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PFAS - A "FOUR-LETTER WORD" FOR WATER AND WASTEWATER UTILITIES?

by Sara R. Thornton

If you follow developments in environmental regulation, you know a day rarely passes without some news story on the regulation of per- and poly-fluoroalkyl substances—or generally known as PFAS. To address growing concerns for PFAS contamination, the Environmental Protection Agency ("EPA") is actively implementing a strategic roadmap for PFAS that includes actions to address PFAS in water, wastewater, and biosolids. Water and wastewater utilities should actively track and weigh in on EPA's actions on PFAS because failure to do so may have utilities considering PFAS a "four-letter word" once EPA implements these actions.

PFAS is a term that represents thousands of man-made chemicals that are widely used and highly persistent in the environment. This wide use and persistence is evidenced through scientists finding PFAS in samples of human blood and in water, air, fish, and soil across the nation. Scientific studies have linked PFAS exposure to certain cancers, thyroid diseases, immune suppression and other health effects. Significant concerns regarding PFAS contamination in water supplies, and potential public health effects, are driving new regulatory requirements by EPA that will affect water, wastewater, and possibly biosolids management.

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PFAS Strategic Roadmap

On October 18, 2021, EPA Administrator Michael S. Regan announced EPA's PFAS Strategic Roadmap (the "Roadmap"). This Roadmap lays out EPA's agency-wide approach to addressing PFAS and establishes timelines for EPA to undertake specific actions and implement new policies to protect public health and the environment, while holding responsible polluters accountable. The Roadmap sets forth the following overarching goals:

PFAS Strategic Roadmap Goals

Research	Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.
Restrict	Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.
Remediate	Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.

In addition to establishing overarching goals and objectives for management of PFAS, the Roadmap details specific actions EPA intends to take, through its program offices, from 2021 through 2024. Of particular concern for water and wastewater utilities are the specific actions being implemented by the EPA Office of Water. Highlighted below are a few actions that are likely to significantly affect water and wastewater utilities.

Drinking Water

On February 22, 2021, EPA reproposed the Fifth Unregulated Contaminant Monitoring Rule ("UCMR 5") to collect new data on PFAS in drinking water and the agency reissued final regulatory determinations for perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") under the Safe Drinking Water Act ("SDWA").

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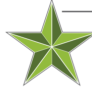
Lloyd Gosselink Rochelle & Townsend, P.C., provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

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

Sheila Gladstone will be receiving the Award for Outstanding Achievement at the Travis County Women Lawyers' Association Annual Grants and Awards Luncheon on May 6 in Austin. Congratulations, Sheila!

Cole Ruiz will be presenting "Growing Pains: The Evolving Law and Regulations Governing Retail Water Service to Municipal ETJs in Times of Urban Sprawl" on April 21 in Austin.

Jamie Mauldin and Roslyn Dubberstein will be giving a "Utility Related Update" at the 2022 Texas City Attorneys Association Summer Conference on June 15 in Galveston.

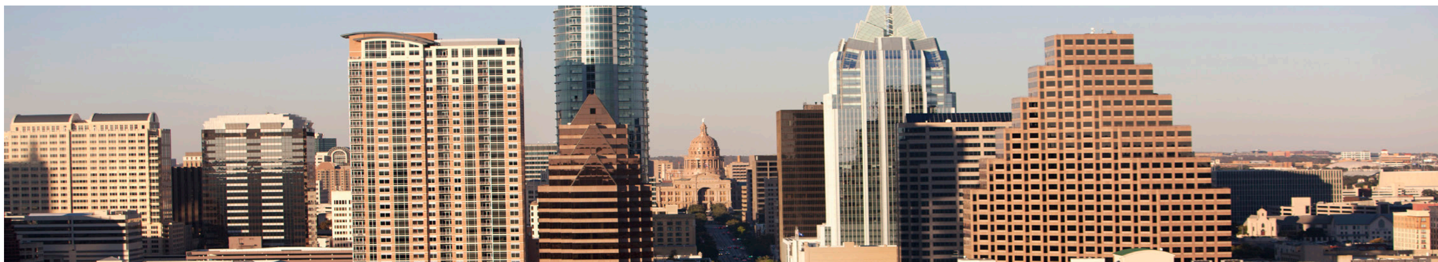
Sheila Gladstone and Sarah Glaser will be presenting an "Employment Law Update and Hot Topics for 2022" at the 2022 Texas City Attorneys Association Summer Conference on June 17 in Galveston.

Sarah Glaser will be presenting "Pandemic's Impact on Employment Law and Employee Relations" at the EEOC Districts Virtual EEO Workshop on July 13.

Lloyd Gosselink was a sponsor of the Austin Young Lawyers Association Inaugural Crawfish Boil Fundraiser on April 9, 2022. In attendance were Wyatt Conoly, an Associate in the Firm's Litigation Practice Group, Roslyn Dubberstein, an Associate in the Firm's Energy and Utility Practice Group, and Matthew Sutton, a paralegal in the Firm's Districts Practice Group.

Keep Austin Beautiful
Enthusiastic members of the Firm and their families participated in Keep Austin Beautiful Day on April 9, 2022.

MUNICIPAL CORNER



Chapter 556 of the Texas Government Code does not apply to certain public entities that are not considered state agencies based on factors outlined by the Office of the Attorney General. Tex. Att'y Gen. Op. No. KP-398 (2022).

In a recent opinion, the Office of the Attorney General addressed whether a specific insurance association was considered a state agency, and thus, subject to Chapter 556 of the Texas Government Code. The Office of the Attorney General concluded the entity was not a state agency subject to such statutory requirements.

The Honorable Briscoe Cain, Chair of the Texas House Committee on Elections, sought a determination by the Office of the Attorney General as to whether the Texas Windstorm Insurance Association (the "Association") was subject to Chapter 556 of the Texas Government Code as a state agency. Under Section 556.006(a), a state agency is prohibited from using "appropriated money to attempt to influence the passage or defeat of a legislative measure." *See* TEX. GOV'T CODE §§ 556.001–.009. State agency is defined in Chapter 556 as "a department, commission, board, office, or other agency in the executive branch of state government, created under the constitution or a statute, with statewide authority." *Id.* § 556.001(2)(A).

The Opinion then outlines the precedent governing whether a public entity is considered a state agency. As previously discussed in Attorney General Opinion JC-0161, there are several factors that must be considered when determining whether a public entity is a state agency. *See* Tex. Att'y Gen. Op. No. JC-0161 (1999). The Attorney General considers (1) whether the board members were appointed by the Governor; (2) whether the board members have to be trained on open meetings, public information, and conflict-of-interest laws; (3) whether the entity is subject to the Sunset Act; (4) whether the entity has rulemaking authority; and (5) whether the entity has statewide authority to perform its duties.

Next, the Opinion provided a detailed discussion of each of the above factors and their applicability to the Association. The Opinion also considered whether the Association was funded by taxes or state funds in addition to the five factors discussed above. Based on this analysis, the Attorney General concluded that the Association was not considered a state agency for the purposes of Chapter 556. This Opinion may be useful for other similarly situated entities when determining whether they are subject to certain statutory requirements.

A county does not have the authority to place a sign in a state highway right-of-way without approval of the Texas Department of Transportation or an agreement with the Texas Transportation Commission. Tex. Att'y Gen. Op. No. KP-399 (2022).

In a recent opinion, the Office of the Attorney General addressed whether Goliad County possessed sufficient authority to erect signage in a state highway right-of-way under Chapter 394 of the Texas Transportation Code, which regulates outdoor advertising on rural roads. The Office of the Attorney General concluded the County did not have the authority to do so.

Goliad County is included in the Governor's continuing disaster proclamation under Section 418.014 of the Texas Government Code due to "the ongoing surge of individuals unlawfully crossing the Texas-Mexico border" that allegedly "poses ongoing and imminent threat of severe damage, injury, and loss of life and property, including [...] human trafficking." Governor of the State of Texas, Disaster Proclamation (May 31, 2021). The Goliad County sheriff placed signs along U.S. Highway 59 in an unincorporated area near the border between Bee County and Goliad County warning travelers to avoid entering Goliad County if involved in human trafficking or carrying illicit drugs. The Texas Department of Transportation eventually removed the signs. The County subsequently filed a request for determination with the Office of the Attorney General to address this matter.

The Attorney General concluded that a county does not have the authority to place the signs in question on the state highway right-of-way. The County argued that Section 394.003 allows a political subdivision to erect signs to protect life and property, and therefore, the sheriff had the right to erect the signs at issue. The Attorney General concluded that Chapter 394 did not grant such authority and Title 6 of the Transportation Code prohibits the placement of a sign on a state highway unless authorized by state law. Therefore, the County did not have the right to erect such signs without approval of the Texas Department of Transportation or an agreement with the Texas Transportation Commission.

A commissioners court of a county may renew a lease agreement authorized by Chapter 319 of the Texas Local Government Code without complying with the competitive purchasing

procedures of Chapter 262 of the Texas Local Government Code. Tex. Att'y Gen. Op. No. KP-391 (2021).

In a recent opinion, the Office of the Attorney General addressed whether a county must comply with the competitive bidding procedures of Chapter 262 of the Local Government Code "before renewing or extending a contract for management of a county facility that was originally awarded through a request for proposals." The Office of the Attorney General concluded the commissioners court of the county could renew a lease agreement without requiring the county to comply with competitive purchasing procedures.

Subchapter C of Chapter 262 outlines competitive processes that a county must use for purchases exceeding $50,000. *See* TEX. LOC. GOV'T CODE § 262.023(a). The Opinion discusses in detail the background of the contract at issue that is authorized by Chapter 319 of the Local Government Code, related to a commissioners court's ability to lease buildings to provide for annual exhibits of horticultural, agricultural, livestock, mineral, and other products that are of interest to the community, as well as the regulatory requirements associated with Chapter 262. Ultimately, the Attorney General concludes that the county commissioners court could renew a lease agreement without requiring the county to comply with competitive purchasing procedures. Additionally, and while declining to construe contracts, the Attorney General concluded that, in general, a commissioners court may agree to reasonable terms in a contract, including an assignment clause, provided such terms are consistent with applicable statutes and constitutional provisions regarding county contracting and the authority of the commissioners court generally.

Attorney General addresses Chapter 22 of the Texas Local Government Code governing Type A general-law municipalities operating under a mayor and alderman form of government and the potential disqualification of candidates and elected officers under certain circumstances. Tex. Att'y Gen. Op. No. KP-394 (2021).

The Attorney General recently responded to the City of Cumby's inquiring regarding Type A general-law municipalities operating under a mayor and alderman form of government related to potential disqualification of candidates and elected officers under Section 22.008 of the Texas Local Government Code. Section 22.008 states that "(a) an officer who is entrusted with the collection or custody of funds belonging to the municipality and who is in default to the municipality may not hold any municipal office until the amount of the default, plus 10 percent interest, is paid to the municipality," and "(b) if a member of the governing body changes the member's place of residence to a location outside the corporate boundaries of the municipality, the member is automatically disqualified from holding the member's office and the office is considered vacant." Tex. Local Gov't Code § 22.008.

The Office of the Attorney General first addressed whether a city may apply Section 22.008(a) to any of its elected officials. The City of Cumby interpreted this Section in a city ordinance as authorizing all City elected officials as officers "entrusted with the collection or custody of funds belonging to the municipality." The Attorney General noted that while Type A general-law municipalities possess authority to prescribe the powers and duties of any of its officers, including additional duties, the Texas Supreme Court has recognized that such authority "does not empower [a city council] to confer upon one officer the powers, duties, or rights expressly conferred by law upon another." *Beard v. City of Decatur*, 64 Tex. 7, 10 (Tex. 1885). Thus, the Attorney General concluded that a court would likely conclude the City may not assign the City treasurer's statutory duty to collect or keep custody of funds to other officers.

Next, the Opinion addresses whether the City may define default as either (a) unpaid "[t]axes or other liability due to the City of Cumby or Hopkins County"; or (b) unpaid "[w]ater, sewer, garbage, or any other utility in the candidate's name or associated with the address upon which the candidate establishes residency in the City of Cumby." The term "default" is not defined in the Local Government Code for the purposes of subsection 22.008(a); however, the Attorney General provides a common definition of "default" and states that unpaid taxes or utilities can be associated with default. The Attorney General further notes that Section 22.008 limits (a) the scope of persons to whom it applies, and (b) the type of political subdivisions to which it applies. The Opinion then outlines the factual and legal background regarding the City's ordinance to disqualify candidates and elected officials who were in default with the municipality and the county.

Ultimately, the Attorney General concluded that Local Government Code Section 22.008(a) prohibits an officer of a Type A general-law municipality entrusted with the collection or custody of municipal funds from holding office while in default to the municipality until the amount, plus interest, is paid. Furthermore, the Attorney General held that a court would likely conclude that by applying Section 22.008(a) to an officer in default to the county, or to an officer residing with another person in whose name a utilities account in default is held, the City went beyond its statutory authority. Moreover, because the Legislature has determined the qualifications for a Type A general-law municipality's governing body, the Attorney General stated that a court would likely conclude that the City has no authority to add to those qualifications and would likely find that the general ordinance authority found in Section 51.012 of the Local Government Code does not authorize an ordinance disqualifying an officer on the basis of default to the county. Finally, since the Legislature has already determined what disqualifies an elected officer from continuing to hold office, the Attorney General determined that a court would likely find that an ordinance adding to those disqualifications is "inconsistent with state law" and is prohibited under Section 51.012.

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

PFAS continued from page 1

EPA published UCMR 5 on December 27, 2021, which requires sample collection for 29 PFAS between 2023 and 2025 using analytical methods developed by EPA and consensus organizations. EPA expects that this sampling collection will provide scientifically valid data on the national occurrence of PFAS contaminants in drinking water and provide new data to improve understanding of the frequency of these 29 PFAS found in drinking water systems and at what levels. If UCMR 5 is applicable to a water utility, such utility should fully understand the new sampling requirements for these 29 PFAS contaminants.

With the final Regulatory Determinations for PFOA and PFOS, EPA will move forward to implement the national primary drinking water regulation ("NPDWR") development process for these two PFAS. The Agency is now developing a proposed NPDWR for these chemicals. As EPA undertakes this action, the agency is also evaluating additional PFAS and considering regulatory actions to address groups of PFAS. The PFAS NPDWR is expected for publication in Fall 2022. EPA anticipates issuing a final regulation in Fall 2023 after considering public comments on the proposal.

Water utilities should actively participate in this PFAS NPDWR rulemaking through participation in stakeholder meetings and submission of public comments to ensure that these regulations are supported by robust toxicological information that clearly defines safe, and unsafe, exposure levels to PFAS in drinking water. Once EPA establishes the NPDWR for PFOA and PFOS, water utilities should seek, and EPA should provide, immediate assistance for communicating monitoring and compliance with this regulation to the public.

Wastewater

As part of the Roadmap, the EPA Office of Water is also pursuing actions to address PFAS contamination from discharges of wastewater, although these actions are not as far along as PFAS drinking water actions.

EPA has undertaken a multi-industry study on PFAS to understand the extent and nature of PFAS discharges. EPA expects in 2022, and on an ongoing basis, to proactively restrict PFAS discharges from industries through a multi-faceted Effluent Limitations Guidelines ("ELGs") program. ELGs establish national technology-based limits for specified pollutants—in this case, PFAS substances—in wastewater discharges into waters of the U.S. and into municipal wastewater treatment facilities.

In Winter 2022, EPA anticipates proactively using existing National Pollutant Discharge Elimination System ("NPDES") authorities to reduce discharges of PFAS at the source and to obtain more comprehensive information through monitoring on PFAS sources and quantities discharged from PFAS sources. EPA will seek to leverage federally-issued NPDES permits to reduce PFAS discharges and to issue new guidance to state permitting authorities, like the Texas Commission on Environmental Quality, to address PFAS in state-issued NPDES permits, like Texas Pollutant Discharge Elimination System ("TPDES") permits. This guidance will recommend that TCEQ, and other state authorities, include permit monitoring requirements for PFAS using EPA's recently published analytical method 1633 that covers 40 PFAS substances at facilities where PFAS are expected to be present in wastewater and stormwater discharges. EPA also expects to develop final recommended ambient water quality criteria for PFAS for aquatic life in Winter 2022 and human health in Fall 2024. This will assist Tribes and states in developing water quality standards to protect and restore waters, issue discharge permits to control PFAS discharges, and assess cumulative impacts of PFAS pollution on communities.

Wastewater utilities should fully participate in available stakeholder processes on the development of PFAS regulations affecting wastewater. During stakeholder participation, utilities should strongly recommend that EPA provide practicable recommendations to state agencies regarding where PFAS is suspected and monitoring should occur. Additionally, since low levels of PFAS likely occur in many large municipal wastewater discharges, wastewater utilities should also request that EPA provide guidance regarding how to communicate PFAS detections to the public.

Biosolids

EPA is undertaking a risk assessment for PFOA and PFOS in biosolids, also known as sewage sludge, from wastewater treatment facilities that can sometimes contain PFAS. The risk assessment is expected to be finalized in Winter 2024 and will serve as the basis for determining whether regulation of PFOA and PFOS in biosolids is necessary and appropriate.

If EPA establishes regulatory levels for PFAS in biosolids, utilities should request, and EPA should provide, guidance for how to communicate lower levels of PFAS to agricultural users of biosolids and the public.

Conclusion

Through the PFAS Strategic Plan, EPA is actively pursuing actions to address growing concerns regarding PFAS contamination. These actions will unquestionably affect utilities' management of water, wastewater, and possibly biosolids, particularly from the increased costs for sampling and compliance with new PFAS regulatory requirements. Utilities should pursue every effort to participate in EPA PFAS rulemakings to ensure regulations are based on nationally supported research and establish risk-based standards for PFAS. If you would like to avoid PFAS becoming a "four-letter word," feel free to reach out to me for assistance in tracking EPA PFAS regulatory actions.

Sara Thornton is a Principal in the Firm's Water Practice Group. Sara assists clients with various water supply and water quality permitting, compliance, and enforcement issues and has particular expertise in wastewater permitting, Clean Water Act Section 404 permitting, TCEQ enforcement, and compliance with the Endangered Species Act and the National Environmental Policy Act. If you would like additional information or have questions about this article, please contact Sara at 512.322.5876 or sthornton@lglawfirm.com.

WATER/WASTEWATER PERMITTING: MAXIMIZING VALUE OF TCEQ PRE-APPLICATION MEETINGS

by Nathan E. Vassar and Jessie M. Spears

As many state and federal agencies are returning to practices and operations more akin to those experienced before March 2020, it is an optimal time to highlight one of the most important tools for any utility with water/wastewater permitting needs at the Texas Commission on Environmental Quality ("TCEQ"). Pre-application meetings afford applicants an opportunity to sketch out the proposed permit action, address critical questions before the clock is officially ticking on permit review, and engage agency staff to make the permitting process move more smoothly. As described below, TCEQ is now looking to expand use of pre-application meetings across programs and divisions, and it has emphasized the role of such discussions in reducing needs for subsequent requests for information ("RFIs") or other impediments during application review.

TCEQ has used pre-application meetings for water rights applications for years in order to work through important technical details surrounding diversion points, accounting plan requirements, and notice triggers, among other common application pinch points. In the last few months, however, on the water quality side, TCEQ has announced that it will require pre-application meetings for certain TPDES permit applications (new applications and major amendments) as a result of its ongoing TPDES permit streamlining efforts initiated in late 2021. The requirement also applies to all non-substantial and substantial pretreatment program modifications and Clean Water Act § 401 Water Quality Certifications. This expansion is intended to help reduce review time of permit writers and the technical review teams, particularly on these types of discharge permitting applications that require a sufficient level of application detail that should be discussed in an early dialogue with the agency. Beyond new discharges and major permit amendments, many applicants – including those represented by our firm – find value in pre-application meetings even for applications that do not require it. Such practice can minimize the risk of surprise in RFIs and the delay associated with the post-application submittal back-and-forth.

As the name implies, a pre-application meeting allows applicants to meet with TCEQ permitting and technical review staff before submitting an application to discuss questions or concerns related to the permit application and process. The reason TCEQ recommends (and in some cases requires) such meetings is simple: to ensure that the applicant submits a complete and correct application the first time. Although the discussion is mostly informal, the substance covered is critical – staff can respond to questions an applicant may have while preparing an application and provide TCEQ staff a chance to point out potential issues (some of which are driven by recent developments/experiences that may not be fully captured by the application and instruction materials). Pre-application meetings also provide applicants an opportunity to describe the complexities associated with their request for a permit to TCEQ staff. TCEQ staff attending the meeting may include an attorney from the TCEQ Environmental Law Division, technical staff, the permit writer, and other permitting staff involved in reviewing the application and drafting the permit.

Prior to the pre-application meeting, the applicant should prepare the application and analyze the proposed request for any issues that may arise to address with TCEQ staff. While preparing an application, the applicant should utilize its team—often involving experienced legal and engineering consultants. Engaging the right team at the beginning of the application process can save time and resources down the road. Whether the full team appears in person or some remotely, it can be helpful for the applicant and its support group to hear TCEQ's perspectives directly, and can lead to questions/answers all at once, which can help move a permit application to its ready-for-filing stage.

As TCEQ continues to place an emphasis on pre-application meetings as a result of issues highlighted during its Sunset Review process and with permit streamlining efforts, we expect to see more updates and changes to application procedures. To that end, we have also prepared a podcast on best practices when engaging TCEQ. That episode can be found in Season 3 of the "Listen in with Lloyd Gosselink" podcast series available at https://www.lglawfirm.com/lg-podcast.

Nathan Vassar is a Principal in the Firm's Water Practice Group and Jessie Spears is an Associate in the Firm's Water Practice Group. If you have any questions about pre-application meetings and how this tool can advance your permitting needs, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com, or Jessie at 512.322.5815 or jspears@lglawfirm.com.

ASK SHEILA

Dear Sheila,

I think our company has done a good job with training employees on workplace harassment, having a culture of no harassment, and having good policies in place. But recently, we seem to have gotten quite a few of what I think of as "minor" complaints, such as a one-time incident of an inappropriate epithet said in the heat of the moment, or complaints about conduct that happened long ago that the employee claims is still making her uncomfortable to be around the perpetrators. Do we have to respond to every one of these, or are there some that are so minor we can just move on from?

Sincerely, Don't Want to be a Full-Time Investigator

Dear Investigator:

What you are describing has been the subject of a few recent federal appellate cases. Bottom line, the courts are finding that an employer who fails to respond to and take appropriate remedial action for complaints that invoke sex, race, or other protected classes is vulnerable to liability should the complainant sue, even for one-time occurrences, or for past behavior that the complainant learns about later.

In a new Fifth Circuit Court of Appeals decision, the court reversed the lower court and held that a supervisor's "single utterance of a racial epithet" can support a hostile work environment claim. *Woods v. Cantrell*, 29 F.4th 284 (5th Cir. 2022). The court found that while many of the plaintiff's allegations were non-specific and conclusory, this one allegation was severe enough that if said even once, especially by a supervisor, could quickly alter the conditions of employment and create an abusive working environment. The Fifth Circuit sent the case back down to the trial court for further consideration of this claim on its merits.

In another recent Fifth Circuit Court of Appeals decision, a female firefighter learned that nine years earlier, a male supervisor got ahold of a sexual video that the firefighter had made privately for her husband, and for the next nine years, viewed the video repeatedly and showed it to another firefighter. *Abbt v. City of Houston*, 28 F.4th 601 (5th Cir. 2022). The complainant didn't know this was happening until after the conduct stopped and the supervisor confessed it to her husband. She also learned that a manager over the supervisor also knew about it nine years earlier and didn't report it. The issue in the case is whether the City could be liable when the objectionable conduct occurred when the complainant was unaware it was happening; in other words, could there be a hostile work environment created because she found out about it, when she was not directly affected at the time the objectionable conduct was actually occurring? The court held that simply learning about the conduct and having to continue to work, eat, and live alongside those who viewed the video was enough to create a hostile work environment, even though the conduct was no longer occurring. Notably, the court said that if she were no longer employed when she learned of the conduct, she would not have been able to maintain a sexual harassment cause of action, because learning of the conduct would not have created a hostile work environment.

The good news is that prompt investigation and proper handling of even serious claims will often shield employers from liability. The Seventh Circuit Court of Appeals just reiterated the state of the law in holding that an employee who complained of graphic sexual comments and racial epithets by coworkers could not maintain a cause of action when she quit after the employer wrote up one accused co-worker and gave a three-day suspension to another. *Paschall v. Tube Processing Corp.*, 28 F.4th 805 (7th Cir. 2022). The complainant quit after the two disciplinary actions occurred, and before any additional improper conduct. The court found that the employer could not be liable because, although it didn't terminate the employees in question who created the hostile work environment, as soon as it received the complaint, it was not negligent in discovering, investigating or remedying the harassment. Note, however, that this case would likely have turned out differently if the harassers were the plaintiff's supervisors and not just co-workers – employers can be strictly liable for the actions of its supervisors and managers if the employer cannot prove it took steps to prevent it (training, discipline and reporting policy), and harassment from supervisors can have a bigger impact on the employees' work environment.

So, keep your workplace harassment and discrimination policies up-to-date, make sure employees have a clear way to report concerns, and train both management and staff on a regular basis. And if you do receive a complaint of harassment or discrimination, especially one that impacts a protected class, conduct a fair and prompt investigation, no matter how minor the allegation. If the investigation shows that improper workplace conduct occurred, take action that a reasonable person would believe would remedy the situation.

"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.*

Water Cases

Pape Partners, Ltd. v. DRR Family Properties LP, 623 S.W.3d 436 (Tex. App.—Waco 2020, pet. granted).

This case focused on a water rights dispute which arose when Pape Partners, Ltd. ("Pape") purchased a tract of land in 2014 that included irrigation water rights recognized by the State of Texas in Certificates of Adjudication that were initially issued to the previous owners as a part of a judgment brought under the Texas Water Rights Adjudication Act. The Certificates of Adjudication were later amended to authorize use of the permitted water for irrigation of an additional 250 acres that were subsequently purchased by DRR Family Properties, LP ("DRR").

When Pape attempted to record its purchase with the Texas Commission on Environmental Quality ("TCEQ") in 2015, TCEQ notified DRR and other potentially interested landowners, and eventually concluded that DRR owned a portion of the water rights. Displeased with TCEQ's determination, Pape moved to reverse the decision but Pape's motion was overruled by operation of law. Without pursuing an administrative appeal, Pape brought suit seeking a declaration that it owned all of the water rights at issue. DRR responded with a motion to dismiss the suit for lack of subject matter jurisdiction, and the trial court granted the motion. Pape appealed the dismissal, asserting that the trial court erred in granting DRR's motion because the question of property ownership is solely within the jurisdiction of the courts, the legislature did not vest TCEQ sole jurisdiction over Pape's claim, and the ruling violated the separation of powers clause in the Texas Constitution. In analyzing Pape's arguments, the court looked to TCEQ's enabling legislation and found that "[a]lthough the [legislation] does not expressly grant exclusive jurisdiction over water rights to the TCEQ, the regulatory scheme behind surface water permits is pervasive and indicative of the Legislature's intent that jurisdiction over the adjudication of surface water permits is ceded to the TCEQ." The court also recognized that other courts had found the same enabling legislation granted TCEQ exclusive jurisdiction over other matters involving water rights. The court ultimately determined that, contrary to Pape's position, the TCEQ had exclusive jurisdiction to determine water rights and affirmed the trial court's judgment. In March 2021, Pape filed a petition for review with the Texas Supreme Court. The Court granted the petition and heard oral arguments on March 24, 2022, but has yet to issue an opinion.

Tex. Comm'n on Envtl. Quality v. Maverick County, No. 19-1108, 2022 WL 413939 (Tex. Feb. 11, 2022).

In 2013, Dos Repúblicas Coal Partnership ("DRCP") applied to TCEQ for the renewal of a TPDES permit for wastewater discharge at a coal mine in Maverick County. TCEQ granted the permit at the time, but Maverick County and downstream landowners subsequently raised a question as to whether DRCP was the operator and the correct permit applicant. Section 305.43(a) of Title 30 of the Texas Administrative Code requires both "the operator and the owner" of such a facility to apply for a permit. DRCP owned the mine and hired a contractor to conduct day-to-day activities at the mine. After a contested case hearing, it was found that DRCP was both the owner and operator of the mine.

Those opposed to the permit sued TCEQ in district court. The court found that DRCP was not the mine's operator and reversed TCEQ's order, holding that TCEQ's determination that DRCP was the proper applicant violated statutory and regulatory provisions, was not reasonably supported by substantial evidence, and was arbitrary and capricious. On appeal, the court of appeals agreed with the district court's judgment, finding that DRCP's contractor was the mine's operator and therefore a required permit applicant, and reversed TCEQ's order as to the operator issue.

On review, the Supreme Court held the governing definition of "operator" to be "the person responsible for the overall operation of a facility," as provided by TCEQ rules. It also found that substantial evidence supported TCEQ's determination that DRCP was the mine's "operator" and the correct applicant for the permit—DRCP remained responsible for the "overall operation" of the mine despite having contracted out the day-to-day running of the mine. Accordingly, the Supreme Court reversed the judgment of the court of appeals and remanded the case for consideration of the remaining issues.

Litigation Case

Earnest v. Sanofi U.S. Services Inc. et al., No. 05-30184 (5th Cir. 2022).

In *Earnest v. Sanofi U.S. Services Inc.*, the Fifth Circuit held that a pharmaceutical company violated the rules of evidence when it attempted to skate the line between Federal Rules 701 and 702. At trial, the district court ruled against a cancer patient

alleging that Sanofi's chemotherapy drug caused her to suffer permanent hair loss. On appeal Earnest challenged the district court's evidentiary ruling, asserting the district court erred by (1) admitting testimony grounded on the company's lay witness's *post hoc* review of a clinical study of the drug, and then (2) allowing an expert witness to bootstrap the lay witnesses analysis into his own testimony. After review, the Fifth Circuit ordered remand and a new trial after determining that the admission of the fact witness's testimony was in error and that the plaintiff's rights were consequently substantially affected.

The pharmaceutical company presented two witnesses at trial, a doctor who was a Rule 30(b)(6) fact witness and an expert witness. At issue in review was both witnesses' reference to TAX316, the drug's clinical study on which both parties relied heavily for the issue of medical causation.

The fact witness, Sanofi's designated corporate representative, testified regarding the procedure and theory behind clinical trials; specifically, he spoke about the data adduced from TAX316's trial participants. After applying a methodology to exclude some of the participants, the lay witness testified that his analysis showed a decreasingly small number of study participants experiencing permanent hair loss. The expert witness's testimony then relied on the fact witness's analysis and concluded that the study demonstrated that permanent hair loss was an outlier risk of the drug regimen.

The Court held that, because the TAX316 study was conducted during the fact witness's tenure with Sanofi, his testimony describing the study was admissible, up to a point. During its examination, Sanofi transparently sought the fact witness's opinions about the TAX316 data "as a board-certified oncologist," as much as a former Sanofi employee. Also, the fact witness's testimony was littered with his interpretation and analysis of the TAX316 study data, which he prepared in litigation in response to Earnest's Rule 30(b)(6) deposition notice. In the words of the Court, "Sanofi effectively smuggled inadmissible opinion testimony past the expert-disclosure and expert-discovery obligations imposed by the discovery and evidentiary rules by offering [the fact witness] as a lay witness." The Fifth Circuit ruled that the district court erred in its evidentiary ruling on this issue.

The Fifth Circuit next addressed the issue of whether Sanofi's expert witness inappropriately relied on the fact witness's inadmissible testimony. The Fifth Circuit held that the expert witness's dependence on the fact witness's "re-analysis" of the TAX316 data had, in turn, tainted his analysis.

The Court found the admission of those witnesses' improper expert testimony, which was featured prominently in the company's closing argument to the jury, to have prejudiced the patient's substantial right during the trial. The Court accordingly reversed and remanded.

Air and Waste Case

State of Tex. and TCEQ v. EPA, No. 22-1013 (D.C. Cir., pet. filed Jan. 28, 2022).

On January 28, 2022, the State of Texas and TCEQ filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging Environmental Protection Agency's ("EPA's") designation of El Paso County as a nonattainment area for ozone. In November 2021, EPA designated El Paso County as a nonattainment area following the D.C. Circuit Court's ruling in July 2020, which required EPA to reconsider its prior 2015 ozone National Ambient Air Quality Standards ("NAAQS") designations for El Paso County, and 15 other counties, under Section 107(d) of the Clean Air Act. EPA based the designation on air quality monitoring data from years 2014-2016. If EPA's designation is upheld, as a nonattainment area, El Paso County will be required to develop a plan to improve ozone air quality in order to meet the NAAQS.

Utility Cases

Fifth District Court of Appeals Rules that ERCOT Lacks Sovereign Immunity.

On February 23, 2022, the Fifth District Court of Appeals in Dallas ruled in an *en banc* review that the Electric Reliability Council of Texas ("ERCOT") does not have sovereign immunity from all lawsuits and that the Public Utility Commission ("PUC") does not have exclusive jurisdiction over all claims against ERCOT.

Panda Power Generation Infrastructure Fund LLC ("Panda") sued ERCOT in 2016 for fraud, negligent misrepresentation, and breach of fiduciary duty, for publishing allegedly misleading reports and press releases about the scarcity of power in Texas, which prompted it to invest $2.2 billion in new power plants, only to face difficulty recouping its expenses as power prices remained low. Panda alleged that ERCOT published false market data to "encourage investors and their financial sponsors to build new power generation." Panda argued that ERCOT is a private corporation and should not benefit from sovereign immunity. ERCOT argued it was immune from suit as an arm of the State performing functions for a public purpose exclusively assigned by the Legislature and the PUC.

In an earlier case before the Fifth District Court of Appeals (*Panda I*), the court determined that ERCOT's actions were "entitled to sovereign immunity from private damages suits in connection with the discharge of its regulatory responsibilities." Following that decision, however, three new opinions came out of the Texas Supreme Court addressing sovereign immunity and governmental immunity. In one of those opinions, the Court explicitly stated, "…we have yet to extend sovereign immunity to a purely private entity—one neither created nor chartered by the government—even when that entity performs some governmental functions."

Given that *Panda I* granted immunity to a private, membership-based, nonprofit corporation not chartered by the government, the Fifth District Court of Appeals conducted an *en banc* review to correct its prior decision.

"[W]e conclude ERCOT is not entitled to sovereign immunity

and the Legislature did not grant exclusive jurisdiction over Panda's claims to the PUC," the Fifth District Court of Appeals' opinion reads. "ERCOT likewise is not liable for its ordinary negligence when it exercises its power to cause the interruption of transmission service for the purpose of maintaining the ERCOT system stability and safety, but it may be liable for 'its gross negligence or intentional misconduct when legally due,'" the court stated.

In addressing the issue of sovereign immunity, the court analogized the structure and regulation of ERCOT to the economic development corporation evaluated in a previous similar case before the Texas Supreme Court, which concluded that the Legislature did not intend an economic development corporation to have discrete governmental-entity status separate from its authorizing municipality. The court noted that ERCOT is fundamentally a private organization and that regulatory oversight, even over a heavily regulated entity, does not confer governmental-entity status.

In response to ERCOT's arguments that Panda's claims fall within PUC's exclusive jurisdiction, the court relied on Texas Supreme Court precedent establishing that the PUC's jurisdiction to regulate is separate from its adjudication authority. In addition, the court points to the Public Utility Regulatory Act, which explicitly addresses the specific disputes involving ERCOT that may be resolved by the PUC.

This opinion is critical in light of the hundreds of lawsuits filed against ERCOT in the wake of Winter Storm Uri for wrongful death, personal injury, and property damage. Those cases have been consolidated before a judge in Houston. The decision is a huge win for the consumers and businesses who brought those suits against ERCOT, as ERCOT can no longer claim it has sovereign immunity, although the decision is likely to be appealed to the Texas Supreme Court.

Brazos Bankruptcy Litigation Paused.

Brazos Electric Power Cooperative ("Brazos") and the Electric Reliability Council of Texas ("ERCOT") have agreed to mediate their dispute over a $1.9 billion bill stemming from Winter Storm Uri.

Brazos claims that ERCOT violated the terms of their contract when it charged $9,000 per megawatt hour during much of the storm, which lasted about a week. Brazos filed for bankruptcy in March 2021 as a result of the bill, asking U.S. Bankruptcy Judge David Jones in Houston to drastically reduce ERCOT's claim. Brazos, which had another $2 billion in funded debt at the time it filed for bankruptcy, says the amount it owes ERCOT is closer to $770 million.

The trial began on February 22, 2022. Early in the trial, former PUC Commissioners DeAnn Walker and Arthur D'Andrea, as well as former ERCOT CEO Bill Magness, all testified, facing harsh criticism from Judge Jones. On March 3, after wading through days of expert testimony, Judge Jones paused the trial to give ERCOT and Brazos time to mediate their dispute. Judge Jones said during the hearing that the parties should "sit in a room and understand what the options are." Another Houston-based bankruptcy judge, Judge Marvin Isgur, has been assigned to oversee the mediation.

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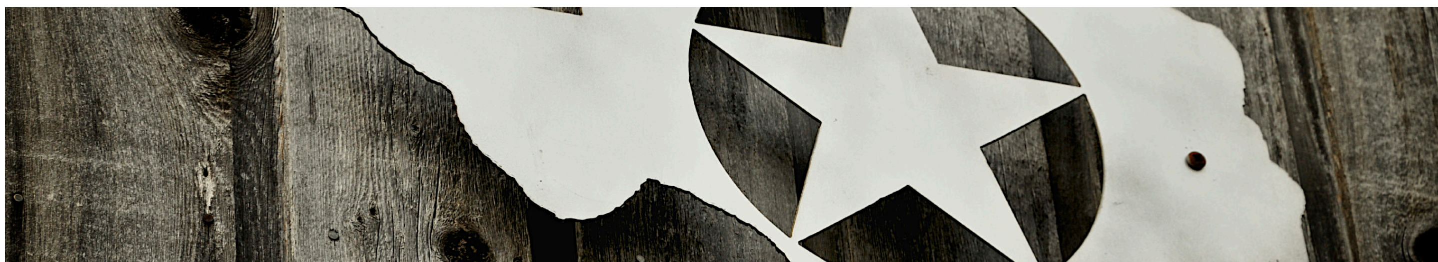
AGENCY HIGHLIGHTS



United States Environmental Protection Agency ("EPA")

EPA's Proposed Definition for Per- and Polyfluoroalkyl Substances ("PFAS") in Draft Fifth Contaminant Candidate List ("CCL 5"). EPA's Science Advisory Board ("SAB") has raised concerns about the narrow definition of PFAS in the draft CCL 5, which is identical to the definition used in the EPA's proposed Toxic Substances Control Act reporting requirements. The draft CCL 5 includes 81 individual contaminants and several groups of chemicals such as PFAS, disinfection byproducts, and cyanotoxins. EPA would define PFAS based on a certain chemical structure, but would leave out perfluorooctanoic acid ("PFOA") and perfluorooctanesulonic acid ("PFOS") as it has already proposed a drinking water standard for the two better known PFAS. The proposed drinking water rule would be published in fall 2022 and be finalized by

fall 2023, but the agency is still considering whether other PFAS should be included in the drinking water rule. Meanwhile, SAB and the American Water Works Association have voiced concerns that the chemical structure-based definition for CCL 5 would exclude PFAS that have been found in drinking water, such as perfluoro-2-methosyacetic acid ("PFMOAA"). The Association of State Drinking Water Administrators recommended that EPA revise the structural definition to match the definitions used by the Organization for Economic and Co-operation and Development ("OECD") and the Interstate Technology Regulatory Council. The Natural Resources Defense Council has also encouraged EPA to mirror the definition of PFAS used by OECD.

EPA Engages the Public in PFAS Discussions. EPA scheduled virtual public meetings on March 2, 2022 and April 5, 2022 to discuss the development of the proposed PFAS National Primary Drinking Water Regulations ("NPDWR"). The meetings are an opportunity for EPA to share information about the proposed PFAS NPDWR and receive input on environmental justice considerations. EPA is also accepting written public comments on environmental justice considerations in the public Docket No. EPA-HQ-OW-2022-0114 until April 20, 2022. The agency has also invited public water systems serving less than 10,000 people to participate as Small Entity Representatives for a Small Business Advocacy Review Panel to help develop a PFAS NPDWR. EPA has not yet determined if the proposed NPDWR will have a significant economic impact on a substantial number of small public water systems, but due to the possibility of such effect it is proceeding with a Small Business Advocacy Review Panel. EPA also has plans to engage other stakeholder groups in 2022, including the National Drinking Water Advisory Council, state and local government officials, and tribal officials.

Federal Water Infrastructure Funding and Domestic Content Requirements. The Bipartisan Infrastructure Law ("BIL") provides $50 million to EPA to fund clean water, drinking water, and stormwater infrastructure, 49% of which is eligible for grants or principal forgiveness loans. EPA will prioritize increasing investment in urban and rural disadvantaged communities, replacing lead service lines ("LSLs"), reducing PFAS and other emerging contaminants. The agency released a memo in March 2020 explaining how these funds would be dispersed through the Clean Water and Drinking Water State Revolving Funds ("SRFs"). The BIL also makes permanent the American iron and steel requirement for the Drinking Water SRF (already a permanent requirement for the Clean Water SRF since 2014). Further, the BIL incorporates parts of the Made in America Act such as expanding the "Buy America" requirements to include non-ferrous metals like copper, plastic, concrete, glass, lumber, and drywall; and new provisions requiring all manufacturing processes used in making the material be completed in the United States to qualify as "American made." Water and wastewater utilities have previously voiced concerns that critical components for their systems do not have domestic supply chains. However, the BIL authorizes waivers under certain circumstances. The White House Office of Management and Budget is expected to issue guidance on the Made in America requirements soon, then EPA will outline a waiver process.

EPA Proposes Changes to Toxic Release Inventory ("TRI") Reporting for De Minimis PFAS Releases. In March 2022, EPA announced its plans to propose a rule this summer that would call for stricter PFAS reporting under TRI. The agency recently released its 2020 TRI National Analysis Report, the first to include PFAS data, showing that only 38 facilities reported PFAS waste. EPA's proposed rule would remove eligibility of the *de minimis* exception for PFAS which allows facilities that report under TRI to disregard certain minimal concentrations of PFAS in mixtures. EPA stated that this change would also remove the exemption with regard to providing supplier notifications to downstream TRI facilities for PFAS and persistent, bioaccumulative, and toxic chemicals. The agency explained that because PFAS is used at low concentrations in many products, removal of the *de minimis* exception will result in more complete data for these chemicals.

Status of Waters of the United States ("WOTUS") Rulemaking. On February 7, 2022, the public comment period closed on EPA and Army Corps of Engineers' (Corps) proposed rule to define WOTUS. The proposed rule put back into effect the pre-2015 definition of WOTUS, also referred to as the 1986 regulations, updated to reflect considerations of Supreme Court decisions such as *Rapanos v. United States*. GOP lawmakers and water utilities have asked EPA to hold off on its rulemaking efforts until the Supreme Court issues a decision in *Sacket v. EPA* in which they are considering whether the Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "WOTUS." However, EPA and the Corps have continued their rulemaking efforts and announced on February 24, 2022 ten roundtables to facilitate discussion on the implementation of WOTUS. These roundtables include agriculture, conservation groups, developers, drinking water and wastewater managers, environmental organizations, communities with environmental justice concerns, industry, Tribal nations, and state and local governments. The agencies plan to host these roundtables virtually this spring and summer.

Uncertainty Surrounding EPA's Lead and Copper Rule Revisions ("LCRR"). On December 16, 2021, EPA's LCRR went into effect with a compliance deadline of October 16, 2024. The LCRR includes many new requirements, including making an inventory of lead service lines ("LSLs"), developing a plan to replace LSLs, developing a tap sampling plan reflecting information about where LSLs are located, changing corrosion control requirements, and adding "find and fix" requirements for locations that exceed 15 micrograms per liter of lead. EPA says it does not expect to propose changes to the LSL inventory requirements or the October 16, 2024 compliance date, but it is considering changes to the LSL replacement plan and tap sampling plan requirements. These changes will be made through the proposed Lead and Copper Rule Improvement ("LCRI") rulemaking, but EPA has not yet set a date for the proposed rule. The agency aims to complete its LCRI rulemaking before the LCRR compliance

deadline so that public water systems can incorporate LCRI changes in their LCRR compliance efforts.

CEQ and EPA Release New Environmental Justice Screening Tools. On February 18, 2022, the White House Council on Environmental Quality ("CEQ") released an early version of its Climate and Economic Justice Screening Tool ("CEJST") to highlight disadvantaged communities using an interactive geospatial map in furtherance of the White House's Justice40 Initiative, which aims to address Environmental Justice issues. In addition, on February 18, EPA released an updated version of its EJScreen environmental justice mapping and screening tool. CEQ and EPA developed these screening tools in direct response to a 2021 Executive Order on Tackling the Climate Crisis at Home and Abroad. Federal agencies will use the CEJST to implement the Justice40 Initiative goal of directing 40 percent of the overall benefits of certain federal investments to disadvantaged communities. EPA will use EJScreen for purposes of compliance and enforcement matters, as well as policy making. In addition, agencies may use EJScreen to identify the location and density of disadvantaged communities for purposes of permitting under the National Environmental Policy Act ("NEPA").

EPA Makes Technical Revisions and Clarifications to NESHAP Rule for MSW Landfills. On February 14, 2022, EPA published a final rule to finalize technical revisions and clarifications for the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for MSW landfills, which EPA proposed in a March 26, 2020 rulemaking. The final rule also amends the New Source Performance Standards for MSW Landfills to clarify and align the timing of compliance for certain requirements involving installation of a gas collection and control system. In addition, the final rule revises the definition of "Administrator" in the MSW Landfills Federal Plan, which was promulgated on May 21, 2021, to clarify who has the authority to implement and enforce the applicable requirements. These technical revisions and clarifications went into effect on February 14.

EPA Proposes to Adopt New ASTM Standard for All Appropriate Inquiries Requirement Under CERCLA. On March 14, 2022, EPA released a proposed and direct final rule to adopt a new standard (E1527-21), issued by the American Society for Testing and Materials ("ASTM") on November 1, 2021, for All Appropriate Inquiries ("AAI") required under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). ASTM issued the new standard for conducting Phase I Environmental Site Assessments ("ESAs"). The proposed rule provides the option for prospective purchasers of property to use either the new standard or the existing standard (E1527-13) to comply with the AAI requirement in order to establish a defense to CERCLA liability. Notably, the new standard includes guidance on per- and polyfluoroalkyl substances ("PFAS") for the first time. EPA is accepting comments until April 13, 2022. If EPA does not receive any adverse comment by that date, then EPA will take no further action on the proposed rule and the direct final rule will become effective on May 13, 2022. However, if EPA receives timely adverse comments, then EPA plans to withdraw the direct final rule and address public comments in a subsequent rulemaking.

EPA Proposes New, More Stringent Emissions Standards for Heavy Duty Vehicles. On March 28, 2022, EPA published a proposed rule aimed at reducing air pollution from highway heavy-duty vehicles and engines, including ozone, particulate matter, and greenhouse gases ("GHGs"). The proposed rule seeks to change the heavy-duty emission control program—including the standards, test procedures, useful life, warranty, and other requirements—to further reduce the air quality impacts of heavy-duty engines across a range of operating conditions and over a longer period of the operational life of heavy-duty engines. In addition, the proposed rule seeks to make targeted updates to the existing heavy-duty GHG Phase 2 program, proposing that further GHG reductions in the model year 2027 timeframe are appropriate considering lead time, costs, and other factors, including market shifts to zero-emission technologies in certain segments of the heavy-duty vehicle sector. The proposed rule also calls for limited amendments to the regulations that implement EPA's air pollutant emission standards for other sectors (e.g., light-duty vehicles, marine diesel engines, and locomotives). EPA is holding a virtual public hearing on the proposed rule on April 12, 2022. The deadline to submit comments is May 13, 2022.

United States Army Corps of Engineers ("Corps")

Army Corps of Engineers To Provide New Approved Jurisdictional Determinations ("AJDs") In Light of Revised WOTUS Definition. On January 5, 2022, the Corps announced that it will require new and pending dredge-and-fill permits ("404 Permits") to rely on new AJDs using the current, pre-2015 WOTUS definition. The Corps stated that it will not revisit 404 Permit decisions that rely on AJDs made under the Trump-Era definition, also known as the Navigable Waters Protection Rule ("NWPR"). The agency explained that it is governed by the WOTUS definition in effect at the time it completes an AJD, not by the date of the request for an AJD. Therefore, AJDs completed prior to the U.S. District Court for the District of Arizona's August 30, 2021 decision vacating the NWPR are safe and will not be reopened until their expiration date. For new and pending permits, the Corps will discuss with applicants whether they would like to receive a new AJD under the pre-2015 WOTUS definition or to proceed in reliance on a preliminary determination or no determination whatsoever.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Creates a LCRR Stakeholder Group. Following an informal survey to stakeholders at its January 11, 2022 Drinking Water Advisory Work Group meeting, TCEQ created a new stakeholder group to discuss EPA's LCRR and help TCEQ develop its own rules. The first LCRR stakeholder meeting will be on April 19, 2022 at 1 p.m. Persons interested in joining can register at https://www.tceq.texas.gov/drinkingwater/dwawg/dwawg-lab-stakeholders-mtg-reg-form.

TCEQ Consolidates Texas Pollutant Discharge Elimination System ("TPDES") Regulations. On March 30, 2022, TCEQ Commissioners approved the consolidation of TPDES rules in 30 Texas Administrative Code Chapters 308, 314, and 315, which contain adoption by reference of federal regulations, with Chapter 305. The adopted rulemaking will repeal Chapters 308, 314, and 315 and move them within Chapter 305, Subchapter P. However, Chapter 308, Subchapters C and J are simply repealed because they were determined to be obsolete. Lastly, the rulemaking also adopted by reference 40 Code of Federal Regulations Part 125, Subpart N. The new rules will take effect on April 21, 2022.

TCEQ's IHW Generator and Management Fee Increases in Effect. In the January 2022 edition of *The Lone Star Current*, we reported on TCEQ's final rule regarding industrial solid waste and municipal hazardous waste generator and management fee increases, adopted on November 3, 2021. That final rule is now in effect and as of March 1, TCEQ has begun implementing the fee increases on a phased fee schedule. The fee increases involve: (1) increasing the Industrial and Hazardous Waste ("IHW") generation fee schedule from \$0.50 to a maximum of \$2.00 per ton for non-hazardous waste generation; and (2) increasing the fee schedule from \$2.00 to a maximum of \$6.00 per ton for hazardous waste generation. In addition, the Executive Director has the ability to adjust the actual IHW generator fee at or below the new fee schedule amounts.

TCEQ's Amendments to ISW and MHW Rules to Maintain Equivalency with RCRA Revisions in Effect. In the January 2022 edition of *The Lone Star Current*, we reported on TCEQ's final rule amending, repealing, and replacing a number of sections of 30 Texas Administrative Code ("TAC") Chapter 335, Industrial Solid Waste ("ISW") and Municipal Hazardous Waste ("MHW"), in order to maintain equivalency with Resource Conservation and Recovery Act ("RCRA") revisions promulgated by EPA. TCEQ adopted the final rule on January 12, 2022, which went into effect on February 3.

The most notable effective rule changes include:

- Revising the existing hazardous waste generator regulatory program by (1) reorganizing the regulations to improve their usability by the regulated community, and by (2) providing greater flexibility for hazardous waste generators to manage their hazardous waste in a cost-effective and protective manner;
- Revising existing regulations regarding the export and import of hazardous wastes from and into the United States by applying 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;
- Revising rules to adopt EPA's methodology for determining the user fees applicable to the electronic and paper manifests to be submitted to the e-Manifest system;
- Revising rules to prohibit disposal of hazardous waste pharmaceuticals into the sewage system and codify the exemption for unused pharmaceuticals that are expected to be legitimately reclaimed from being classified as a solid waste; and
- Adding rules to add hazardous waste aerosol cans to the universal waste program.

Public Utility Commission of Texas ("PUC")

ERCOT Finalizes New Board of Directors. Four new appointees have been named to the ERCOT Board of Directors, finalizing the entity's new Board. On December 1, 2021, the ERCOT Board Selection Committee named John Swainson and Robert "Bob" Flexon as new directors. On December 28, 2021, ERCOT filled the remaining two Board seats, announcing the addition of Julie England and Peggy Heeg. Elaine Mendoza, who was previously appointed to the ERCOT Board on November 1, 2021, has since resigned due to a conflict issue. Mendoza sits on the board of regents for Texas A&M, which has a 50 megawatt power generation facility and has the ability to sell electricity into the ERCOT market. Accordingly, Texas A&M is a market participant, and market participants are prohibited from serving on the ERCOT Board.

The newest members will join ERCOT Chair Paul Foster, Vice Chair Bill Flores, Board Member Carlos Aguilar, Board Member Zin Smati, and Chairman of the PUC, Peter Lake, the Interim Public Counsel at the Office of Public Utility Counsel, Chris Ekoh, and the Interim CEO of ERCOT, Brad Jones. The new members were selected by the ERCOT Board Selection Committee, comprised of Arch "Beaver" Aplin, G. Brint Ryan, and Bill Jones, who were appointed by the Governor, Lieutenant Governor, and Speaker in accordance with Senate Bill 2, passed in the 87th regular session.

Market Redesign Update; ERCOT Seeks PUC Direction on Grid Reform Efforts. On December 1, 2021 the PUC adopted a number of "Phase I" regulatory changes to protect the grid against future weather emergencies. The agency also will continue considering a number of other "Phase II" changes during 2022.

The "Phase I" changes the PUC adopted include the following:

- A decrease in the High System-Wide Offer Cap ("HCAP") from \$9,000 per megawatt hour to \$5,000. The HCAP is the top price for which electric companies can offer to sell their power in the ERCOT wholesale market.
- An increase in the Minimum Contingency Level ("MCL") to 3,000 megawatts as of January 1, 2022. The MCL is the minimum level of power reserves on the grid, after which ERCOT begins taking out-of-market actions.
- Changes to the Operating Reserve Demand Curve, which is an ERCOT-administered system that automatically creates price adders to wholesale energy offers.

- Allowances for the earlier deployment of Emergency Response Service ("ERS"), which is a service through which power consumers are paid to be willing to curtail load. Under the new rules, ERCOT can deploy ERS before an emergency alert is declared.
- Various changes to "Ancillary Services," which ERCOT deploys to maintain system reliability on an hour-by-hour basis.

The PUC signaled that it will also continue investigating a number of "Phase II" options during 2022. These options include:

- A "Load-Side Reliability Mechanism" through which retail electric providers, cooperatives, and municipal utilities would be obligated to procure commitments for sufficient capacity to serve forecasted peak-load.
- A "Dispatchable Energy Credits" program through which load-serving entities would be required to obtain sufficient dispatchable capacity to meet net peak-load (peak-load minus renewables) during a future period.
- A "Backstop Reliability Service," which would be a new Ancillary Service to meet specific reliability needs not met by ERCOT's real-time and Ancillary Service markets.
- Hybrid Models, which could include combinations of all other proposed Phase II mechanisms.

At the December 16, 2021 Open Meeting, the PUC instructed ERCOT to come up with an implementation schedule for the "Phase I" market design changes. In response, ERCOT reported it already had implemented some of the requested changes, but that others remain in the conceptual stage. ERCOT's Vice President of Commercial Operations, Kenan Ogelman, filed a market redesign project update with the PUC on January 10, 2022. Regarding the "Phase I" market design, the update indicated that ERCOT has so many post-Winter Storm Uri projects underway that it wants regulators to step in and set priorities. Ogelman's update cautioned that "ERCOT and its vendors cannot do all the work for each project simultaneously." "Each task needs a priority to signal which items are the most important when managing constraints and risks within the portfolio of projects," he wrote.

PUC Requires Utilities to File Emergency Operations Plans Under New Rule. On February 25, 2022, the PUC adopted a new 16 Texas Administrative Code ("TAC") § 25.53 in Project No. 51841, Review of 16 TAC § 25.53 Relating to Electric Service Emergency Operations Plans ("EOPs"). The rule implements new standards for EOPs for electric utilities, transmission and distribution utilities, power generation companies, municipally owned utilities, electric cooperatives, retail electric providers, and ERCOT. The utilities were already required to develop EOPs, but the PUC adopted more comprehensive requirements in compliance with Senate Bill 3 in the 87th Texas Legislature. Utilities are required to file their EOPs with the PUC by April 15, 2022, including strategies for improved communications, robust supply chains, cold weather events, and cyberattacks. The PUC held a workshop on March 11 to assist utilities in interpreting the new rule's requirements and to work out technical details related to the submission of the EOPs. Going forward, the annual EOPs will be due March 15 each year. Commissioner McAdams complimented the comprehensive nature of the new rule and said it will "establish the bones of a policy that we can grow in the future to adapt to any threat."

PUC Pursues Enforcement Action Against Generation Resources. On December 10, 2021, ERCOT filed a report with the PUC, reporting on the number of generation resources who met the December 1 deadline to file Winter Weather Readiness Reports ("WWRRs"). According to ERCOT, 98% of the 847 generation resources met the deadline to file reports, representing more than 99% of the total installed generating capacity. One hundred percent ("100%") of reports from transmission companies were submitted on time. The PUC's Division of Compliance and Enforcement identified 13 separate generation resources owned by eight companies that missed the deadline. The 13 resources make up less than one percent of the state's total installed capacity. The PUC is recommending more than $7.5 million in fines against those eight companies. About the enforcement action, the PUC's Executive Director Thomas Gleeson said: "The PUCT cannot tolerate the failure of these companies to even file their readiness reports . . . We are recommending stiff administrative penalties against each of these entities. The Governor, Legislature and the Commission have consistently told PUC staff that they expect compliance with our new rules and that we must be swift and meaningful with our enforcement action. Today's actions demonstrate just how seriously this agency takes its job to improve the reliability of the grid." The purpose of the WWRRs is to ensure the generation fleet in Texas is better prepared to provide service through severe winter weather. Failure to timely file WWRRs does not indicate whether or not these companies have taken the steps to weatherize their facilities. Subsequent inspections by ERCOT are needed to verify that. Entities receiving violations have 20 days to respond to the notice of violation and can request a hearing.

Firm Fuel Product Plans Progress at ERCOT with PUC Oversight. A new program under which natural gas-fired generators would receive payments for having fuel stored on-site should become operational by winter 2023, under plans underway at ERCOT and the PUC. ERCOT and the PUC have spent the last several months working through details of the proposed "firm fuel product," which policymakers see as one tool among several to prevent weather-related generation outages similar to those that incapacitated Texas last February. Experts have identified gas supply failures as major contributing factors for last February's generation shortfalls. Under the program, ERCOT would issue periodic requests for proposals in which generators could receive payments in exchange for commitments for having on-site fuel available in advance of the winter season. Approximately 4,400 megawatts of such capacity already exists within ERCOT, but the program would incentivize the creation of more.

In parallel memos filed on January 26,

PUC Commissioners Lori Cobos and Will McAdams laid out implementation guideposts for the new program. Although writing separately, both Commissioners agreed that only gas-fired generators with at least 48 hours of on-site fuel should be eligible for participation. Commissioner Cobos wrote that the ERCOT Board must approve new rules for the program by March so that the organization's staff can begin work on its computerized settlement systems to accommodate the new firm-fuel product. "ERCOT should procure the product in a phased-in manner, which would require ERCOT to issue its first (request for proposal) no later than August 2022 to send a price signal to the market and launch the product by next winter," wrote Commissioner Cobos. She added that ERCOT should then increase use of the product during future winters. Commissioner McAdams, in his separate memo, said ERCOT should enforce a yet-to-be-determined budget limit and cost cap as they issue requests for proposals. He wrote that implementation questions remain, such as how much growth in firm fuel resources should be targeted, and whether units with off-site but accessible fuel should be allowed to participate. "The over-arching objective is to have expedited implementation so that we know that we have our generators out there, building tanks, scouring tanks, purging tanks in the next two years," said Commissioner McAdams during a discussion of the program at the PUC's January 27 open meeting.

The new firm-fuel product is contemplated in Senate Bill 3, an omnibus energy reform bill that Texas lawmakers adopted last year in response to the Winter Storm Uri outages. The PUC Commissioners' memos relating to the program—along with more information about the firm-fuel product in general and other issues relating to the ERCOT wholesale market design—can be found on the PUC website under Docket No. 52373.

Update on PUC Rulemaking Projects. PUC Staff maintains a rulemaking calendar under Project No. 51715, which helps track the Commission's efforts to implement statutes adopted by the Legislature. The Commission opened a new project, Project No. 52935, which houses the updated rulemaking calendar. In a February 23, 2022 memo, the Commission's Director of the Rules and Projects Division wrote that the calendar "does not capture the full breadth of Staff's rulemaking activities." He also noted that a number of rulemaking projects that were opened prior to the 87th Legislative Session have been removed from the calendar, but that doesn't mean those projects were closed, rather "[t]he Commission's current focus is on implementing the statutes adopted by the Legislature," and those projects would be revisited at a later date, if appropriate.

As of February 23, 2022, the following rulemaking projects are being prioritized:

- Project No. 51888, Review of Critical Load Standards and Processes
- Project No. 51841, Review of 16 TAC § 25.53 Relating to Electric Service Emergency Operations Plans
- Project No. 52287, Power Outage Alert Criteria
- Project No. 52301, ERCOT Governance and Related Issues
- Project No. 52312, Review of Administrative Penalty Authority
- Project No. 52313, Statutory Definitions
- Project No. 52757, Review of Chapter 25- Rules Applicable to Electric Service Providers
- Project No. 52845, Middle Mile Broadband
- Project No. 53191, Reorganization of 25.505
- Project No. 53169, Review of Transmission Rates for Exports From ERCOT
- Project No. 52796, Review of Market Entrant Requirements
- Project No. 52405, Review of Certain Water Customer Protection Rules
- Project No. 52059, Review of Commission Filing Requirements

Other prioritized projects include:

- Weather Preparedness Standards Phase 2
- HB 2483 Implementation
- Consumer Benefits Test

Railroad Commission of Texas ("RRC")

RRC Approves Securitization Financing Order. A $3.4 billion financing order to pay natural gas costs from Winter Storm Uri has been approved by the RRC. Under the February 8 regulatory action, ratepayers will end up paying potentially for decades for fuel they consumed during the weeklong storm. Although the RRC gave its initial approval in November, this latest decision pushes the process forward by directing a separate agency known as the Texas Public Finance Authority to issue the bonds within six months.

Atmos, CenterPoint, Texas Gas Service and 8 other gas utilities applied for financial recovery under the debt financing deal, which utilities promote as a method to help their customers avoid rate shock. Under ordinary circumstances, the cost of natural gas consumed by utility customers would have flowed directly into monthly bills. During last year's Winter Storm Uri, however, gas prices spiked to intolerable levels and so gas utilities instead set aside those fuel costs as "regulatory assets" to deal with later. The new bond financing allows utilities to receive reimbursements for these expenses. The downside for ratepayers, however, is that they will have to pay off the bonds over many years—up to 30—and with interest. The size of the resulting bill charges still remains unclear.

Under the financing order, Atmos Energy can receive reimbursements under the bond financing arrangement for approximately $2 billion in fuel costs, CenterPoint can receive approximately $1.1 billion and TGS can receive $197.3 million. Other utilities to receive recovery include Bluebonnet, Corix, EPCOR, SiEnergy, UniGas, TGS West Texas Service Area and CoServ. The bond financing process received authorization in 2021 by the Texas Legislature, under House Bill 1520. By law, gas distribution utilities such as Atmos, CenterPoint and TGS cannot profit from the sale of the gas commodity, but instead must pass those costs directly to end users without markups.

Report: RRC Critical Gas Inspections Fall Short. Inspections of critical gas units since Winter Storm Uri have suffered major

gaps, according to an inspection of RRC documents. In a February 7 report from the *EnergyWire* news service, journalists who examined regulatory documents obtained through a Freedom of Information Act request concluded that gas production and transmission facilities could not guarantee they can withstand another hard freeze. According to documents obtained by the news site, operators at about 40 percent of the pipeline and storage sites Texas deems critical either had not conducted a winterization test, or company officials did not know if one had been performed. The records indicated that state inspectors had not actually visited dozens of sites because of “time constraints,” according to the news site. Records examined by the reporters indicated that one gas-fired plant endured a forced shut down one month after state inspectors said its supply pipelines had passed inspection. In other cases, inspectors appeared to have overlooked important information, according to the report. Andrew Keese, a spokesperson for the RRC, in a response to the news site’s findings, said the records reviewed by the journalists represent only a snapshot of conditions. Keese said that companies had made progress since the filing of the regulatory reports. “In the fall, some of the sites had yet to finish winterizing or test winterization because they were coming off summer operations,” the spokesperson said in a statement. EnergyWire reports that its journalists reviewed data on more than 3,600 inspections of wells, pipelines and storage fields, obtained through a public records request.

CenterPoint GRIP Filings. In early March, CenterPoint Gas made Gas Reliability Infrastructure Program (“GRIP”) filings with the cities in their Houston and Texas Coast divisions. Under GRIP rules, the state’s natural gas utilities can periodically increase rates without substantial regulatory review.

For cities in the Houston Division, CenterPoint is seeking recovery of $193,152,387 in invested capital. This compares to $153,689,801 last year, $157,664,708 in 2020, $99,461,495 in 2019 and $112,238,512 in 2018. The current filing will increase rates to residential customers by $1.36 per month. This will increase the current residential customer charge from $18.38 to $19.74 per month. Last year the increase was $0.99 per month.

For cities in the Texas Coast Division, the Company is seeking recovery of $51,135,035 in invested capital. This compares to $45,065,113 last year, $37,937,732 in 2020, $46,935,293 in 2019 and $31,889,184 in 2018. The current filing will increase rates to residential customers by $1.32 per month. This will increase the current residential customer charge from $18.62 to $19.94 per month. Last year the increase was $0.88 per month. Increases in both divisions are currently scheduled to go into effect on May 2, 2022.

On March 3, CenterPoint Gas also made GRIP filings with the cities in its South Texas Division and Beaumont / East Texas Division. For cities in the South Texas Division, the current filing will increase rates to residential customers by $2.11 per month. This will increase the current residential customer charge from $24.92 to $27.03 per month. For cities in the Beaumont / East Texas Division, the current filing will increase rates to residential customers by $1.59 per month. This will increase the current residential customer charge from $20.38 to $21.97 per month. The increase is currently scheduled to go into effect on May 2, 2022.

Atmos Energy GRIP Filings. On February 25, Atmos Energy filed for GRIP rate adjustments for a number of its jurisdictions within Texas. In each case, the company based its proposed GRIP adjustments on the difference between the value of invested capital as of December 31, 2021 and the value of the invested capital as of December 31, 2020. The company also proposed an effective date of April 26, 2022 for each case. No recovery costs related to Winter Storm Uri from 2021 were included in the filings.

Details of the new GRIP filings are as follows:

- The company proposed a GRIP rate adjustment for the unincorporated areas served by its Mid-Tex Division. Under it, the current monthly charge for residential customers will increase by $5.15, or 17.67 percent, from $29.14 to $34.29. Average bills will increase by 8.26 percent, from 62.36 to 67.51. For commercial users, monthly charges will increase by $16.47, from $77.77 to $94.24. For industrial users, the meter charge will increase by $309.07 per month, from $1,463.47 to $1,772.54. This is the fourth GRIP case for the unincorporated areas of the Mid-Tex Division since the setting of base rates under a previous rate case, designated Gas Utility Docket No. 10742.
- The company proposed a GRIP rate adjustment for the incorporated areas of the Atmos Texas Municipalities Coalition (“ATM Cities”). Under it, the current monthly charge for residential customers will increase by $5.15, from $30.99 to $36.14. For commercial users, monthly charges will increase by $16.47, from $81.27 to $97.74. For industrial users, the meter charge will increase by $309.07 per month, from $1,463.50 to $1,772.57. This is the fourth GRIP case for ATM Cities since the calculation of base rates in Gas Utility Docket No. 10779.
- The company proposed a GRIP rate adjustment for the incorporated areas of Amarillo, Lubbock, Dalhart, and Channings (“ALDC”) located in the utility’s West Texas Division. Under it, the current monthly charge for residential customers will increase by $2.83, from $15 to $17.83. For commercial users, the monthly charge will increase by $8.79, from $50.00 to $58.79. For industrial users, the meter charge will increase by $152.87 per month, from $525.00 to $677.87. This is the fourth GRIP case for ALDC since the calculation of base rates in Gas Utility Docket No. 10174. The company proposed a GRIP rate adjustment

for the unincorporated areas of the utility's West Texas Division. Under it, the current monthly charge for residential customers will increase by $3.20, from $24.79 to $27.99. For commercial customers, monthly charges will increase by $8.95, from $67.31 to $76.26. For industrial users, the meter charge will increase by $139.13 per month, from $782.88 to $922.01. This is the fourth GRIP case for the unincorporated areas of the West Texas Division since the calculation of base rates in Gas Utility Docket No. 10743.

In a separate filing from those referenced above, Atmos Pipeline-Texas on February 11 also filed for a GRIP rate increase—but one that applies to the utility's entire pipeline system. Its effective date would be April 12, 2022. Under this filing, Atmos Pipeline-Texas proposes to increase capacity charges, which flow only in an indirect fashion to residential and business customers. In the utility's Mid-Tex Division, the current capacity charge is $13.85726 per Metric Million British Thermal Unit ("MMBtu"). The company proposes to increase that charge by $2.08058, to $15.93784 per MMBtu. This is the sixth GRIP case for Atmos Pipeline-Texas since its base rates were set in Gas Utility Docket No. 10718.

"Agency Highlights" *is prepared by Danielle Lam in the Firm's Water and Districts Practice Groups; Jeff Reed in the Firm's Air and Waste Practice Group; and Taylor Denison in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these agencies or other matters, please contact Danielle at 512.322.5810 or dlam@lglawfirm.com, Jeff at 512.322.5835 or jreed@lglawfirm.com, or Taylor at 512.322.5874 or tdenison@lglawfirm.com.*

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The remaining lineup and projected topics for 2022 below:

Released Season Three Episodes

- Regulatory Changes After Winter Storm Uri | Thomas Brocato and Taylor Denison
- Federal Water Issues Update | Nathan Vassar and Lauren Thomson
- Legislative Updates in Texas Employment Law | Jessica Maynard and Shelia Gladstone

To-be-released Season Three Episodes

- CCN Corner – Providing Updates on Certificates of Convenience and Necessity | David Klein
- Career Reflections at Lloyd Gosselink | Lambeth Townsend
- Agency Perspective and Best Practices | Multiple Attorneys

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