or that could be used to serve the Land; or (3) the initiation of any steps to design, construct, or install facilities to provide the requested service to the Land. Recommendation at 2. Therefore, PUC Staff concluded that there was no evidence demonstrating that the Land was receiving service, but only that Carnegie had *requested* it. *Id*.

At their open meeting on May 21, 2021, the Commissioners adopted PUC Staff's recommendation and the associated proposed order. *Public Utility Commission of Texas Open Meeting Broadcast* (May 21, 2021), ADMIN MONITOR, http://www.adminmonitor.com/tx/puct/open_meeting/20210521/. In doing so, the Commissioners also provided clarification on their interpretation of the meaning of "receiving service." Chairman Lake first explained that the burden of demonstrating entitlement to streamlined expedited release is on the petitioner, and opined that Carnegie had "done [its] job." *Id*. Commissioner McAdams then expressed an intent to establish a "bright line [rule]" for determining whether a CCN holder had sufficient "facilities committed to providing service" to warrant

a determination that a tract of land was "receiving service" for purposes of satisfying the requirements of TWC § 13.2541 and 16 TAC § 24.245(h). *Id.* He opined that "the act of moving paperwork" alone would not be sufficient, explaining his intent to avoid locking service requestors into captive markets when "no tangible commitments have been made on the part of the [CCN holder]." *Id.* Chairman Lake agreed, stating that a tract of land should not be considered to be "receiving service" unless the CCN holder is capable of providing reliable service in a timely manner. *Id.*

The Commissioners' discussion and approval of the Petition serves as a bellwether for future CCN release policy developments at PUC, and we will continue to monitor those developments as the Commissioners settle into their new roles.

Maris Chambers is in the Firm's Districts, Water, Compliance and Enforcement, and Energy and Utility Practice Groups. If you would like additional information or have questions, please contact Maris at 512.322.5804 or mchambers@lglawfirm.com.

ASK SHEILA

Dear Sheila,

Our firm has a generous maternity leave policy for our female employees. We provide 18 weeks of paid leave. For male employees who have children, we provide two weeks of paid leave, plus an additional ten weeks of unpaid leave, to give the full 12 weeks required by the Family and Medical Leave Act. Now we have an expectant father claiming this is unfair and discriminates against him on the basis of sex. Is this a problem?

Sincerely, Mother-Friendly Workplace Proponent

Dear Mother-Friendly:

You likely have a discriminatory policy under sex discrimination law. Any part of the parental leave policy that treats women differently than men must be based on the period of disability related to pregnancy, and not be based on baby-bonding time. This means that you may give a biological mother more time off, including paid time off, for the time to give birth and recover from giving birth, for the time she can show an actual disability (unable to work for physical reasons). This time period, determined by a health-care provider, is usually four to six weeks, though it could be longer with complications. The rest of the time, often called "baby-bonding" time, should be offered to men and women on equal terms.

This principle also applies when the child is adopted. Since neither parent is giving birth, both should be treated equally under your policies.

Finally, you should change the terminology in your policy to account for same-sex parents, now equally protected by gender discrimination law. Instead of using "father" and "mother", use more gender-neutral terms, such as "employees who give birth" and "employees who become parents but don't give birth." Don't have "maternity" or "paternity" leave policies, but rather a "parental leave" policy.

"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

Florida v. Georgia, 141 S. Ct. 1175 (2021).

This case concerns the Apalachicola-Chattahoochee-Flint River Basin (the "Basin"), an area spanning more than 20,000 square miles in Georgia, Florida, and Alabama, and composed of three rivers. The Chattahoochee River and the Flint River start in Georgia and empty into Lake Seminole, which straddles the Georgia-Florida border. The Apalachicola River begins at the southern end of Lake Seminole and flows south through the Florida Panhandle, emptying into the Apalachicola Bay, near the Gulf of Mexico. The Apalachicola River supports a wide range of river wildlife and plant life in the Florida Panhandle, and its steady supply of fresh water makes the Bay a suitable habitat for oysters. For many years, Florida's oyster fisheries were a cornerstone of the regional economy.

Many factors influence Apalachicola River flows, including precipitation, air temperature, and Georgia's upstream consumption of Basin waters. The U.S. Army Corps of Engineers (the "Corps")

regulates Apalachicola flows by storing water in, and releasing water from, its network of reservoirs in the Basin. In recent years, low flows in the Apalachicola River have become increasingly common during the dry summer and fall months, particularly during droughts.

In 2013, Florida accused Georgia of overconsuming water from the Basin, causing low flows in the Apalachicola River, which allegedly caused Florida's oyster fisheries and river ecosystem to suffer. Operating under the riparian doctrine of a water law, Florida and Georgia have an equal right to make reasonable use of the Apalachicola River's waters. To obtain an equitable apportionment of interstate waters, Florida must show (1) Georgia's upstream consumption caused a threat or actual injury of serious magnitude; and (2) the benefits of the equitable apportionment substantially outweighed the harm that resulted.

Having original jurisdiction over suits between states, the U.S. Supreme Court granted Florida leave to file its complaint and referred the case to a Special Master. After 18 months of extensive discovery and a 5-week trial, the Special Master recommended in his report that Florida be denied relief, because—although the Florida had suffered serious injuries that were at least in part due to Georgia's upstream water use—Florida failed to prove by clear and convincing evidence that any remedy would redress its asserted injuries. This was because a remedial decree would not bind the Corps, which could operate its reservoirs to offset any added streamflow produced by the decree.

On review of Florida's exceptions to the Special Master's Report, the Supreme Court remanded, concluding that the Special Master's clear and convincing evidence standard for the question of redressability was "too strict," at least absent further findings. The Supreme Court then directed the Special Master to make definitive findings and recommendations on several additional issues, including: (1) whether Florida had proved any serious injury caused by Georgia; (2) the extent to which reducing Georgia's water consumption would increase Apalachicola River flows; and (3) the extent to which any increased Apalachicola flows would redress Florida's injuries.

Soon after that decision, the original Special Master retired, and the Court appointed a new Special Master, who issued an 81-page report recommending that the Supreme Court deny Florida relief and concluding that Florida failed to prove by clear and convincing evidence that Georgia's alleged overconsumption caused serious harm to Florida's oyster fisheries or its river wildlife and plant life.

Florida filed exceptions to the Supreme Court, arguing that Georgia's excessive agricultural water consumption caused sustained low flows in the Apalachicola River leading to the Bay's increased salinity. Florida believed that the high salinity attracted saltwater predators who attacked oysters and brought diseases. Georgia declined responsibility and asserted that Florida's mismanagement of its oyster fisheries led to the decline in oysters. Moreover, documents from Florida and its witnesses revealed that Florida allowed unprecedented levels of oyster harvesting in the years before the collapse. The Supreme Court then conducted an independent review of the record and assumed the ultimate responsibility for deciding all matters of fact and law.

The Supreme Court evaluated the parties' arguments in light of the record evidence, and held for Georgia because the evidence did not show a high probability that Florida's oyster fisheries suffered a serious injury as a direct result of Georgia's overconsumption.

Canadian River Mun. Water Auth., Appellant v. Hayhook, LTD., No. 07-20-00196-CV, 2021 WL 1202346 (Tex. App.—Amarillo Mar. 30, 2021, no pet.)(mem. op).

This case involves a takings claim by Hayhook, LTD ("Hayhook"), owner of the Hayhook Ranch (the "Ranch") surface estate, asserted against the Canadian River Municipal Water Authority ("Canadian"), the owner of the Ranch groundwater estate.

In 1976, the prior owners of the Ranch conveyed all the water rights under the Ranch to Southwestern Public Service. Canadian became the successor to those rights in 1996, and acquired all of the groundwater rights associated with the Ranch, including easements for underground pipelines reasonably necessary and desirable to permit full and complete use of the groundwater rights. In 1999, Canadian began developing a water well field on the Ranch, which resulted in litigation with the then surface estate owners, and ended with a settlement (the "2000 Agreement"). Hayhook came to own the surface estate of the Ranch in 2004.

In 2008, Canadian tendered an agreement offering $85,320 to Hayhook, in exchange for permission to install a 54-inch pipeline to carry water produced from offsite locations to a pumping station on the Hayhook Ranch. Hayhook declined, but Canadian commenced installation anyway, clearing a 120-foot right-of-way across the eastern portion of the Ranch and excavating a ditch 10- to 12-feet deep and wide over 2.6 miles. The project, completed in March of 2010, disturbed approximately 38.78 acres of Hayhook's land. No wells or pipelines drawing water from the Ranch were connected to its 54-inch pipeline.

Haycook sued, alleging inverse condemnation. The trial court found that transporting offsite water across the Ranch was not reasonably necessary and desirable to permit the full and complete utilization of the water rights in and under the Ranch—as provided by the 2000 Agreement. Nor was the pipeline reasonably necessary to produce and remove groundwater from the Ranch. Therefore, the trial court granted Hayhook compensation for inverse condemnation, and Canadian appealed, asserting that it operated under color of right—thereby negating the requisite intent to engage in a taking.

An inverse condemnation requires the government intentionally take private property without just compensation. Government entities have a constitutional obligation to reasonably compensate those whose property it takes. To commit inverse condemnation, the governmental entity must know a specific act will cause harm or that the result is substantially

certain to arise from the governmental action. Conversely, a taking does not exist when the government acts pursuant to colorable contract rights.

Here, Canadian's use of the Ranch to transport water produced from fields other than those underlying that of the Ranch triggered the initial suit. The pipeline across the Ranch only transports water produced offsite. The 2000 Agreement permitted Canadian to construct water pipelines, but not to burden the Ranch for that purpose.

The Amarillo Court of Appeals affirmed the trial court's holding that Canadian's pipeline construction solely for transporting offsite water constituted a physical taking of part of the Hayhook Ranch.

San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp. Tex., No. 20 40575, 2021 WL 1726813 (5th Cir. Apr. 30, 2021).

In 2019, San Antonio Bay Estuarine Waterkeeper ("San Antonio Bay") sued Formosa Plastics Corporation Texas and Formosa Plastics Corporation U.S.A. (collectively, "Formosa") under the Clean Water Act ("CWA") for illegally discharging plastic pellets and other materials into Cox Creek and Lavaca Bay in violation of Formosa's Texas Pollutant Discharge Elimination System ("TPDES") permit. Eventually, San Antonio Bay and Formosa agreed to settle San Antonio Bay's CWA claims with a Consent Decree to regulate Formosa's discharge by a designated third-party Monitor.

The parties dispute the interpretation of paragraphs 36, 37, and 38 of the Consent Decree. Formosa argued that paragraph 36 required Formosa to pay if the Monitor finds it discharged plastic after the Consent Decree's effective date. San Antonio Bay believed that paragraph 36 means the presence of plastics proves discharge occurred from Formosa, regardless of the discharge date. The district court agreed with San Antonio Bay. Formosa filed an appeal of the district court's decision.

Upon review, the Fifth Circuit highlighted the forward-looking language in the Consent Decree to determine the meaning of paragraph 36. Paragraph 36 has many words in the present tense, suggesting that San Antonio Bay and Formosa contemplated only active discharges rather than those from the past. Also, in paragraph 36, the penalty schedule includes payments for the years following the Consent Decree. The Fifth Circuit found the parties did not contemplate discharges occurring prior to the Consent Decree as a trigger for Formosa's payment and reporting obligations. The Court concluded that paragraphs 37 and 38 aligned with paragraph 36.

Therefore, the Fifth Circuit ruled in favor of Formosa, reversed the District Court's decision, and remanded for further proceedings.

San Jacinto River Auth. v. Ray, No. 14-19-00095-CV, 2021 WL 2154081 (Tex. App.—Houston [14th Dist.] May 27, 2021, no pet. h.)(mem. op.).

Hurricane Harvey made landfall in Southeast Texas in August 2017. As a result, the San Jacinto River Authority ("SJRA") released rising water from Lake Conroe into the San Jacinto River. Downstream property owners sued SJRA in state district court, contending that the release of water from Lake Conroe flooded their properties, and asserted inverse condemnation claims under Article I, Section 17 of the Texas Constitution.

SJRA filed a plea to the jurisdiction, arguing that the district court lacked subject matter jurisdiction for two reasons: (1) under Government Code section 25.1032, county civil courts at law have exclusive jurisdiction over constitutional inverse condemnation claims filed in Harris County; and (2) appellees failed to plead sufficient facts demonstrating a statutory takings claim under Chapter 2007.

Addressing SJRA's first reason, the Houston Court of Appeals cited its own decision issued in early 2020 in *San Jacinto River Auth. v. Ogletree*, 594 S.W.3d 833, 839-40 (Tex. App.—Houston [14th Dist.] 2020, no pet). There, numerous property owners downstream from Lake Conroe alleged that SJRA, by releasing water from Lake Conroe in the immediate aftermath of Hurricane Harvey, intentionally flooded their properties to protect the integrity of the Lake Conroe dam and other properties. The *Ogletree* claimants asserted constitutional inverse condemnation claims against SJRA in a Harris County district court. Similar to this case, SJRA filed a plea to the jurisdiction, which the trial court denied. On appeal, the Houston Court of Appeals held that, pursuant to Texas Government Code section 25.1032(c), Harris County civil courts at law have exclusive jurisdiction over the property owners' constitutional inverse condemnation claims. Consequently, as in *Ogletree*, the district court lacks subject matter jurisdiction over the constitutional inverse condemnation claims.

With regard to SJRA's second argument the district court lacked subject matter jurisdiction, the property owners contend that the trial court has such jurisdiction because they alleged alternative claims for a statutory taking under Chapter 2007, and district courts possess jurisdiction over such claims.

The Court of Appeals held that pleadings must give reasonable notice of the claims asserted. Since the property owners' petition neither cited Chapter 2007 nor asserted a waiver of governmental immunity under Chapter 2007, the Court ruled that property owners never asserted Chapter 2007 statutory condemnation claim. As a result, their petition negates the district court's jurisdiction over their claims. Accordingly, the Court reversed the trial court's order denying SJRA's plea to the jurisdiction and rendered judgment dismissing appellees' claims for lack of subject matter jurisdiction.

Litigation cases

SCOTUS holds regulation permitting third-party access to property is *per se* physical taking.

In *Cedar Point Nursery v. Hassid*, agricultural employers brought an action against members of California's Agricultural Labor Relations Board ("the Board") alleging that California's regulation granted labor organizations a "right to take access" to agricultural employers' property in order to solicit support for

unionization triggered an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. No. 20-107, 2021 WL 2557070 (U.S. June. 23, 2021). The regulation mandated that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. The employers sought declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them.

The District Court denied the employers' motion for preliminary injunction and granted the Board's motion to dismiss, holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner. A divided panel of the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed the Ninth Circuit's opinion holding the regulation constitutes a *per se* physical taking.

Notably, the Supreme Court made it clear that the holding of this case does not efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. Many government authorized physical invasions will not amount to takings because they encompass traditional common law privileges to access private property. Unlike a mere trespass, the regulations grant a formal entitlement to physically invade the employers' land. Importantly, the Court made clear—the government regulation constitutes a per se physical taking (even as granting access to a third-party) reasoning that the regulation appropriates a right to physically invade the growers' property—to literally "take access"— and therefore constitutes a per se physical taking under the Court's precedents.

In case of first impression SCOTX rules constitutional takings claim cannot be asserted when the State commits copyright infringement.

In *Jim Olive Photography v. University of Houston System*, Jim Olive, a professional photographer sued the University of Houston for the unauthorized use of his copyright image alleging an unlawful takings claim. No. 19-0605, 2021 WL 2483766 (Tex. June 18, 2021). In 2012, Olive discovered the University had downloaded a copyrighted image from Olive's website, removed all identifying copyright and attribution material, and displayed it on its webpage as a promotional image. Olive filed suit against the University for an unlawful taking and sought compensation under Article I, Section 17 of the Texas Constitution and under the Fifth Amendment of the United States.

The District court denied the University's Plea to the Jurisdiction holding that Olive had pleaded a viable takings claim. The Court of Appeals disagreed. It reasoned that the University's single act of copyright infringement was not a taking and the University's actions did not take away Olive's right to use, license, or dispose of the underlying creative work and therefore the University maintained immunity from suit.

The Supreme Court of Texas affirmed the Court of Appeals rationale. The Court, in a matter of first impression, held that copyright infringement by the State cannot support a viable takings claim. It reasoned that an infringer violates the copyright owner's rights, but it does not confiscate or appropriate those rights. The copyright owner still retains the right to possess, use, and dispose of the copyrighted work.

Air and Waste Cases

Territory of Guam v. U.S., 141 S. Ct. 1608 (2021).

On May 24, 2021, the U.S. Supreme Court issued a unanimous decision in *Territory of Guam v. U.S.*, clarifying a question under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), or Superfund law, regarding the right to seek contribution, reversing a decision of the D.C. Circuit Court of Appeals.

The D.C. Circuit Court of Appeals ruled in 2020 that Guam waited too long to file a Superfund contribution claim against the U.S. Navy for the cleanup of a landfill on the island, known as the Ordot Dump, where the Navy disposed of dangerous munitions and chemicals, including agent orange and DDT. The Navy began using the landfill in the 1940s and throughout the Korean and Vietnam Wars. The landfill was unlined and released contaminants into nearby rivers flowing into the Pacific Ocean.

In 2002, EPA sued Guam as the site owner for violating the Clean Water Act for discharging pollutants into the Waters of the U.S., leading to a consent decree into 2004. In turn, Guam sued the Navy in 2017, seeking to recoup its landfill-closure and remediation costs, which it estimated would exceed $160 million.

The D.C. Circuit Court ruled that the 2004 consent decree triggered a three-year statute of limitations for Guam to pursue a Superfund Contribution Claim; therefore, Guam's claims against the Navy were time-barred. However, the U.S. Supreme Court reversed the D.C. Circuit's decision that a contribution claim was triggered (and consequently, that a statute of limitations had run) based on the consent decree, which was founded in the Clean Water Act, not CERCLA. Instead, the Court ruled that "a party may seek contribution under CERCLA only after settling a CERCLA-specific liability, as opposed to resolving environmental liability under some other law." Based on this decision, a settlement with EPA based on an environmental statute other than CERCLA will not trigger the statute of limitations, and by implication, may not trigger the right to request contribution under Section 113(f) of CERCLA without an express resolution of CERCLA liability. The decision leaves open the question of what language in EPA consent decrees will be sufficient to settle "a CERCLA-specific liability."

Utility Cases

Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC, 619 S.W.3d 628 (Tex. 2021).

On March 19, 2021, the Texas Supreme Court issued an opinion in a case centering

on questions of the Electric Reliability Council of Texas ("ERCOT") ability to be sued, in this instance, by a power generator, Panda Power Generation Infrastructure Fund (Panda). Panda claimed that after it used ERCOT's 2011-12 reports that predicted generating capacity shortfalls as a basis to build power plants in Temple and Sherman at the cost of $2.2 billion, ERCOT revised its forecasts and predicted an excess of generation. Panda filed causes of action in district court alleging that ERCOT misled Panda, as well as accusing ERCOT and three of its officers of fraud, negligent misrepresentation, and breach of fiduciary duty. ERCOT filed a Plea to the Jurisdiction claiming PUC has exclusive jurisdiction over Panda's claims, and PUC filed an amicus brief supporting ERCOT, but the trial court denied it. In this proceeding, Panda originally filed two petitions, one for a writ of mandamus and the other for review, where Panda sued ERCOT, alleging fraud and fiduciary breach. The cases were consolidated and appealed to the Supreme Court, where Justice Boyd, joined by Justices Blacklock, Busby, Bland, and Huddle, delivered the opinion on March 19, 2021.

Since the court of appeals held that sovereign immunity applied, it had ordered the trial court to dismiss Panda's claims within 30 days. Panda filed a petition for writ of mandamus challenging the court of appeals holding, and ERCOT filed a conditional petition for review challenging the same court's holding that ERCOT is not a governmental unit under the Tort Claims Act. Despite pleadings from both sides alleging either mootness or a lack of plenary power, both parties agreed that they sought final resolution to the case and the Supreme Court granted ERCOT's conditional petition for review and set it and Panda's mandamus petition for argument on September 15, 2020.

After both parties briefed whether the subsequent entry of the trial court's order rendered these proceedings moot, the Supreme Court analyzed and applied the mootness doctrine, which is a constitutional limitation that prohibits courts from issuing advisory opinions. The Court's opinion discussed the difference in procedural mootness and substantive mootness, indicating that sometimes parties' controversy over the substantive issue remains live after the trial court issues a final judgment, even though typically the final judgment would render the appeal from the interlocutory order procedurally moot. When this happens, the complaining party's remedy is to raise the live substantive issue in an appeal from the final judgment.

The Court further held that the trial court's entry of a final judgment rendered the causes Panda illustrated as procedurally moot, and parties must seek final resolution of their pending controversies by appeal from the trial court's final judgment. Consequently, the Supreme Court concluded this proceeding is moot. However, despite the trial court's entry of final judgment, the live controversy exists over whether the court of appeals erred by ordering the trial court to vacate its interlocutory order denying ERCOT's jurisdictional plea, even though the Court's resolution of that issue required them to decide whether the trial court erred by entering that interlocutory order. The Court reasoned that the Court could not grant effective relief because the trial court lost its plenary power after 30 days following its final judgment granting ERCOT's jurisdictional plea and dismissing Panda's claims. Citing section 329(b)(f) of the Texas Rules of Civil Procedure, the Supreme Court held that the trial court no longer had the power to act; if it acted, that action would be void. And so, the Court reasoned that it had no authority to order another court to perform a void act.

Regarding the mandamus relief, the Supreme Court's mandamus power does not allow it to decide moot cases or issues any more than its power of appellate review. The Court said it will not exercise mandamus jurisdiction if the parties have an adequate remedy by appeal. An appeal is inadequate when parties are in danger of permanently losing substantial rights which occurs when the appellate court would not be able to cure the error, when the party's ability to present a viable claim or defense is vitiated, or when the error cannot be made part of the appellate record.

The Court acknowledged that this may not be convenient, and it was somewhat sympathetic to that, but held that this is a mandate of the Constitution, not a matter of convenience. The Court ultimately held that the entry of a final judgment mooted Panda's manadamus petition and the need for ERCOT's conditional petition for review, dismissing both the mandamus petition and conditional petition for review for want of jurisdiction.

Tex. Tel. Ass'n v. Pub. Util. Comm'n, 03-21-00294-CV (Tex. App.—Austin).

Almost 50 rural telephone companies have sued Public Utility Commission ("PUC") in Travis County District Court, requesting an emergency restraining order for a judge to declare "void" PUC's funding reductions. In June 2020, 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 Texas Universal Service Fund ("TUSF") funding. The Commissioners decided to leave the TUSF as-is, but limit TUSF funding to lifeline projects.

The purpose of the TUSF is to enable all residents of Texas to obtain basic local telecommunications services needed to communicate with other residents, businesses, and governmental entities. The TUSF accomplishes this by assisting telecommunications providers in providing baseline services at reasonable rates to customers in high-cost, rural areas, and to qualifying low income and disabled customers. The TUSF is funded by a statewide uniform charge, payable by each telecommunications provider, based on a percentage of each provider's actual intrastate telecommunications services receipts. Since 2015, the TUSF has been funded by a 3.3% charge on the Texas intrastate taxable telecommunications receipts. This is relatively low, compared to previous rates as high as 5.65%.

In response to PUC's decision, the Texas Telephone Association and the Texas Statewide Telephone Cooperative, Inc. (the "Associations") filed a petition for rulemaking in Project No. 51020, asking the PUC to reconsider (1) its inaction to adjust the assessment rate and (2) its decision to only fund lifeline projects, leaving high-cost programs unfunded. The

Associations claimed that PUC's inaction on the impending TUSF shortfalls was unprecedented and illegal.

At the August 27, 2020 open meeting, the PUC shot down the Associations' petition, in accordance with a memorandum filed by PUC Chairman Deanne 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.

In January 2021, Associations filed suit in Travis County against PUC for declaratory judgment, temporary restraining order, temporary injunction, writ of mandamus and request for compensation for regulatory taking. In their argument, Associations claimed that they are small and rural telephone providers that build, maintain, and operate the state's wireline network and cannot operate without adequate TUSF funding. Despite PUC staff's recommendations to adequately fund TUSF, PUC Executive Director and TUSF Administrator made a decision to reverse its policy through a contract amendment, which was not implemented through a duly noticed rulemaking proceeding or through orders in a contested case. Associations seek relief to compel the PUC to keep making TUSF disbursements or, as they argue, risk losing up to $10 million dollars per month.

In response, PUC defended its decision to seek direction from the Legislature on these issues but also claimed sovereign immunity against the claims. Associations filed a Motion for Summary Judgment, and PUC filed a Plea to the Jurisdiction and Cross-Motion for Summary Judgment. On June 7, 2021, the court granted both of PUC's motions, and the case was dismissed. Associations appealed on June 24, 2021.

Texas Supreme Court Addresses PUC Exclusive Original Jurisdiction

The Texas Supreme Court issued opinions on three cases involving the PUC's exclusive original jurisdictional powers. In each of the cases, summarized below, plaintiffs brought causes of action involving tort claims against an electric utility company. In all three cases, the utility companies relied upon the Texas Supreme Court's previous holding in *Oncor Elec. Delivery Co. v. Chaparral Energy, LLC*, 546 S.W.3d 133 (Tex. 2018) in asserting PUC had original jurisdiction over the claims. In *Oncor*, the Texas Supreme Court agreed with the utility company, and held that the Legislature intended disputes regarding utility rates, operations, and services to begin at PUC. However, that case was centered on a breach of contract cause of action, where the facts of the underlying case fell within the scope of "utility rates, operations, and services." The issues before the Texas Supreme Court in the following cases are distinguishable because they are related to tort-related causes of action. In each case, the Court carefully relied upon the *Oncor* analysis to distinguish its ruling in that case from the case under review. Likewise, in each case, the Court holds that PUC's exclusive original jurisdiction is not all-encompassing; it is limited in nature based upon the constraints that the legislature placed upon it.

In re Tex.-New Mexico Power Co., 19-0656, 2021 WL 2603683 (Tex. June 25, 2021).

The underlying facts involve a suit for damages, where property owners claimed they suffered water damage during Hurricane Harvey due to negligent actions by Texas-New Mexico Power Company's ("TNMP") general contractor when the contractor was moving power lines during construction.

TNMP was the defendant in the trial court, where the court denied TNMP's motion to dismiss the case for lack of subject-matter jurisdiction. A petition for writ of mandamus was filed in the 1st Court of Appeals, requesting it to order the trial court to vacate its order denying TNMP's motion and enter an order dismissing the case against it for want of subject-matter jurisdiction. The Court of Appeals denied the mandamus.

After the Court of Appeals denied relief, on August 1, 2019, TNMP filed a petition for writ of mandamus requesting the same relief as it did in its appellate filing. This case centers on the interpretation of the *Oncor* opinion based upon section 32.001 of the Texas Utilities Code regarding the exclusive original jurisdictional powers of PUC.

TNMP argued in its petition that the Oncor decision bolsters its argument that PUC has original jurisdiction of these claims. Citing to the Court's previous holding, TNMP argued that the Public Utility Regulatory Act does not define "operation," and thus the underlying facts in the case related to the contractor moving power lines could fall within the ordinary meaning of the word "operation." Plaintiffs alleged that the negligence was unrelated to any activities of TNMP that could be considered as an operation or service. Thus, the Texas Supreme Court was left with the question as to whether its opinion regarding PUC's exclusive original jurisdiction in the *Oncor* case was limited to contractual claims, or if its holding extended to other causes of action including torts.

Chief Justice Hecht delivered the opinion on June 25, 2021, and held that the original plaintiffs' claims against TNMP did not involve TNMP's "rates, operations, or services," and did not fall within the PUC's exclusive jurisdiction. The Court differentiated between the facts from the *Oncor* case and this case, as well as clarified the scope of the word "service." The Court reasoned that in the *Oncor* case, the breach of contract claim involved a contract to provide electricity, which was a complaint about Oncor's "services." Here, the claim was too far removed from the services TNMP provides to fall within the exclusive original jurisdiction of PUC. This holding is not specific as to whether tort claims are within the exclusive original jurisdiction of PUC; the holding focuses on applying the "utility rates, operations, and services" standard to the specific facts of a proceeding.

In re Oncor Elec. Delivery Co., 19-0662, 2021 WL 2605852 (Tex. June 25, 2021).

In this case, Oncor claimed the trial court abused its discretion by denying its plea to the jurisdiction. The appellate

court denied Oncor's petition for writ of mandamus.

Here, a customer brought a personal injury cause of action against Oncor, alleging negligence and consumer-protection violations stemming from the customer being electrocuted while trimming a tree. The customer alleged the tree needed to be trimmed due to a hazard from a drop line crossing the customer's property.

The question the Court considered was whether an electric utility may compel a plaintiff who alleges a common law personal injury claim to appear before PUC before appearing in court. Similar to the two companion cases, the Court held that the customer's claims did not fall within PUC's exclusive jurisdiction. The Court stated that "negligence alleged in a context merely coincidental to utility activities does not create Commission jurisdiction." The Court concluded that the proper venue to hear the underlying facts of this case was the district court, which has subject-matter jurisdiction to resolve the dispute.

In re CenterPoint Energy Houston Elec., LLC, 19-0777, 2021 WL 2671808 (Tex. June 30, 2021).

The history of this case involves a person who was electrocuted while helping victims of a car accident which caused a CenterPoint power line to fall. In the trial court, CenterPoint filed a plea to the jurisdiction on the issue as to whether the exclusive jurisdiction of PUC over an electric utility's rates, operations, and services extends to claims involving common-law torts against utilities.

The Supreme Court issued an opinion which held that PUC does not have exclusive jurisdiction because the plaintiffs are not "affected persons" authorized by statute to bring a complaint in PUC. Additionally, the Court held that a court, not a state agency, is the proper forum to decide whether there was a breach of the common-law duty of reasonable care. Thus, the Court denied CenterPoint's petition for writ of mandamus, and agreed with the trial court's denial of CenterPoint's plea to the jurisdiction.

The Court performed a similar analysis as in Oncor. In its holding, the Court stated that an administrative agency only has the powers that have been conferred upon it and are necessary to accomplish its duties. Specifically, PUC has the authority to exercise its powers of enforcement and adjudication. Within those powers are resolving complaints by an "affected person" alleging an "act or omission by a public utility in violation or claimed violation" of a law, order, ordinance, or rule. Because the plaintiffs cannot initiate complaints at PUC, they are not within the definition of "affected persons" and PUC cannot adjudicate their claims. Additionally, PUC does not adjudicate compliance with common-law negligence standards. As opposed to the holding in the TNMP case, this case specifically addresses the lack of jurisdiction PUC has regarding common-law negligence claims.

Impact of Winter Storm Uri

In response to Winter Storm Uri, several suits were filed attributable to the short-pay and uplift mechanisms implemented by ERCOT. ERCOT acts as a sort of clearing house or middleman between wholesale energy buyers and sellers; under the current system, the amounts that ERCOT collects from the market must equal the amounts that ERCOT pays out to wholesale sellers. This system is disrupted when a market participant defaults on an amount due to ERCOT. To make up the shortfall of market participants' failure to pay the amount owed for the extreme cost of power during Winter Storm Uri, ERCOT implemented a measured termed "uplift." In such an instance, other participants, such as several of the plaintiffs in the following suits, share those unpaid bills when the costs are shifted to them.

In re Elec. Reliability Council of Tex., Inc., 04-21-00244-CV, 2021 WL 2814899 (Tex. App.—San Antonio July 7, 2021, no pet. h.).

CPS Energy is a municipally-owned gas and electric utility provider, owned by the City of San Antonio. In its Original Petition and Application for Temporary Injunction and Permanent Injunction filed on March 12, 2021, CPS Energy ("Plaintiff") alleges that ERCOT ("Defendant") materially breached its contractual obligations under an effective market agreement by failing to pay CPS Energy. Plaintiff also claims ERCOT made an acknowledged error by not coming down from the system-wide offer cap on February 18 and February 19, 2021, breaching ERCOT's fiduciary duty. Plaintiff claims that both the PUC and ERCOT have not corrected the overcharge, and that ERCOT should not be allowed to charge short-pay or default uplift invoices resulting from these overcharges until this error is resolved. The suit also claims, similar to other pending suits in various courts, that forcing CPS Energy to pay the debts of other failed market participants violates the Texas Constitution and constitutes a taking. Defendant's plea to the jurisdiction was denied, as was the motion to transfer venue. On June 15, 2021, ERCOT filed an interlocutory appeal, assigned Cause Number 04-21-00242-CV, as well as a petition for writ of mandamus, Cause Number 04-21-00244-CV. Both appeals challenged the trial court's order, which denied ERCOT's plea to the jurisdiction. The petition for writ of mandamus also challenged the trial court's order which denied ERCOT's amended motion to transfer venue. ERCOT requested that both proceedings be consolidated, but the Fourth Court of Appeals denied that request. CPS Energy requested that the Temporary Restraining Order be extended, but also argued in an emergency motion that the expiration of the Temporary Restraining Order was automatically stayed during the pendency of the interlocutory appeal. CPS Energy filed a motion to dismiss on June 23, 2021, which claimed that the Fourth Court of Appeals lacked jurisdiction over the interlocutory appeal alleging ERCOT is not a governmental unit. On July 7, 2021, the Fourth Court of Appeals denied the petition for writ of mandamus and held that ERCOT was not entitled to the relief sought.

City of Denton v. Elec. Reliability Council of Tex., Inc., No. D-1-GN-21-001227 (353rd Dist. Ct., Travis County, Tex. June 4, 2021).

The City of Denton ("City" or "Plaintiff") owns Denton Municipal Electric, which is a utility that sells the electricity its plant produces to the electric grid operated by

Electric Reliability Council of Texas, Inc. ("Defendant" or "ERCOT"). On February 25, 2021, the City filed suit against ERCOT seeking to prevent it from having to pay the "uplift" charge, alleging an illegal and unconstitutional process by ERCOT due to this mechanism forcing city-operated utilities to cover other market participants' debts. The City cited to the Texas Constitution, Articles III, Section 52(a) and Article XI, Section 3, where both reflect the limitations of a city related to lending its credit, granting public money or a thing of value in aid of, or to any individual, association, or corporation. ERCOT responded that it is protected from suit based upon sovereign immunity, and that the Court does not have jurisdiction because ERCOT falls exclusively under the Public Utility Commission's ("PUC's") jurisdiction. On the same day, the Court granted the Temporary Restraining Order ("TRO") through March 11, 2021. Contemporaneously with the district court's Order related to a motion to transfer venue, the Court extended the TRO through April 30, 2021. On March 18, 2021, the Court issued an agreed Order to transfer venue to Travis County. Subsequently, parties agreed to extend the TRO through June 4, 2021, which prevented ERCOT from implementing the uplift mechanism. On May 10, 2021, the Court held a remote hearing based upon defendants' previously filed plea to the jurisdiction and alternative plea in abatement. Defendants argued that the PUC retains exclusive jurisdiction, there was no pleading of viable *ultra vires* claim so as to waive immunity, and the City failed to join necessary parties. In its order filed on June 4, 2021, the Court ultimately held that the City did not exhaust all of its administrative remedies before the PUC, dismissing Plaintiff's claims pursuant to Defendants' plea to the jurisdiction and request for dismissal. As a result, the TRO under which the City was not assessed short payments was dissolved, and ERCOT has stopped reallocating the City's share of short payments to other market participants. The appellate deadline was July 6, 2021, and there has been no appeal filed.

Luminant Energy Company, LLC v. Public Utility Commission of Texas, 03-21-00098-CV (Tex. App.—Austin).

Luminant Energy Company, LLC v. Public Utility Commission of Texas, 03-21-00108-CV (Tex. App.—Austin).

Luminant Energy Company, LLC v. Public Utility Commission of Texas, 03-21-00126-CV, 2021 WL 1567883 (Tex. App.—Austin Apr. 22, 2021, no pet. h).

Luminant Energy Company, LLC v. Public Utility Commission of Texas, 03-21-00139-CV (Tex. App.—Austin).

Luminant Energy Company, LLC ("Luminant") filed a total of four direct appeals in the Third Court of Appeals regarding the validity of PUC orders as a result of Winter Storm Uri. On March 30, 2021 Luminant filed a motion to dismiss No. 03-21-00126-CV, and that motion was granted on April 22, 2021. In the remaining direct Third Court of Appeals proceedings involving Luminant ("Luminant Appeals"), Luminant seeks to invalidate PUC's orders and force PUC to engage in retroactive repricing of the electricity sold during Winter Storm Uri. While Exelon Generation Company, LLC, DGSP2, LLC, Distributed Generation Solutions, LLC, Talen Energy Corporation, and others joined as intervenors, supporting Luminant's position, Calpine Corporation and TexGen Power, LLC filed interventions in support of PUC. Luminant and supporting intervenors claim that ERCOT adopted its pricing rule without notice, publication, public comment, reasoned justification, or any of the essential requirements for issuing or amending a rule. Intervenors supporting PUC claim that they would be substantially harmed if the orders were reversed, and Calpine specifically argued that it responsibly hedged its generation on the Intercontinental Exchange based upon ERCOT's daily prices. Several parties have already filed briefs in No. 03-21-00098-CV, and oral arguments have been requested. Briefs were filed in No. 03-21-00108-CV, and are due for No. 03-21-00139-CV on July 26, 2021. These cases are still pending.

Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. v. the Public Utility Commission of Texas, No. D-1-GN-21-002099 (261st Dist. Ct., Travis County, Tex.).

Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. v. the Public Utility Commission of Texas, No. D-1-GN-21-001772 (53rd Dist. Ct., Travis County, Tex.).

In Travis County District Court, several suits, including those filed by Constellation NewEnergy, Inc. and Exelon Generation Company, LLC, alongside intervenors in support of the same actions, were filed to challenge the procedure that ERCOT used to deviate from the uplift rule and the PUC's action to permit ERCOT to retain discretion in taking action under its ERCOT Nodal Protocols to resolve financial obligations between a market participant and ERCOT. Plaintiffs alleged that PUC failed to obtain written approval from the Governor prior to promulgating this uplift rule, and eliminated default uplift invoice caps. The causes of action challenged the action pursuant to the requirements listed under several sections of the Texas Administrative Procedures Act and alleged an *ultra vires* claim under the Uniform Declaratory Judgment Act. In both cases, plaintiffs filed motions to abate, requesting the proceeding be abated pending the outcome of the related appeal to the Third Court of Appeals for the Third District of Texas. Subsequently, on June 8, 2021, the Court granted the plaintiffs' unopposed motion to abate for No. D-1-GN-21-002099, but the Court has not yet ruled on No. D-1-GN-21-001772.

RWE Renewables Americas LLC v. the Public Utility Commission of Texas, No. D-1-GN-21-001839 (201st District Court, Travis County).

RWE Renewables Americas LLC, TX Hereford Wind, LLC, Miami Wind I, LLC, Goldwaithe Wind Energy LLC, and Ector County Energy Center LLC ("Plaintiffs") filed a lawsuit in Travis County District Court against the PUC and Commissioners in their official capacities. This suit alleges similar causes of action to the above suits, and also includes a count regarding improper emergency rulemaking. Plaintiffs seek to reverse PUC's orders from February 15 and 16, 2021. Plaintiffs also request the court issue a declaration that PUC's orders constitute invalid rulemaking, thus vacating the orders. Plaintiffs request specific additional relief, including a

request that the court issue a declaratory judgment that the Commissioners acted *ultra vires* in promulgating the orders, issue a declaratory judgment that PUC and Commissioners in their individual capacity acted outside the scope of their legal authority in allowing ERCOT to exceed the orders and refuse to correct pricing, and issue a writ of mandamus or injunction directing PUC to rescind the orders. This case is still pending.

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA Awards Over $17 Million to Benefit Small and Rural Water Systems. On May 12, 2021, EPA announced over $17 million in grant funding to small drinking water and wastewater systems that serve small communities and rural America for training and technical assistance purposes. Technical assistance may include circuit-rider and multi-state regional technical assistance programs, training and site visits, as well as training or technical assistance to diagnose and troubleshoot operational and compliance-related problems and identify solutions. EPA anticipates that grants will be awarded to (1) the Rural Community Assistance Partnership; (2) the National Rural Water Association; and (3) the University of New Mexico to provide training and technical assistance and improve water quality.

EPA Further Delays Revisions to Lead and Copper Rule ("LCRR"). On June 16, 2021 EPA announced that the effective date and compliance dates for its Lead and Copper Rule Revisions ("LCRR") will be delayed according to President Biden's Executive Order 13990 directing federal agencies to review certain environmental-related regulations. Implementation of the LCRR will be further delayed until December 16, 2021. The compliance date has also been pushed back from January 16, 2024 to October 16, 2024. During this time, EPA plans to review the LCRR and consider concerns raised by stakeholders such as disadvantaged communities that have been disproportionately impacted, states that administer national primary drinking water regulations, consumer and environmental organizations, and water systems. Stakeholders concerns include, but are not limited to, incentives to replace all lead service lines, replacement of privately owned lead lines, and costs to public water systems.

EPA Adds New Contaminants to its Drinking Water Treatability Database. EPA updated its Drinking Water Treatability Database to add new per- and polyfluoroalkyl substances ("PFAS"). The Database provides information on different contaminants, scientific references, and possible treatment processes to remove contaminants from drinking water. The update adds treatment information for 11 PFAS compounds, bringing the total number of treatment information in the database to 37 including perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS"). The new PFAS entries are: perfluoropentanesulfonic acid ("PFPeS"); perfluorohexanesulfonamide ("PFHxSA"); perfluorobutylsulfonamide ("PFBSA"); perfluoro-4-methoxybutanoic acid ("PFMOBA"); perfluoro-3-methoxypropanoic acid ("PFMOPrA"); perfluoro-3,5,7,9-butaoxadecanoic acid ("PFO4DA"); fluorotelomer sulfonate 4:2 ("FtS 4:2"); ammonium 4,8-dioxa-3H-perfluorononanoate ("ADONA"); perfluoro-4-(perfluoroethyl)cyclohexylsulfonate ("PFECHS"); F-53B: a combination of 9-chlorohexadecafluoro-3-oxanone-1-sulfonic acid and 11-Chloroeicosafluoro-3-oxaundecane-1-sulfonic acid; perfluoro-2-{[perfluoro-3-(perfluoroethoxy)-2-propanyl]oxy}ethanesulfonic acid ("Nafion BP2").

EPA to Revise 2020 Clean Water Act ("CWA") Section 401 Certification Rule. On May, 27, 2021, EPA announced its intent to revise the 2020 CWA Section 401 Certification Rule after determining that it erodes state and tribal authority. Section 401 of CWA prohibits a federal agency from issuing a permit or license to conduct an activity that may result in any discharge into waters of the United States unless the affected state or Tribe certifies that the discharge is in compliance with CWA and state law, or waives certification. The 2020 CWA Section 401 Certification Rule places limits on the certification process, notably: (1) binding authorities to a strict timeline, subject to a boundary of one year and without any tolling provisions; (2) requiring decisions to be based on specific discharges from a proposed activity, not the water quality effects of the activity as a whole; and (3) limiting

state and tribal conditions to those related to point source discharges into waters of the United States such that they are based on the requirements of CWA and do not consider issues like waters protected by state law, air emissions, transportation effects, or climate change.

EPA and Department of the Army Intend to Redefine "Waters of the United States." On June 9, 2021, EPA and the Department of the Army (the "Agencies") announced their intent to revise the definition of the "waters of the United States" ("WOTUS"). WOTUS is a term that establishes the geographic scope of federal jurisdiction under CWA. The current definition was established in 2020 through the Navigable Waters Protection Rule which rescinded the Obama Administration's 2015 Clean Water Rule defining WOTUS. The Agencies determined that the 2020 Rule significantly reduced clean water protections, particularly in arid states where many streams were found to be non-jurisdictional. The Agencies will base their rulemaking efforts on the following considerations:

- Protecting water resources and communities consistent with CWA;
- The latest science and the effects of climate change on our waters;
- Emphasizing a rule with a practical implementation approach for state and Tribal partners; and
- Reflecting the experience of and input received from landowners, the agricultural community, states, Tribes, local governments, community organizations, environmental groups and disadvantaged communities with environmental justice concerns.

In conjunction with this rulemaking, the Department of Justice also filed a motion to request remand of the 2020 Rule.

EPA Releases Environmental Justice Memo. On April 30, 2021, EPA's Office of Enforcement and Compliance Assurance released a new internal memo outlining actions intended to strengthen enforcement and advance the protection of "overburdened communities" with Environmental Justice concerns. The memo defines "overburdened communities" to include minority, low-income, tribal, or indigenous populations of geographic locations in the countries that potentially experience disproportionate environmental harms and risks. The memo is expected to be the first in a series of memoranda released by EPA in response to the Biden Administration's emphasis on Environmental Justice.

The memo outlines a general plan to advance the agency's Environmental Justice goals, including:

- Increasing the number of facility inspections;
- Strengthening enforcement and compliance;
- Increasing public engagement in overburdened communities; and
- Prioritizing community health when deciding appropriate action when state partner agencies are involved.

EPA Establishes PFAS Council Following Introduction of PFAS Action Act of 2021. On April 27, 2021, EPA established a specific PFAS Council with the stated goals to collaborate on cross-cutting strategies, advance new science, develop coordinated policies, regulations and communications, and engage with affected states, tribes, communities and stakeholders. The PFAS Council will develop a multi-year strategy to deliver critical public health protections to the American public (to be titled "PFAS 2021-2025 - Safeguarding America's Waters, Air and Land").

The Firm's Air and Waste Practice Group has reported on PFAS in previous editions of *The Lone Star Current* (April 2019, July 2019, and April 2020), since EPA first introduced the PFAS Action Plan in 2019. Following the announcement of EPA's PFAS Action Plan, Congress introduced the PFAS Action Act of 2019, which passed in the U.S. House of Representatives, but died in the U.S. Senate. On March 24, 2021, the PFAS Action Act of 2021 was introduced in the U.S. House of Representatives and is nearly identical to the 2019 bill. As it relates to the solid waste industry, the PFAS Action Act of 2021 would require EPA to declare PFOS and PFOA (the two main categories of PFAS) as hazardous substances within one year and to determine a list of additional PFAS to consider hazardous substances within five years. Listing these compounds as hazardous substances could require cleanup of sites with known contamination, and could result in PFAS being added to the list of constituents that landfill groundwater monitoring networks test for and potentially remediate.

EPA Rescinds Clean Air Act ("CAA") Cost-Benefits Rule. On May 13, 2021, EPA rescinded a procedural rule aimed at improving the rulemaking process under the CAA cost-benefits rule by establishing requirements for evaluating the benefits and costs of regulatory decisions. The "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process Rule" (the "Cost-Benefits Rule"), finalized in December 2020, required: (1) EPA to prepare a benefit-cost analysis ("BCA") for all significant proposed and final regulations under the CAA; (2) EPA to develop BCAs in accordance with best practices from the economic, engineering, physical, and biological sciences; and, (3) EPA to increase transparency in how it presents the costs and benefits resulting from significant CAA regulations. EPA decided to rescind the Cost-Benefits Rule after finding that it imposed procedural restrictions and requirements that would have limited EPA's ability to use the best available science in developing CAA regulations, and would be inconsistent with economic best practices.

EPA Rescinds Guidance Document Rule. On May 18, 2021, EPA rescinded the "EPA Guidance; Administrative Procedures for Issuance and Public Petitions Rule" (the "Guidance Document Rule"), after the agency finalized the rule in October 2020 pursuant to an executive order titled *Promoting the Rule of Law Through Improved Agency Guidance Documents*. The Guidance Document Rule revised EPA's practice of organizing, evaluating, and issuing guidance documents in order to increase the transparency of its guidance practices and improve the process used to manage its guidance documents. The stated purpose of the rule was to ensure EPA guidance documents:

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

EPA rescinded the Guidance Document Rule after it "concluded that the internal rule on guidance deprives EPA of necessary flexibility in determining when and how best to issue public guidance based on particular facts and circumstances, and unduly restricts EPA's ability to provide timely guidance on which the public can confidently rely." In rescinding the rule, EPA stated that it will continue to make agency guidance available to the public online and will continue to solicit stakeholder input on guidance of significant stakeholder and public interest.

The American Jobs Plan. On March 31, 2021, President Biden released the American Jobs Plan which seeks to replace 100% of the nation's lead pipes and service lines. To fund the plan, Biden asked Congress to invest $45 billion in EPA's Drinking Water State Revolving Fund and in Water Infrastructure Improvements for the Nation Act ("WIIN") grants. In addition to reducing lead exposure in homes, the Plan aims to reduce exposure in 400,000 schools and childcare facilities. The Plan would also provide $56 billion in grants and low-cost flexible loans to states, Tribes, territories, and disadvantaged communities to modernize their systems, and $10 billion to monitor and remediate PFAS in drinking water and to invest in rural small water systems and household well and wastewater systems, including drainage fields.

United States Fish and Wildlife Service ("FWS")

FWS to Leave "Habitat" Undefined under Endangered Species Act ("ESA"). The Biden Administration announced that it wants the term "habitat" to be undefined under ESA. While ESA does not define "habitat," the Trump Administration created a regulatory definition after a 2018 Supreme Court case holding that only a "habitat" of an endangered species can be designated as "critical habitat" under ESA. FWS stated that "habitat" does not need a definition to comply with the Court's ruling and that a definition would preclude an agency's ability to determine what constitutes a "critical habitat." While the Trump Administration's definition will remain in effect until the FWS completes the rulemaking process, the Biden Administration is also working to rescind the definition. The FWS rulemaking, conducted jointly with the National Marine Fisheries Service, seeks to rescind or update the Trump Administration's ESA regulations that address what areas can be excluded from a critical habitat; how ESA protects plants and animals; and how federal agencies work together on these issues.

Texas Water Development Board ("TWDB")

Brooke Paup Takes Over as Chairwoman of the Texas Water Development Board. On April 22, 2021, Governor Abbot named Brooke T. Paup as Chairwoman of TWDB. Paup has served as a member of the TWDB since February 2018. She previously served as the Director of Legislative Affairs for the Texas Comptroller of Public Accounts. Paup was also the Deputy Division Chief of Intergovernmental Relations and Special Assistant for Policy and Research for the Office of the Attorney General and worked on legislative issues, special litigation, and public finance, including the creation of the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Announces New Water Quality Deputy Director, Wastewater Permitting Section Manager, and Pretreatment Team Leader. The TCEQ's Water Quality Division recently announced changes in its leadership. Colleen Cook will serve as the new Pretreatment Team Leader. Cook worked for the Alabama Department of Environmental Management's Water Division for over five years before joining the Pretreatment Team in January 2020. Additionally, Matthew Udenenwu will serve as the new Wastewater Permitting Section Manager. Udenenwu has worked for the TCEQ for over 20 years. Lastly, Robert Sadlier will serve as the new Water Quality Division Deputy Director. Sadlier has worked for the TCEQ for over 9 years serving as an environmental investigator, supervisor, and manager.

TCEQ Releases Guidance Document on Prohibited Waste Removal Plans. On April 7, 2021, the TCEQ MSW Permits Section released a new guidance document (RG-546) for Preparing Work Plans for Removing Prohibited Waste from Municipal Solid Waste Landfills. According to the guidance document, a Prohibited Waste Removal Plan is required for removal of prohibited wastes that have been disposed of in a MSW landfill. The permittee or operator must notify the TCEQ of such occurrences and prepare and submit a Prohibited Waste Removal Plan to the MSW Permits Section for review and approval before removing the prohibited wastes. However, a Prohibited Waste Removal Plan is not required for removal of prohibited wastes that are discovered and immediately removed in accordance with the landfill permit and Site Operating Plan.

TCEQ Proposes Rulemaking for Industrial and Hazardous Waste (IHW) Generator and Management Fees Increase. On June 4, 2021, TCEQ published a proposed rulemaking regarding industrial solid waste and municipal hazardous waste generator and management fee increases. The proposed rulemaking would increase the fees for generation and management of Industrial and Hazardous Waste (IHW). Additionally, it would give TCEQ the ability to adjust the fees on an annual basis at or below the new proposed fee schedules. TCEQ is proposing the fee increases because the revenue in Waste Management Account Fund 0549 is facing a declining fund balance and the fee rates have not been adjusted since 1994.

The proposed rulemaking aims to increase the IHW management fee schedule by 45%. More specifically, the proposed rulemaking seeks to (1) increase the IHW generation fee schedule from $0.50 to a maximum of $2.00 per ton for non-hazardous waste generation; (2) increase the fee schedule from $2.00 to a

maximum of $6.00 per ton for hazardous waste generation; and (3) allow the Executive Director the ability to adjust the actual IHW generator fee at or below the new fee schedule amounts. TCEQ anticipates that the fee increases will primarily impact small businesses and the public may experience increased fees for waste generation or passed through price increases. TCEQ anticipates there may also be a small environmental benefit from waste generation reductions.

The deadline to submit written comments is July 6, 2021. TCEQ anticipates adopting a final rule on November 3, 2021.

TCEQ Proposes Amendment to Air Quality Standard Permit for Concrete Batch Plants. On May 28, 2021, TCEQ announced plans to amend the air quality standard permit for concrete batch plants. TCEQ originally issued the concrete batch plant standard permit in 2000, and amended it in 2003 and in 2012. This proposed amendment will update the standard permit to add an exemption from emissions and distance limitations that was inadvertently removed during the 2012 amendment. The standard permit will be effective for standard permits issued after September 22, 2021.

TCEQ is accepting comments on the proposed amendment until June 29, 2021.

TCEQ to Propose Rules to Amend Industrial Solid Waste and Municipal Hazardous Waste Rules to Maintain Equivalency with RCRA Revisions. On July 14, 2021, the TCEQ Commissioners will propose a rulemaking to amend, repeal, and replace a number of sections of 30 Texas Administrative Code Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in order to maintain equivalency with Resource Conservation and Recovery Act ("RCRA") revisions promulgated by EPA, and to formalize the foundry sands exclusion. The future rulemaking would update Chapter 335 to include federal rule changes set forth in parts of RCRA Clusters XXIV – XXVII, including the following:

- RCRA Cluster XXIV - Checklist 233
  - Rule changes in Checklist 233 implement vacaturs of parts of the federal definition of solid waste ("DSW") ordered by the United States Court of Appeals for the District of Columbia Circuit by revising several recycling-related provisions associated with the DSW. The purpose of these revisions is to ensure that the hazardous secondary materials recycling regulations encourage reclamation in a way that does not result in increased risk to human health and the environment.

- RCRA Cluster XXV - Checklist 237
  - Rule changes in Checklist 237 revise the existing hazardous waste generator regulatory program by reorganizing the regulations to improve their usability by the regulated community; providing a better understanding of how the RCRA hazardous waste generator regulatory program works; addressing gaps in the existing regulations to strengthen environmental protection; providing greater flexibility for hazardous waste generators to manage their hazardous waste in a cost-effective and protective manner; and making technical corrections and conforming changes to address inadvertent errors and remove obsolete references to programs that no longer exist.

- RCRA Cluster XXVI - Checklists 238 and 239
  - Rule changes in Checklist 238 revise existing regulations regarding the export and import of hazardous wastes from and into the United States. Specifically, this rule applies a confidentiality determination such that no person can assert confidential business information claims for documents related to the export, import, and transit of hazardous waste and export of excluded cathode ray tubes. EPA is making these changes to apply a consistent approach in addressing confidentiality claims for export and import documentation.
  - Rule changes in Checklist 239 would adopt the methodology EPA established to determine and revise the user fees applicable to the electronic and paper manifests to be submitted to the national electronic manifest (e-Manifest) system that EPA developed under the Hazardous Waste Electronic Manifest Establishment Act. Certain users of the hazardous waste manifest are required to pay a prescribed fee to EPA for each electronic and paper manifest they use and submit to the national system.

- RCRA Cluster XXVII - Checklist 241
  - Rule changes in Checklist 241 establish cost-savings and streamlined standards for handling hazardous waste pharmaceuticals to better fit the operations of the healthcare sector while maintaining protection of human health and the environment. The rule would prohibit disposal of pharmaceuticals into the sewage system, exempt nicotine wastes from classification as a listed hazardous waste, and codify the exemption for unused pharmaceuticals that are expected to be legitimately reclaimed from being classified as a solid waste.

- RCRA Cluster XXVIII - Checklist 242
  - Rule changes in Checklist 242 add hazardous waste aerosol cans to the universal waste program. This change would benefit the wide variety of establishments generating and managing hazardous waste aerosol cans, including the retail sector, by providing a clear, protective system for managing discarded aerosol cans, easing regulatory burdens, and promoting the collection and recycling of these cans.

TCEQ anticipates publishing the proposed rulemaking on July 30, 2021 with the public comment period to end on August 30, 2021. TCEQ anticipates adopting a final rule in January 2022.

TCEQ to Propose Rules to Clarify Composting Notice Process and Obsolete Terms. On July 14, 2021, the TCEQ Commissioners will propose a rulemaking to clarify and update existing notice language and requirements found in 30 Texas Administrative ("TAC") Code Section 332.22(b), add existing language that applies to composting from 30 TAC Chapter 330, Subchapter P, concerning Fees and Reporting, to Chapter 332, and make substantive and nonsubstantive revisions to bring the chapter more up to date with agency and program standards. More specifically, the future rulemaking would provide clarity on the definition of adjacent landowner for compost Notification of Intent ("NOI") and remove other vague mailing requirements. Currently, Section 332.22(b) uses the phrase "affected landowners" regarding who the Chief Clerk mails notice of the planned facility to, which creates ambiguity on which landowners should be listed by the applicant. This rulemaking would incorporate applicability, fees, and reporting requirements from 30 TAC Chapter 330, Subchapter P into sections for registered and permitted facilities. Revisions and clarifications would be done to various citations and other conflicting rules between multiple chapters. Broken and obsolete links, typos, misspellings, and grammar mistakes would be fixed throughout the rule to ensure clarity and readability, and provide overall effectiveness of the rules.

TCEQ anticipates publishing the proposed rulemaking on July 30, 2021 with the public comment period to end on August 30, 2021. TCEQ anticipates adopting a final rule on December 15, 2021.

Public Utility Commission of Texas ("PUC")

Governor Abbott Appoints New Chairman and Commissioners to PUC. Last month, we reported that all three Commissioners of PUC resigned in the wake of Winter Storm Uri. Since that time, Governor Greg Abbott has appointed a new Chairman and two new Commissioners to PUC.

On April 1, 2021, Governor Abbott announced the appointment of Will McAdams, President of the Associated Builders and Contractors of Texas, to one of the vacant PUC Commissioner positions for a term set to expire on September 1, 2025. On April 12, Governor Abbott appointed Peter Lake, Chairman of the Texas Water Development Board, as Chairman of PUC for a term set to expire on September 1, 2023. On June 17, Governor Abbott appointed Lori Cobos, Chief Executive and Public Counsel for the Office of Public Utility Counsel, to the other vacant PUC Commissioner position for a term set to expire September 1, 2021.

PUC Ends Disconnect Moratorium, Extends Required Deferred Payment Plans. On February 21, 2021, PUC issued an order establishing a good cause exception to specific electric, water, and sewer rules that enacted a moratorium on disconnections, preventing utilities from disconnecting customers due to nonpayment. PUC based its decision "on the existence of a public emergency and imperative public necessity following Winter Storm Uri." On June 1, 2021, Commissioner McAdams issued a memo, recommending that PUC should end the disconnect moratorium at the June 11, 2021 Open Meeting.

At the June 11, 2021 Open Meeting, the Commissioners ended the disconnect moratorium, effective on June 18, 2021. The Commissioners discussed the "delicate balance between financial impact on consumers in households and the economic health of electric providers in our competitive marketplace," and the need to remove the "regulatory limbo" before the heat of the summer months. They urged small commercial and residential consumers to work with their providers to get on deferred payment plans, and also expressed their expectation that all Retail Electric Providers ("REPs") re-notice their customers who are behind on payments.

Lastly, the Commissioners renewed the directive from the March 26, 2020 Order in Project No. 50664 directing all REPs to offer deferred payment plans to customers upon request regardless of qualification. An order issued on July 16, 2020 renewed this directive, and at the June 11, 2021 Open Meeting, the Commissioners again renewed the directive until November 12, 2021.

PUC Amends Substantive Rule Section 25.505 Related to ERCOT Scarcity Pricing Mechanism. At the March 5, 2021 Open Meeting, PUC directed Commission Staff to open a project to evaluate whether the Commission should amend its rules to adjust the low system-wide offer cap ("LCAP") prior to this summer. The Commission further requested comments from interested parties addressing this question. As a result of the initial and reply comments filed by multiple stakeholders, PUC filed on May 6, 2021 its Proposal for Publication of Amendments to 16 Texas Administrative Code ("TAC") § 25.505 as approved at the May 6, 2021 Open Meeting, and requested additional comments on the proposed language from interested parties.

PUC received comments on the proposed amendments from NRG Energy. Inc., Texas Electric Cooperatives, Inc., the Lower Colorado River Authority, Texas Industrial Energy Consumers, South Texas Electric Cooperative, Inc., the Steering Committee of Cities Served by Oncor and the Texas Coalition for Affordable Power, ERCOT, Exelon Generation Company, LLC, Texas Energy Association for Marketers, Texas Competitive Power Advocates, and Texas Retail Energy, LLC.

PUC's final amendments, with changes to the proposed text as published in the May 21, 2021 issue of the *Texas Register* (46 Tex. Reg. 3227 (May 21, 2021)), modify the value of the LCAP by eliminating the provision that ties the value of the LCAP to the natural gas price index and sets the LCAP at $2,000 per megawatt hour, with no alternate calculation. It also includes a make-whole provision that would require that "[w]hen the system-wide offer cap is set to the LCAP, ERCOT must reimburse resource entities for any actual marginal costs in excess of the larger of the LCAP or the real-time energy price for the resource."

PUC Waives ERCOT Protocol Related to Confidential Outage Information. On June 23, 2021, Chairman Lake filed a memo stating that "we need more transparency and information about forced outages and that information should quickly be made available to the public." Under the Electric Reliability Council

of Texas' ("ERCOT") protocols, information regarding forced outages is considered protected and confidential for a 60-day period. However, after a call for conservation in early June due in part to a higher than expected number of forced generation outages, Chairman Lake stated that the public deserved to know "what generation units are unavailable, the amount of unavailable capacity, the cause of the outage, and when the units are expected to return to service." Therefore, he recommended that PUC waive the portion of ERCOT Nodal Protocol § 1.3.1.1(1)(c) that protects outage information for sixty days for forced outages, effective for the time period of June 1, 2021 through September 30, 2021. He also recommended that ERCOT make access to this information clearly visible on the front page of its website.

At the June 24, 2021 Open Meeting, after hearing from Michele Richmond, Texas Competitive Power Advocates, and Woody Rickerson, Vice President of Grid Planning and Operations at ERCOT, the Commissioners voted to waive ERCOT Nodal Protocol § 1.3.1.1(1)(c) consistent with Chairman Lake's memo.

PUC Holds Weekly Open Meetings, Transitions to Back to In-Person Format. The newly appointed Commissioners of PUC have announced they will be holding Open Meetings once per week this summer to address an influx of critical issues coming out of the 87th Texas Legislature and following February's Winter Storm Uri. Some of these Open Meetings will be for the purpose of conducting normal business, but others will be held in a "workshop" format, for the Commission to work with stakeholders and Staff. No formal action will take place at these workshop-type Open Meetings, but the focus is instead on brainstorming with the public and stakeholders on key issues. Further, at the June 24, 2021 Open Meeting, PUC Executive Director Thomas Gleeson said Open Meetings will be held in person beginning with the July 15 Open Meeting, but asked parties to limit in-person representation to two people each.

PUC Opens Rulemaking Projects to Implement Legislation Adopted by the Texas Legislature. The 87th Texas Legislative Session ended on May 31, 2021. There were 326 bills filed that directly affected PUC's operations or regulated entities. Pending the end of the Governor's veto period on June 20, 2021, 25 bills have passed that will require PUC action, including Senate Bill 3, which includes 41 sections covering a wide range of provisions in response to Winter Storm Uri.

PUC Staff has begun providing information about the rulemaking and implementation process it will undertake to address the recently enacted legislation. PUC has published the following list of upcoming or pending rulemakings:

- Project No. 51825 – Investigation Regarding the February 2021 Winter Weather Event
  - Commission Staff is scoping the parameters of the project along with other winter weather projects.

- Project No. 51830 – Review of Wholesale-Indexed Products for Compliance with Customer Protection Rules for Retail Electric Service
  - This rulemaking implements provisions of House Bill 16, including limitations on wholesale-indexed products for compliance with customer protection rules and requirements surrounding expiration notices and default renewal products.
  - Commission Staff is scoping the project and drafting a proposed rule scheduled for consideration at the July 15 Open Meeting. Staff intends to restyle the rulemaking and expand it to include additional customer protection related rule changes.

- Project No. 51839 – Electric Gas Coordination
  - This rulemaking examines and improves coordination between the electric and gas industries.
  - Commission Staff is scoping the project parameters, which overlaps with the Critical Load project (Project No. 51888).

- Project No. 51840 – Rulemaking to Establish Weatherization Standards
  - This rulemaking implements provisions of Senate Bill 3 and will examine weatherization standards for power generation facilities.
  - Commission Staff is refining policy proposals and drafting a strawman for consideration by approximately July 1, 2021 and will have a proposed rule for consideration in late August.

- Project No. 51871 – Review of the ERCOT Scarcity Pricing Mechanism
  - This rulemaking reviews and identifies potential improvements to the rules and protocols of the ERCOT wholesale electric market, with emphasis on pricing of energy and ancillary services.
  - The proposal for adoption was published following the June 24, 2021 Open Meeting.

- Project No. 51888 – Review of Critical Load Standards and Processes
  - This rulemaking implements provisions of Senate Bill 3 and House Bill 3648, which establish standards and processes to protect load that provides an essential service to electric generation.
  - Commission Staff is scoping the project parameters and refining policy proposals.

- Project No. 51889 – Review of Communication for the Electric Market
  - This rulemaking reviews communications standards and expectations among ERCOT, governmental entities, market participants, and the public.
  - Commission Staff is scoping the project parameters and refining policy proposals.

Other topics for future rulemakings identified by Commission Staff include:

- Review of 16 TAC § 25.53 Relating to Electric Service Emergency Operations Plans
- Power Outage Alert

New Application for Critical Load Created. On May 7, 2021, PUC filed a new "Application for Critical Load Serving Electric Generation and Cogeneration" in Project No. 51839, *Electric-Gas Coordination*. One of the contributing factors to the outages during the February winter storm was confusion and lack of coordination regarding the designation of critical load, as ERCOT shut off power to many facilities later identified as critical load facilities. As a result, the ERCOT Gas Electric Working Group ("GEWG") coordinated with PUC Staff, the electric and gas industries, and Railroad Commission ("RRC") Staff to create a new and improved form for these facilities to use.

The revised form broadens the scope of critical load to include premises that provide electricity to natural gas production, saltwater disposal wells, processing, storage, or transportation such as a natural gas compressor station, gas control center, or other pipeline transportation infrastructure. The revisions were made "in an effort to increase the reliability of uninterrupted supply of natural gas to natural gas-fired generation and cogeneration." To facilitate the accessibility of the form, ERCOT has posted it on the ERCOT GEWG home page. PUC filing included a reminder that neither PUC nor ERCOT designate loads as critical, but instead, an application for designation of a premise as critical load should be submitted to the particular utility that provides electric service to the premise.

TNMP, AEP, and Oncor File DCRF Applications with PUC. In April 2021, Texas-New Mexico Power Company ("TNMP"), AEP Texas, and Oncor Electric Delivery Company LLC ("Oncor") filed applications with PUC to adjust their Distribution Cost Recovery Factor ("DCRF") to recover new investment in distribution equipment.

TNMP filed its DCRF Application on April 5, 2021 (*Application of Texas-New Mexico Power Company to Amend its Distribution Cost Recovery Factor*, Docket No. 51959 (pending)), requesting an increase in its distribution revenues of $13,959,505. The parties have unanimously reached a tentative agreement in principle on all issues and are currently working on finalizing the settlement agreement and documents.

AEP Texas filed its DCRF Application on April 6, 2021 (*Application of AEP Texas Inc. to Amend its Distribution Cost Recovery Factor*, Docket No. 51984 (pending)), requesting an increase in its distribution revenues of approximately $54.56 million. The parties have unanimously reached an agreement in principle on all issues and are currently working on finalizing the settlement agreement and documents.

Oncor filed its DCRF Application on April 8, 2021 (*Application of Oncor Electric Delivery Company LLC to Amend its Distribution Cost Recovery Factor*, Docket No. 51996 (pending)), requesting an increase in its total distribution revenue requirement by $97,826,277. The parties have unanimously reached an agreement in principle on all issues and are currently working on finalizing the settlement agreement and documents.

TNMP, Oncor, and CenterPoint File EECRF Applications with PUC. In May and June 2021, TNMP, Oncor, and CenterPoint Energy Houston Electric, LLC ("CenterPoint") filed applications with PUC to adjust their Energy Efficiency Cost Recovery Factor ("EECRF") to reflect changes in program costs and bonuses, and to minimize any over- or under-collection of energy efficiency costs resulting from the use of the EECRF.

On May 27, 2021, TNMP filed its 2022 EECRF application with PUC (*Application of Texas-New Mexico Power Company for Approval to Adjust the Energy Efficiency Cost Recovery Factor and Related Relief*, Docket No. 52153 (pending)). TNMP is seeking to adjust its EECRF to collect $7,225,543 in 2022.

On May 28, Oncor filed its 2022 EECRF application with PUC (*Application of Oncor Electric Delivery Company LLC to Adjust its Energy Efficiency Cost Recovery Factor*, Docket No. 52178 (pending)). Oncor is seeking to adjust its EECRF to collect $83,760,515 in 2022.

On June 1, 2021, CenterPoint filed its 2022 EECRF application with PUC (*Application of Centerpoint Energy Houston Electric, LLC to Adjust its Energy Efficiency Cost Recovery Factor*, Docket No. 52194 (pending)). CenterPoint is seeking to adjust its EECRF to collect $63,367,922 in 2022.

Railroad Commission of Texas ("RRC")

Texas Legislature Passes Gas Securitization Bill, RRC Begins Implementation. Winter Storm Uri resulted in a historic demand for energy, causing gas utilities to incur extraordinary costs in procuring the necessary supply of gas to maintain service to their customers. House Bill 1520 allows for the high cost of gas from the storm to be securitized, which will ensure end-use customers do not receive high, unexpected bills from their natural gas utility provider in the wake of Winter Storm Uri. The bill passed out of the Texas Legislature and was signed by Governor Greg Abbott on June 16, 2021. House Bill 1520 directs RRC and the Texas Public Finance Authority to work together to issue customer rate-relief bonds, the proceeds of which gas utilities would use to pay for the extraordinary cost of natural gas. The bonds would provide rate relief to customers by allowing gas utilities to recover the cost of gas through customer bills over a long time period. The bill provides financial relief to gas utilities that choose to apply for the bonds by providing for a low-cost source of financing to fulfill outstanding obligations to natural gas suppliers.

As reported last month, RRC gave notice to Local Distribution Companies, authorizing them to record in a regulatory asset account any and all "extraordinary expenses" related to securing natural gas during Winter Storm Uri, including the cost of gas and transportation of gas supply. RRC also sent gas utilities a "Notice to Operators," providing further information related

to the bill, including specifics on how gas utilities can file an *Application for Regulatory Asset Determination*. A gas utility that chooses to participate in the process would submit information and documentation to RRC regarding its extraordinary costs to procure natural gas during Winter Storm Uri. The agency would review the application and, if the agency determines that issuing bonds is cost-effective, direct the Texas Public Finance Authority to issue bonds.

Atmos Requests Penalty Waiver from RRC. On April 8, 2021 Atmos filed a "Request for Penalty Waiver" letter at RRC. Atmos provides non-firm (i.e., interruptible) service to numerous industrial and transportation customers. Some of these customers are large city-owned accounts, but most are private industrial customers. These customers pay a discounted rate in return for being available to curtail their service in the event of a supply shortage. If they fail to curtail service when called upon, they are assessed penalties equal to 200% of the price of gas during the time they failed to curtail. The penalties are designed to incentivize customers to comply with natural gas service priorities and allow for continuous service to firm customers. During Winter Storm Uri, Atmos sent a notice on February 12, 2021 requesting that these customers curtail service by noon on February 13, 2021. Although Atmos claimed that "99% of the customers were good actors" and reduced their consumption, Atmos has calculated that "hundreds of millions of dollars" in penalties should have been assessed. Any penalties collected would be an offset to the cost of gas paid by all customers.

Notwithstanding the language in its tariffs, Atmos requested permission from RRC to waive issuing critical weather event imbalance fees, customer imbalance fees, curtailment overpull fees, and pooling agreement fees incurred by customers for service provided between February 13, 2021 and February 21, 2021. Atmos proposed to waive the penalties due to the severity and unanticipated nature of the storm. According to Atmos, "[a]bsent the requested waiver, the penalties incurred by affected customers, which include hospitals, schools, municipalities, and other businesses that continued to operate at minimum levels for plant protection, will be significant and unnecessarily punitive due to historically high natural gas prices" during the winter storm. Significantly, Atmos has reported that it did not have to curtail service during the storm to firm customers. On April 19, 2021 RRC issued a letter finding it "permissible" for Atmos to waive the fees.

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