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IT'S STILL HOT AT SUNSET: TCEQ'S SUNSET REVIEW

by Nathan E. Vassar

Once every 12 years, the Texas Commission on Environmental Quality ("TCEQ") undergoes a performance review by the Texas Sunset Advisory Commission and the Texas Legislature. TCEQ is currently in the middle of such review as its processes are evaluated and scrutinized on every front from permitting to enforcement, and across programs and its charges of environmental oversight. The process, as can be the case with Sunset reviews of other agencies, has included detailed legislative and self-assessment reports, along with public comment and testimony from stakeholders, citizens, and industry groups across the state.

Ultimately the review is intended to hold up to the light TCEQ's performance against the backdrop of its legislative charges, as established in statute. State administrative agencies that oversee the day-to-day regulation of thousands of activities across the state do not have perpetual existence – at the end of each entity's assigned schedule, the review process takes place and as a technical matter, either the agencies are continued for another period (often with recommended changes), or the Legislature has the option to allow expiration or "sunset" of such agencies. As can be the case in Sunset reviews, it is not uncommon to see recommendations that go beyond existing statutory requirements. Outside factors and recommendations come into play that often reflect views that certain underlying statutory provisions should change. Accordingly, a continued agency existence can also dovetail with new legislation specifying requirements for the agency that did not previously exist.

Several details from the TCEQ Sunset process to date are worth highlighting. Some of the initial recommendations included adding additional public participation options, such as public meetings on the front end of a permit application. Such approach would mean additional comments for agency staff to address and potentially incorporate during the technical review processes. It is not lost on many that adding new steps in various permitting regimes that already require significant work and take months and months (or longer) to complete will extend permitting timeframes even longer. That recommendation also pulls against some of the other findings, including that TCEQ should expedite many of its internal review processes. Other recommendations – some of which are not likely to be viable – include reinstating a water right cancellation process that exists but has not been implemented for decades.

Public comments have been copious and impassioned. At a hearing in late June in Austin, citizens filled the Capitol, asked Legislators to charge TCEQ with additional authority, and offered comments about locations of certain activities, raising arguments familiar to those who have been tracking recent environmental justice initiatives. As noted above, some of the public comments effectively asked to expand TCEQ's current charges beyond existing statutory bounds. Written comments closed in late June and Lloyd Gosselink Rochelle & Townsend, P.C. attorneys have been involved with several organizational comment letters. One undercurrent across many perspectives is the need for additional staffing in order for TCEQ to process the many activities, permits, and enforcement needs reflective of a state that continues to attract new businesses and people from elsewhere in the nation.

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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 will be presenting "The Changing World of MOU TCOS Filings at the PUC" at the Texas Public Power Association 2022 Annual Meeting on July 25 in Austin.

Sarah Glaser will be discussing "Lessons Learned from the Pandemic" at EEOC Virtual Training Institute on April 21.

James Aldredge will be presenting "TCEQ's Antidegradation Policy" at the 34th Annual Texas Environmental Superconference on August 4 in Austin.

Sarah Glaser wil be participating on a panel discussing "Navigating the Price of Talent Acquisition" at the SHRM/TAB Employer Symposium on August 11 in San Antonio.

Sheila Gladstone and Sarah Glaser will be presenting "An Update on Employment Law" at the 2022 CSCD HR Forum on August 31 and September 1 in San Marcos.

Mike Gershon will be moderating a panel "Navigating the Journey to and through a Contested Hearing" at the 11th Annual Texas Groundwater Summit on September 1 in San Antonio.

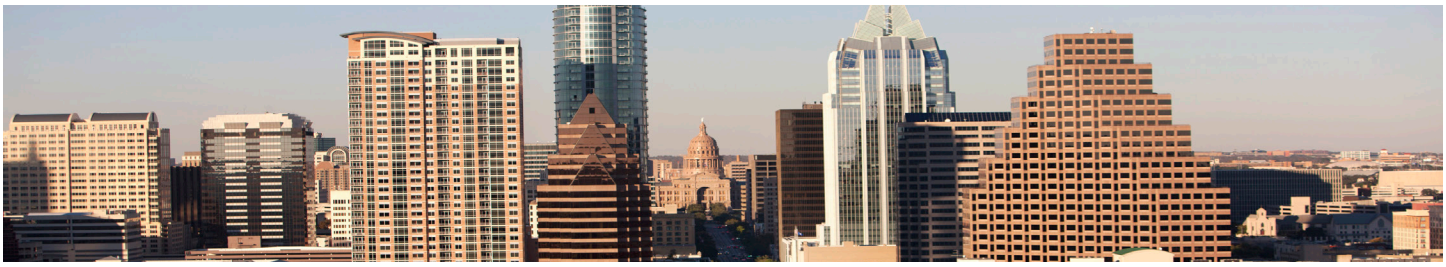
Sheila Gladstone and Sarah Glaser will be discussing "Hot Topics in Employment Law" at the Big Country Society for Human Resource Management (SHRM)'s Legal Workshop on September 27 in Abilene.

Sheila Gladstone and Sarah Glaser will be presenting "An Employment Law Update" at the Annual Chief's Leadership Conference on October 11 in Galveston.

Thomas Brocato will be presenting "Utility 101 - A Foundational Guide to Electric & Gas Utility Regulation" and "Winter Storm Uri: Are We Safer Now?" at the TCCFUI 2022 Fall Seminar on October 14 in Houston.

Jamie Mauldin will be presenting "PUC and RRC Regulatory Update" at the TCCFUI 2022 Fall Seminar on October 14 in Houston.

On July 12th, Lloyd Gosselink employees volunteered time by working at the Central Texas Food Bank Warehouse. Thanks to our efforts, we were able to provide 161 boxes or 3,500 meals to our neighbors in need. We are grateful to have this opportunity to give back to our community.



The Lone Star Infrastructure Protection Act prohibits contracts and other agreements with certain foreign-owned companies in certain circumstances in connection with critical infrastructure in this State. Tex. Att'y Gen. Op. No. KP-410 (2022).

In a recent opinion, the Office of the Attorney General addressed whether the Lone Star Infrastructure Act (the "Act") prohibits a business or government from entering into an agreement to provide utility service to a factory owned by a company that meets one of the criteria under the Act. The Office of the Attorney General concluded such an agreement would fall under the scope of the Act depending on the terms of the agreement, including whether the company would gain direct or remote access to critical infrastructure.

The 87th Legislature adopted the Act to prohibit "contracts or other agreements with certain foreign-owned companies in connection with critical infrastructure of this state." Act of May 24, 2021, 87th Leg., R.S., ch. 975, 2021, Tex. Gen. Laws 2535 (S.B. 2116 preamble). The Act was added to both the Business & Commerce and Government Codes as applicable to business and governmental entities.

The Act prohibits an entity from entering into an agreement relating to critical infrastructure if the company involved would be granted direct or remote access to or control of critical infrastructure in this state, and if the entity knows that the company is owned or controlled by individuals who are citizens of or a company controlled by citizens or the governments of China, Iran, North Korea, Russia, or a country designated by the Governor, or headquartered in China, Iran, North Korea, Russia, or another country designated by the Governor. TEX. BUS. & COM. CODE § 113.002; see also TEX. GOV'T CODE § 2274.0102.

The Opinion noted the relevant question at issue revolved around whether the company party to the agreement with the governmental entity would have direct or remote access to or control of critical infrastructure. Under the Act, critical infrastructure consists of "a communication infrastructure system, cybersecurity system, electric grid, hazardous waste treatment system, or water treatment facility." *Id*. The utility service at issue in the request would require a utility provider to use critical infrastructure to provide services to a consumer, in this case a factory owned by a company that meets certain criteria under the Act. The Attorney General concluded that while an electricity provider will use the electric grid to transfer electricity to the factory, and a water utility will use a water treatment facility to purify water before passing the water to the factory, this use of critical infrastructure to provide services to an end-use would not inherently result in the utility consumer itself obtaining access to the critical infrastructure prohibited by the Act.

The Attorney General further noted that the Act does not define "access" or "control," and that such terms should be defined based on their common, ordinary meaning. The Opinion relied on the definitions provided in the *New Oxford American Dictionary* and *Black's Law Dictionary* for its analysis. The Opinion then referenced a previous determination by the Attorney General addressing whether the Act prohibited an interconnection agreement between a transmission service provider and an electricity generator that was a wholly- or majority-owned subsidiary of a Chinese-headquartered corporation. *See* Tex. Att'y Gen. Op. No. KP-0388 (2021) at 3. There, the Attorney General concluded that because the electricity generator would obtain the ability to connect to and supply electricity to the electric grid, such an agreement would therefore be implicated by the Act. The Attorney General contrasted the previous Opinion with the agreement at issue and stated that based on the terms of the agreement, the service rendered would not amount to access such that the Act would apply.

Additionally, the Attorney General addressed whether the construction and maintenance of new infrastructure, including power lines, waterlines, sewer lines, and other infrastructure to provide such services, constitute an agreement that grants direct or remote access to or control of critical infrastructure. The Attorney General concluded that nothing in the Act prohibits construction or maintenance of new infrastructure to facilitate the provision of additional utility services. The Act would only be implicated if the new infrastructure provided a factory as described in the request at issue with direct or remote access or control of critical infrastructure as described above.

The Attorney General concluded that the Act prohibits contracts or other agreements with certain foreign-owned companies in certain circumstances in connection with critical infrastructure in this State. For the Act to apply, the Attorney General noted that the agreement at issue must give a company direct or remote access to or control of critical infrastructure. An agreement to

provide standard utility services, by itself, did not grant an entity the ability to access critical infrastructure as contemplated by the Act. The extent to which any specific agreement grants direct or remote access to or control of critical infrastructure will depend in part on the terms of the contract at issue. This Opinion may be useful for other similarly situated entities when determining whether any agreements to which they are a party would fall under the Act.

A court would likely conclude that the common-law incompatibility doctrine and conflict-of-interest laws do not bar a Nueces County Commissioner from simultaneously serving as the general manager of the South Texas Water Authority. Tex. Att'y Gen. Op. No. KP-407 (2022).

In a recent opinion, the Office of the Attorney General addressed whether the doctrine of incompatibility or conflict-of-interest laws prevent simultaneous service as a county commissioner and general manager of a water authority. The Office of the Attorney General concluded such a court would likely hold the common-law incompatibility doctrine and conflict-of-interest laws would not bar such simultaneous service.

First, the Attorney General addressed the incompatibility doctrine, which prohibits dual public service in cases of self-appointment, self-employment, and conflicting loyalties. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928). The Attorney General noted that self-appointment and self-employment conflicts were not at issue, and conflicting-loyalties incompatibility would only apply if both positions are public offices. *See* Tex. Att'y Gen. Op. No. KP-0369 (2021) at 3. The Attorney General referenced a previous decision where the Attorney General concluded that a general manager of a water district did not occupy a public office. *See* Tex. Att'y Gen. Op. No. GA-0849 (2011) at 2. Accordingly, the conflicting-loyalties incompatibility doctrine would not prohibit a county commissioner from also serving as general manager of the Authority.

Next, the Opinion addressed conflict-of-interest law questions concerning the Authority's execution of a management service agreement with a corporation, for which the Nueces County Commissioner is president. Under the management services agreement, the Nueces County Commissioner would serve as the general manager of the Authority. Section 81.002(a) of the Local Government Code requires a county commissioner to take an "official oath and swear in writing that the person will not be interested, directly or indirectly, in a contract with or claim against the county." TEX. LOC. GOV'T CODE § 81.002(a). The Attorney General concluded that Section 81.002 is not applicable because the management service agreement between the Authority and the corporation is not a "contract with or claim against the county." *Id*.

Finally, the Attorney General addressed whether Chapter 171 of the Local Government Code, which prohibits a local public official from participating in a vote or decision involving a business entity in which the official has a substantial interest, had been violated. In a previous opinion, the Attorney General determined the prohibition "applies only to a local public official who may participate in a vote or decision of the governmental entity that will result in a special economic effect on the official's business." *See* Tex. Att'y Gen. Op. No. KP-0244 (2019) at 2. While the individual at issue is a local public official, the Attorney General concluded that neither state statute nor the facts at issue provide that the individual, as county commissioner or general manager, participates in the vote or decision of the Authority to approve the management service agreement, which is the responsibility of the Authority's board. Therefore, a court would likely conclude that the Authority's vote to approve the management service agreement with the corporation does not constitute a vote or decision requiring the individual, as county commissioner or general manager, to comply with the conflict-of-interest procedures under Section 171.004. Tex. Att'y Gen. Op. Nos. KP0376 (2021) at 5, KP-0244 (2019) at 4, DM-0244 (1993) at 3.

Municipalities, utility providers, and other governmental or business entities may utilize this Opinion to determine whether issues exist involving the incompatibility doctrine or conflict-of-interest laws.

"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.*

Sunset continued from page 1

TCEQ is one of the primary agencies our clients, consultants, and colleagues join us in engaging with on a daily basis. The Sunset review process can be searching and difficult, at times, and we endeavor to work with the agency and its self-initiated efforts to maintain and recommend improved performance across many environmental media. As we march toward the 2023 Legislative Session, we will continue to track the TCEQ Sunset Review process and will keep *The Lone Star Current* readers apprised of developments.

Nathan Vassar is a Principal in the Firm's Water Practice Group. Please reach out to Nathan with any questions about the TCEQ Sunset process and if there are ways to improve the regulatory relationship with the agency moving forward. If you would like any additional information or have questions related to these or other matters, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com.

WHAT TO WATCH FOR IN THE NEXT SCOTX TERM

by James F. Parker

It is that time of year when our attention turns toward the normal summertime pursuits—baseball, cook-outs, and the next term of the Texas Supreme Court.

So for your summertime beach reading, may we offer the briefs from a few of the cases the Court will be hearing when it returns to Austin in September. And if you find any of these cases pertinent to your interests, please let us know so that we can discuss what actions you can take to protect those interests:

Is a floodgate "motor-driven equipment" under the Texas Tort Claims Act?

Ratttray v. City of Brownsville, --- S.W.3d ---, 2020 WL 6118473 (Tex. App.—Corpus Christi 2020, pet. granted) (SCOTX Docket No. 20-0975).

Homeowners sued the City after their homes were flooded from the nearby resaca, alleging that the City's negligent operation of its stormwater system caused their damages. The stormwater system contains a series of drainage ditches that are controlled by numerous motor-driven gates and pumps. The homeowners allege that a City employee negligently did not open a gate to release stormwater downstream.

The Tort Claims Act waives immunity to claims for property damage that "arises from the operation or use" of motor-driven equipment. The Court of Appeals concluded that the homeowners did not allege that the City negligently operated or used the floodgate, but that it failed to use the gate. Hence, the Tort Claims Act did not apply and the City's immunity was not waived.

The issue is thus presented—is non-use "use" of the floodgates for purposes of the Tort Claims Act? The answer could greatly expand governmental tort liability.

Is a government contractor a "governmental entity" for purposes of the Whistleblower Act?

Tex. Health & Human Servs. Comm'n v. Pope, 2020 WL 2079093 (Tex. App.—Austin 2020, pet. granted) (SCOTX Docket No. 20-0999).

The Texas Health & Human Services Commission ("HHSC") runs a Medical Transportation Program, under which contractors provide rides to parents for Medicaid-eligible health services. Two HHSC employees, Pope and Pickett, complained to law enforcement authorities that a third-party contractor was failing to follow state parental-accompaniment rules in transporting minor patients, that the contractor was not making required payments to HHSC, and that the contractor was not providing required documentation.

After Pope and Pickett were fired, they sued HHSC for violation of the Whistleblower Act. But the Whistleblower Act only protects employees who make a good-faith report of a violation of law by a governmental entity. Nevertheless, the Court of Appeals concluded that Pope and Pickett's complaint about the third-party contractor's legal violations necessarily implicated a violation by HHSC, and that HHSC's "responsibility" to enforce Medicaid laws may have been violated when it did not seek reimbursement from the contractor.

The Supreme Court granted HHSC's petition to consider whether the Whistleblower Act's good-faith standard applies when the reporting employee identifies only a governmental contractor.

Is a Chapter 380 economic-development agreement a contract for goods or services under the Local Government Contract Claims Act?

City of League City v. Jimmy Changas Inc., 619 S.W.3d 819 (Tex. App.—Houston [14th Dist.] 2021, pet. granted) (SCOTX Docket No. 21-0307).

The City entered into an economic development agreement with Jimmy Changas by which the City offered incentives to Changas to develop a restaurant. After the City allegedly failed to fully perform, Changas sued for breach of contract.

The City asserted that it was immune to Changas' claim. But the Court of Appeals concluded that the City had no governmental immunity because it was acting within its proprietary capacity when it entered into the development agreement under Chapter 380 of the Local Government Code. And as noted in the discussion of the Austin Court of Appeals' decision in *City of Austin v. Findley* in the "In the Courts" column, plaintiffs are becoming more aggressive in asserting that actions are proprietary to avoid governmental immunity.

Thus far, Texas courts have been very restrictive in identifying cities' actions as "proprietary." Will that continue?

Can a state university revoke the degree of a former student?

Hartzell v. S.O., 613 S.W.3d 244 (Tex. App.—Austin 2020, pet. granted) (SCOTX Docket No. 20-0811)

--consolidated with—

Trauth v. K.E., 613 S.W.3d 222 (Tex. App.—Austin 2020, pet. granted) (SCOTX Docket No. 20-0812)

For many years, we were plagued with a recurring dream: we were actually one credit short of graduation and, through some bit of bureaucratic clean-up, the university only recently discovered it and rescinded our degree.

If you also have had this dream, this case is for you.

In *Hartzell*, S.O. received a Ph.D. from The University of Texas at Austin in 2008. In 2012, UT began an investigation into whether she had engaged in scientific misconduct and academic dishonesty in connection with her doctoral research. When S.O. sued, both the trial court and the Court of Appeals concluded that the university president lacks legal authority to rescind a degree that has already been conferred.

Trauth involves similar facts. But unlike in *Hartzell*, the university had already revoked the former student's degree. Nevertheless, the result was the same—the trial court and the Court of Appeals concluded that the university's president acted *ultra vires*.

So, does the statutory authority granted to the universities by the Education Code allow for degrees to be rescinded? Or will our nightmares be put to rest?

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

REFLECTIONS AND CONSIDERATIONS REGARDING THE STREAMLINED EXPEDITED DECERTIFICATION PROCESS

by David J. Klein

As we look to the last half of 2022, prior to the commencement of the 2023 Legislative Session, the quickest and most certain process for some Texas landowners to be removed from the service area boundaries of a water and/or sewer certificate of convenience and necessity ("CCN") is through a petition process in Texas Water Code ("TWC") § 13.2541 known as the "streamlined expedited decertification process." In general, a CCN is a permit, currently regulated through the Public Utility Commission of Texas ("PUC"), which provides its holder with the exclusive right and obligation to provide continuous and adequate retail water/sewer service over a specific geographic area. CCNs can be approved for new authorizations; and existing CCNs can be amended and transferred. It seems, however, that a majority of the CCN-related applications are petitions for decertification. Many years ago, CCN decertifications were a near-impossible endeavor- an option available under TWC § 13.254(a), limited to other retail service providers and the Commission (and its predecessor agencies) itself. It was common that a contested CCN decertification petition under that process would likely take 18-24 months.

In 2005, House Bill 2876 amended Chapter 13 of the Texas Water Code, establishing several landowner-friendly laws that in part enabled landowners – for the first time – to somewhat control the extent to which their land is included within a CCN. Specifically, landowners across the state that could meet certain prerequisites could file a petition for expedited CCN release (decertification) under TWC § 13.254(a-1). That being said, a landowner-petitioner would need to demonstrate under TWC § 13.254(a-1) that the existing CCN holder either refused to provide service or the existing CCN holder is not capable of providing the service on a continuous and adequate basis within the timeframe, at the level, or at the approximate cost that the alternative provider is capable of providing for a comparable level of service, or in the manner reasonably needed or requested by current and projected service demands in the area. No guarantee existed that a landowner petition filed under that new law would be approved. But again, the landowner now had the opportunity to try to get removed from an existing CCN, under a timeframe – approximately 180 days – that was far quicker than the traditional TWC § 13.254(a) process.

Then, in 2011, the Legislature passed Senate Bill 573, establishing TWC § 13.254(a-5), which created a second avenue for certain landowners to file streamlined expedited decertification process petitions at the PUC. The scope of TWC § 13.254(a-5) was narrower than TWC § 13.254(a-1), as it was only available to landowners of 25 acres or more that are located either within a county of 1 million people or in a county adjacent to a county of 1 million people, and not receiving water or sewer service from the CCN holder. However, there was much more certainty under TWC § 13.254(a-5) that a landowner who meets those prerequisites will be decertified from the CCN that includes their land. Plus, the Legislature required that the PUC approve such petitions no later than the 60th day after they are filed at the

PUC, which has been interpreted by the PUC as 60 days after the day the PUC deems the petition administratively complete.

Most recently, in 2019, the Legislature transitioned the streamlined expedited decertification process from TWC § 13.254(a-5) to § 13.2541 and tweaked the compensation process. But the core purpose of the streamlined CCN decertification remains in place today: if you can meet the statutory prerequisites, then the PUC should remove your land from the CCN in approximately 60 days.

Dozens, if not hundreds, of landowners have availed themselves of this streamlined expedited decertification process over the past 10+ years by filing and pursuing petitions at the PUC. However, history has shown that the Legislature is prone to modify this CCN decertification law. Depending on your perspective, the changes over the past years have been for the good, at times, and for the bad, at other times. Thus, as we start the third calendar quarter of 2022 and simultaneously look to 2023 and the upcoming Legislative Session, landowners and CCN holders alike should be considering their next moves as to whether they should be filing streamlined expedited decertification petitions now, or wait.

David Klein is a Principal in the Firm's Districts and Water Practice Groups. If you have any questions regarding CCNs or other water or wastewater system issues, please contact David at 512.322.5818 or dklein@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We understand that in September 2021, the Texas Legislature expanded the ways doctors in Texas can legally prescribe medical marijuana. We have a no-tolerance drug policy. What do we do when one of our safety-sensitive employees or applicants test positive for marijuana, and then say that it is legally prescribed?

Sincerely,
Drug-Free Workplace

Dear Drug-Free,

It is true that HB 1535 amended the Texas Occupations Code to expand the conditions for which physicians may prescribe low-THC cannabis. Previously, medically-prescribed marijuana was allowed only for a very narrow range of conditions, but HB 1535 now authorizes prescriptions for all forms of cancer, post-traumatic stress disorder, and certain medical research.

Although the bill does not provide employment protection to applicants or employees who qualify for medical use, it is possible that disciplining or terminating an employee for using properly-prescribed marijuana would lead to a claim under disability discrimination and accommodation statutes, such as the Americans with Disabilities Act or Chapter 21 of the Texas Labor Code. The question will be whether the employer can reasonably accommodate the medical use of marijuana; at no time will the employer be required to allow the employee to be intoxicated at work. As with other prescription drugs such as opioids, it is not a reasonable accommodation to permit an employee to work in a manner that impairs the ability to perform tasks safely or efficiently.

Employees should be reminded to inform drug testing personnel prior to screening of any prescription drugs being taken that could result in a positive drug test. If the employee tests positive for marijuana, he or she will need to provide proof of a valid prescription, and the employer should engage in a discussion (the "interactive process") with the employee about the timing of doses and the risks of workplace intoxication, and whether anything can be done to mitigate such risks.

Note that prescription medical marijuana will likely not be treated the same legally as over-the-counter (OTC) products that contain THC, so we believe you can still ban such OTC use for your workforce. Consider warning employees in your drug policy that it is their responsibility to know the contents of what they are taking, prescribed or non-prescribed, and that unregulated substances are used at their own risk. Employees should know that they may be subject to discipline for violations of your drug policy, whether intake of an illicit substance was intentional or otherwise, and that OTC cannabis products that cause a positive drug test or cause the employee to be under the influence at work are prohibited.

"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

Milton v. United States, 36 F.4th 1154 (Fed. Cir. 2022).

In this case, landowners and corporations downstream from Barker Dam and Addicks Dam on the Buffalo Bayou (the "Landowners") sued the United States (the "Government") in the Court of Federal Claims and asserted takings claims due to property damage resulting from controlled flooding by the U. S. Army Corps of Engineers ("USACE") during Hurricane Harvey. The Barker Dam and Addicks Dam were built to control flooding in Buffalo Bayou with large reservoirs behind each for flood control. Due to the extensive rainfall during Hurricane Harvey, the USACE started releasing water from the dams, resulting in millions of dollars in property damage, with some properties being flooded for more than 11 days, and some properties being flooded with water reaching 8 feet above the first floor. The Landowners alleged that the flooding constituted a taking of their property as flowage easements.

The Government filed motions to dismiss and for summary judgment against the Landowners, arguing that neither Texas law nor federal law recognized the Landowners' claims. When the lower court granted the motions in favor of the Government, the Landowners appealed the decision to the Federal Circuit Court of Appeals.

The Court of Appeals analyzed several issues, including whether the Government was immune from the Landowners' claims and whether the Landowners identified a cognizable property interest. After a thorough analysis of each point by the Government, the Court of Appeals reversed the lower court and determined that the Government was not protected against the Landowners by sovereign immunity, and that "the Court of Federal Claims erred in concluding that Appellants failed to assert a cognizable property interest." The Court of Appeals remanded the case for further proceedings on the Landowners' takings claims.

Post Oak Clean Green Inc. v. Guadalupe Cnty. Groundwater Conservation Dist., No. 04-21-00087-CV, 2022 WL 2135546 (Tex. App.—San Antonio Jun. 15, 2022, no pet. h.).

Post Oak Clean Green, Inc. filed an application with the Texas Commission on Environmental Quality ("TCEQ") for a permit to construct and operate a landfill located within the boundaries of the Guadalupe County Groundwater Conservation District (the "District"). The District objected to the landfill, arguing that the location of the proposed landfill would violate its Rule 8.1, which states, "In no event may waste or sludge be permitted to be applied in any manner in any outcrop area of any aquifer within the . . . District." During the next five years, Post Oak and other intervening parties, including the District, participated in TCEQ's administrative review process of Post Oak's permit application.

Ultimately, TCEQ issued an order authorizing Post Oak to construct and operate the landfill at the proposed site. The District, in turn, filed an administrative appeal to overturn the TCEQ's order. The District also sued Post Oak in a separate lawsuit asserting a claim under the Uniform Declaratory Judgments Act ("UDJA"). The District's UDJA claim requested a declaration that the District's Rule 8.1 prohibited construction of the proposed landfill. TCEQ intervened in the District's lawsuit against Post Oak. Together, TCEQ and Post Oak filed pleas to the jurisdiction alleging, among other things, that the redundant remedies doctrine barred the District's request for declaratory relief. When the trial court denied the pleas to the jurisdiction, TCEQ and Post Oak appealed the decision.

On appeal, the Fourth Circuit Court of Appeals reversed the trial court's decision and concluded that the redundant remedies doctrine barred the District's UDJA claim. Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels. Even though the District claimed that the relief sought by its UDJA claim and its administrative appeal were different, the court concluded that the claims sought the same relief: blocking Post Oak's landfill. Because the District's UDJA claim sought the same relief as its administrative appeal, the court dismissed the UDJA claim for lack of jurisdiction under the redundant remedies doctrine.

Louisiana v. Am. Rivers, 142 S. Ct. 1347 (2022).

The U.S. Supreme Court recently issued an emergency order temporarily reinstating the Trump Administration's 2020 Rule governing EPA's Clean Water Act Section 401 Certification Rule, codified at 40 C.F.R. Part 121. The Court's decision stays an order

by the Northern District of California to vacate the 2020 Rule, pending the Ninth Circuit's ruling on appeal. A group of states and industry organizations, claiming they would "otherwise suffer irreparable harm," had asked the Supreme Court to stay the Northern District of California's order, and the Supreme Court granted the stay in a one-paragraph opinion. The opinion did not provide any justification for the stay. Justice Kagan dissented, observing that the applicants did not "cit[e] a single project that the court's ruling threatens, or is likely to threaten, in the time before the appellate process concludes." Even if the 2020 Rule is upheld by the Ninth Circuit, the EPA is working to revise the rule and restore power to states and tribes. On June 9, EPA released a proposal to revoke the 2020 Rule.

Litigation Cases

TCEQ does not have jurisdiction to adjudicate surface water right disputes.

Pape Partners, Ltd. v. DRR Fam. Prop. LP, No. 21-0049, 2022 WL 1592723 (Tex. May 20, 2022).

On May 20, 2022, the Texas Supreme Court held that the Texas Commission on Environmental Quality ("TCEQ") does not have jurisdiction to adjudicate conflicting claims of ownership to surface water rights, and these claims are the responsibility of the courts.

Pape Partners and related parties bought a 1,086-acre farm in McLennan County from Lola Robinson, including the right to divert water from the Brazos River for irrigation under a permit that TCEQ issued to Robinson years prior. Originally these water rights were in two permits, but were consolidated into one permit that included an adjacent tract with appurtenant water rights that Robinson had previously owned. That tract was later sold to DRR Family Properties. TCEQ updated its records in response to chain-of-title documentation submitted by Pape, DRR, and other nearby landowners. The update reflected Pape's right to irrigate only 821 acres.

Pape filed suit in district court, seeking a declaration that it owned surface water rights to the entire 1,086-acre farm. DRR moved to dismiss the claims for lack of subject-matter jurisdiction, arguing that TCEQ has exclusive jurisdiction to determine ownership of surface water rights.

The Supreme Court explained the presumption in favor of district court jurisdiction and the corresponding rule that an agency may only exercise powers delegated by the Legislature in clear and express statutory language. The Court then turned to Chapters 5 and 11 of the Water Code. The Court explained that the inclusion of "water rights adjudication" in Section 5.013(a) refers to the Water Rights Adjudication Act in Chapter 11. The provisions of Chapter 11, in turn, demonstrate that water-rights adjudication is a term of art for TCEQ's process of allocating the rights to the water of a particular source through permits. That process, which is outlined in Chapter 11, requires a district court to determine all issues of law and fact independently of TCEQ. Nothing in the statute gives TCEQ the authority to decide conflicting claims to water rights acquired with the title to land.

Bottom line: The TCEQ process for surface water rights adjudication is limited. If there is a dispute about who owns the water rights, that dispute must be taken to court through a trespass to try title action.

Street lights are a governmental function, and hence immunity applies.

City of Austin v. Findley, No. 03-21-00015-CV, 2022 WL 1177605 (Tex. App.—Austin Apr. 21, 2022, no pet. h.).

Faced with very limited waivers of governmental immunity, plaintiffs are increasingly challenging governmental actions as being "proprietary," and hence not protected by immunity.

In *Findley*, the plaintiffs argued their injuries were due in part to the City's failure to properly illuminate the area near train tracks. They sued the City, arguing that street illumination was a proprietary function, and that immunity therefore did not attach.

The court explained that proprietary functions of a City are not protected by governmental immunity, but governmental functions and activities that are closely related or necessary to those governmental functions are protected by governmental immunity. Although Plaintiffs claimed the provision of street lighting qualified as operation of a public utility and was therefore a proprietary function, the court agreed with the City's argument that the provision of street lighting was closely related to two listed governmental functions in the Torts Claims Act (TTCA), street construction and design and regulation of traffic. The court cited evidence in the case that showed the purpose of the City's provision of street lighting was to assist drivers.

The court also distinguished this case from a prior case involving unmaintained power lines that arced and caused a fire (*City of Austin v. Liberty Mutual*). The court indicated that in *Liberty Mutual*, the injury resulted from the maintenance and operation of power lines as a public utility, which is a proprietary function and not protected by governmental immunity, as opposed to the street lighting plan that had the stated purpose of providing adequate lighting for drivers to navigate the road safely, which is closely related to two government functions and is protected by governmental immunity.

Bottom line: Most things cities do will be within their governmental functions. But they should be aware that there continues to be liability for actions that are within their proprietary powers.

Supreme Court declines to stay agency use of interim cost of carbon to set federal policy.

- *Louisiana v. Biden*, No. 2:21-CV-01074, 2022 WL 438313

(W.D. La. Feb. 11, 2022) (issuing preliminary injunction).
- *Louisiana v. Biden*, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022) (issuing stay of preliminary injunction pending ongoing appeal).
- *Louisiana v. Biden*, No. 21A658, 2022 WL 1671759 (U.S. May 26, 2022) (denying application to vacate stay of preliminary injunction).

On May 26, 2022, the Supreme Court of the United States denied an application to vacate the 5th Circuit stay on a preliminary injunction against agencies using the interim social cost of greenhouse gases to set federal policy. The denial was issued without comment and allows the continued use of this metric, pending the outcome of the appeal in front of the 5th Circuit based on the substance of the case.

The dispute began after President Biden issued an executive order reforming the Interagency Working Group on the Social Cost of Greenhouse Gases, granting them authority to issue estimates on the social cost of greenhouse gases and requiring federal agencies to consider these estimates in their cost-benefit analysis for new regulations and policy decisions.

In February 2021, the group issued new interim estimates, returning to the 2016 estimates while adjusting for inflation. Louisiana and nine other states, including Texas, challenged this executive order and asked for a preliminary injunction on the implementation of the interim estimates. The States argued that (1) the estimates were not created through the requisite notice-and-comment process under the Administrative Procedures Act (APA), (2) the President and federal agencies lack the authority to enforce these estimates as they are substantively unlawful, and (3) the Government Defendants acted outside of their authority by basing policy on global considerations. After finding that the States had standing, the interim estimate was reviewable, and the States would likely succeed on the merits, the District Court granted the preliminary injunction.

The Government Defendants appealed to the 5th Circuit and asked the court to stay the injunction pending the appeal before the 5th Circuit. The Government argued that the States lacked standing, their claims were not ripe, and the interim estimates are not reviewable since they are not final agency action under the APA. The 5th Circuit granted the stay on the preliminary injunction, stating that the Government Defendants were likely to succeed on the merits since the States lack standing. The court reasoned that the injury to the States is merely hypothetical, since the claims are based on speculative regulations that may result from including these interim estimates as one of many factors and may place an increased burden on the States. Additionally, the alleged injury is untraceable to a specific agency action as one of many factors, and the States did not challenge a specific regulation or action. The 5th Circuit also noted that the preliminary injunction would cause more harm to the Government than the stay of the injunction would cause to the States. The appeal based on the substance of the case is before the 5th Circuit.

Bottom line: With the United States Supreme Court denying the application to vacate the stay of the preliminary injunction, the interim estimates of the social costs of greenhouse gases will continue to be used by agencies as a factor when conducting a cost-benefit analysis during rulemaking procedures, pending the outcome of the ongoing appeal.

GOVERNMENTAL IMMUNITY – Whistleblower Act:

City of Fort Worth v. Pridgen, No. 20-0700, 2022 WL 1696036 (Tex. May 27, 2022).

On May 27, 2022, the Texas Supreme Court addressed the proper interpretation of a "good faith report of a violation of law" under the Texas Whistleblower Act. Primarily, this case focused on determining if the actions of two employees constituted a "report."

Pridgen and Keyes were veteran law enforcement officers employed by the Fort Worth Police Department responsible for investigating allegations of police misconduct. In December 2016, a video depicting Officer William Martin's forceful arrest of a woman and her daughter went viral. Pridgen and Keyes investigated the incident, concluding that Officer Martin committed several criminal violations and should be terminated. They assert they reported these recommendations to their supervisor, Chief Fitzgerald, on multiple occasions.

Several months later, Officer Martin's previously undisclosed body camera video and other confidential files were released and posted on a public website. After an investigation into the source of the leak, Internal Affairs concluded that Pridgen had downloaded the files to a thumb drive and that Keyes had been in Pridgen's office at the time of the download. Pridgen and Keyes were placed on detached duty and demoted.

Pridgen and Keyes sued the City under the Texas Whistleblower Act, alleging the City took adverse action against them in response to their "good faith reports" of Officer Martin's alleged "violations of law." The City claimed Pridgen and Keyes failed to allege facts necessary to waive governmental immunity. The City also claimed that Pridgen and Keyes did not "in good faith report a violation of law," because (1) they merely conveyed "their opinions" regarding internal policies and the consequences they believed were appropriate, and (2) they lacked a subjectively and objectively reasonable belief that Martin violated the law.

The Supreme Court agreed with the City, holding that a "report" requires the provision of information as opposed to mere conclusions or opinions. The Whistleblower Act is aimed at finding and addressing government mismanagement as a matter of public interest, so a public employee must convey information that furthers this purpose by exposing or corroborating a violation of law or otherwise provide relevant, additional information that will help identify or investigate illegal conduct. The Court also held that the Act's "good faith" limitation applies to all the Act's components, including the "report" requirement.

The Court rejected the City's arguments that (1) to "report" under the Act, an employee must "disclose" new information, and (2) information conveyed as part of an employee's job duties does not constitute a "report." Although a disclosure of new information can be a report, it is not the only type of communication protected by the Act. Public employees in positions that investigate misconduct are best positioned and equipped to convey information regarding government illegality.

However, the Court determined that Pridgen and Keyes failed to "report" under the Act because (1) their "reports" were not geared toward exposing, corroborating, or otherwise providing information pertinent to identifying or investigating governmental illegality, and (2) they did not "corroborate" any facts that were unverified or subject to dispute. The Court concluded that these recommendations amount to conclusions and opinions that do not trigger the Act's protections. Therefore, the Act does not waive the City's immunity from suit.

Bottom line: *City of Fort Worth v. Pridgen* confirms that the waiver of immunity by the Texas Whistleblower Act is fact-specific. In order to be strong enough to waive immunity, a report must convey information that exposes or corroborates a violation of law or otherwise provide relevant, additional information that will help identify or investigate illegal conduct.

Cutting off utility service for non-payment is not a constitutional taking.

City of Baytown v. Schrock, No. 20-0309, 2022 WL 1510310 (Tex. May 13, 2022).

On May 13, 2022, the Texas Supreme Court held that there was no evidence of a regulatory taking by the City of Baytown when the city refused to connect utility services to Schrock's property because of past-due utility bills for services provided to a previous tenant. Schrock owns a rental property and lost a tenant after the city refused to connect utilities. Instead of paying the past-due amount and getting the utilities reconnected, Schrock sued the city, claiming that the refusal to connect utilities constituted a taking in violation of the Texas or United States Constitution.

The Supreme Court of Texas, following its decision in *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014), concluded that the city's enforcement action did not regulate land use in a manner that constituted a taking or permanently deprived Schrock of his property. Additionally, the city's ordinance was unrelated to land use, and it provided a means to redress the enforcement actions related to the past-due bills. For these reasons, this was not a regulatory taking.

In a concurrence, Justice Young wrote to address the scope of takings under the Texas Constitution and suggest lack of causation as an additional reason for reversing the court of appeals' judgment.

While the city ordinance prohibiting the connection of new utility service at properties encumbered by outstanding utility bills was in violation of Texas Government Code Section 552.0025, the enforcement of the ordinance did not constitute a regulatory taking, so it did not waive governmental immunity.

Bottom line: The most interesting thing about this case—aside from the query about what type of litigant would leave a rental property unoccupied for years to pursue litigation rather than pay a past-due utility bill—is Justice Young's concurrence. Justice Young posits that the Texas Constitution provides broader protection against takings than does the United States Constitution. The exact practical effect of that observation is unanswered. But Justice Young expressly invites litigants in the future to explore that issue, implicitly signaling an openness to a broader view of takings jurisprudence.

Supreme Court outlines discretion to interpret statutes for purposes of *ultra vires* claims.

Van Boven v. Freshour, No. 20-0117, 2022 WL 1815048 (Tex. June 3, 2022).

Schroeder v. Escalera Ranch Owners' Ass'n, Inc., No. 20-0855, 2022 WL 1815042 (Tex. June 3, 2022).

Jones v. Turner, No. 21-0358, 2022 WL 1815031 (Tex. June 3, 2022).

On June 3, 2022, the Texas Supreme Court issued three opinions clarifying (maybe?) the scope of the *ultra vires* exception to governmental immunity.

In the first, the Court held that the Texas Medical Board acted *ultra vires* by revising a temporary sanction against a physician in the National Practitioner Data Bank instead of voiding it after the Board found the allegations unproven.

The case began when two patients filed complaints against Dr. Van Boven. The Board temporarily restricted his license to practice medicine and reported the suspension to the National Practitioner Data Bank via an Initial Report, in accordance with the Department of Health and Human Services ("HSS") Guidebook. The Guidebook requires an Initial Report to be filed when an adverse action is taken against a physician. A Void Report withdraws an Initial Report entirely and is used when the adverse action is "overturned on appeal." A Revision-to-Action Report creates a separate action that pertains to the Initial Report but does not withdraw the Initial Report and is used to modify a previously reported adverse action.

Eighteen months after the restriction on Van Boven's license was issued, an ALJ concluded the Board did not prove the allegations, and the Board issued a Final Order reinstating his medical license. Van Boven urged the Board to submit a Void Report, but the Board instead submitted a Revision-to-Action

Report, causing the Initial Report to remain as part of the physician's record.

Van Boven sought a writ of mandamus, arguing that the Board officials acted *ultra vires*. The Texas Supreme Court agreed with the physician, holding that the Board was not given absolute discretion to interpret the HHS's reporting requirements, but instead was required by federal law to report information in the form and manner prescribed by HHS. The Court determined that while the Initial Report was not explicitly overturned, the temporary restriction was functionally overturned by the ALJ and the Final Order when both concluded that the basis for the order had not been proven. Since this superseded the temporary suspension, the Guidebook required a Void Report to be filed. By failing to file a Void Report, the Board acted *ultra vires*.

* * *

In another opinion issued on the same day, the Court held that the duty to interpret the Unified Development Code ("UDC") had been committed to the discretion of a city's planning commission. In *Schroeder v. Escalera Ranch Owners's Ass'n*, the Court addressed the developer's application to the City of Georgetown's Planning and Zoning Commission for approval of a preliminary plat for a new subdivision. Escalera Ranch residents asserted that the plan would add excessive traffic to Escalera Parkway and did not conform to the City's UDC. The Commission concluded the plat did conform to UDC requirements, so it had a duty under state law to approve the conforming plat.

The Escalera Ranch Owners' Association sued the Commission members for mandamus relief, asserting that the plat was nonconforming. In a plea to the jurisdiction, the Commissioners argued that once they determined that the plat was conforming, they had a ministerial duty to approve the plat. The trial court granted the Commissioners' plea.

The Supreme Court agreed with the Commissioners, concluding that governmental immunity protected the Commissioners' determination of conformity. The Court explained that governmental immunity for the Commissioners had not been waived by statute, and the Association's claim did not fall within the *ultra vires* exception. The Court reasoned that (1) there was no ministerial duty to deny a nonconforming plat, and (2) there was no clear abuse of discretion by the Commissioners because the Commissioners fully considered the proper materials, and the duty to interpret the UDC had been committed to the Commissioners' discretion.

* * *

In the last *ultra vires* case of the term, the Texas Supreme Court held that taxpayers have standing to challenge alleged misallocation of tax revenue by city officials, and they sufficiently pleaded *ultra vires* acts by alleging the city officials had no discretion in so misallocating the funds.

Two Houston taxpayers sued city officials for allegedly underfunding the Dedicated Drainage and Street Renewal Fund established under the City Charter, which mandated that a certain amount of *ad valorem* tax revenue be spent "exclusively" on drainage and street maintenance. Taxpayers alleged that in Fiscal Year 2020 there was a shortfall of about $50 million to the Fund.

City Officials filed a plea to the jurisdiction asserting governmental immunity, arguing the pleadings did not show that they acted outside their authority. The trial court denied the plea to the jurisdiction.

The Supreme Court also disagreed with the City's arguments and held that Taxpayers pleaded sufficient facts showing that public funds were expended on allegedly illegal activity. Their calculations showed a measurable misallocation and alleged that the money was spent on services that would not have received those funds if City Officials had allocated them properly. The Court also reviewed the immunity question and held that the Charter gave the City Officials no discretion in allocating these funds.

In this case, decided the same day as *Van Boven* and *Schroeder*, the Court further clarifies that government officials are not protected by governmental immunity when they act *ultra vires* and exercise discretion that is not granted through statute.

Bottom line: Distinguishing between *Van Boven* and *Schroeder*, the Court clarifies that a significant factor in determining whether an act falls within the *ultra vires* exception to governmental immunity is the level of discretion in the statute. In *Van Boven*, the governing statute did not grant discretion in determining which form to file with the Data Bank. In *Schroeder*, the UDC granted the Commission discretion to determine the plat's conformity as long as it considered the proper factors. And in *Jones*, the City had no discretion in applying funds as set out by a formula in the City's charter.

Air and Waste Cases

Builders Recovery Servs., LLC v. Town of Westlake, No. 21-0173, 2022 WL 1591976, (Tex. May 20, 2022).

In *Builders Recovery Services v. Town of Westlake*, the Texas Supreme Court held that general-law municipalities do not have authority to impose "gross revenue" based fees on waste service providers. Builder Recovery Services ("BRS") is a construction site waste management company that contracts with Westlake. The town enacted an ordinance requiring waste management companies to obtain a license to operate in the town and pay a monthly license fee based on a percentage of BRS' gross revenue. BRS brought a declaratory judgment action claiming that Westlake lacks authority to require a license or impose a licensing fee based on a percentage of BRS's revenue. According to the Texas Supreme Court, general-law cities can require a

license but can only assess fees that are calibrated to cover the cost of administration and oversight of the license.

Adkisson v. Jacobs Eng'g Grp., Inc., 36 F.4th 686 (6th Cir. 2022).

Jacobs Engineering Group Inc. ("Jacobs") is a corporation that is wholly owned by the Tennessee Valley Authority ("TVA"), a federal governmental agency. The plaintiffs were injured during a coal ash cleanup, removal, and recovery project at the plant. A jury found that Jacobs was generally liable for its failure to warn workers of the dangers of exposure to fly ash, failure to supply gas masks, and failure to implement other safety measures. Jacobs filed several motions seeking "derivative immunity from suit based on its status as a government contractor" before appealing to the 6th Circuit. The 6th Circuit affirmed the district court's denial of Jacobs's derivative immunity claims.

U.S. government entities generally have sovereign immunity from suit, and derivative immunity is available to government contractors for suits that arise from actions performed in a governmental capacity. However, the Court found that, in this case, the U.S. had waived its immunity from torts suits under the Federal Torts Claim Act. Therefore, since the TVA was not immune from the litigation, neither was Jacobs as a government contractor.

Ohio v. EPA, No. 22-1081 (D.C. Cir. filed May 12, 2022).

The Clean Air Act includes a waiver provision that allows states to adopt motor vehicle emissions standards that are as-strict or stricter than those set by EPA. This waiver was revoked by the Trump Administration in 2019 and subsequently reinstated by the Biden Administration in March 2022. Ohio, Texas, and several other states filed suit to challenge the EPA's authority to reinstate the waiver. The states argue that EPA cannot selectively waive the Clean Air Act's preemption for California alone because that favoritism violates the states' equal sovereignty. California, several other cities and states, and a group of carmakers including Ford and BMW filed motions to intervene to protect the waiver.

The D.C. Circuit Court's decision may have sweeping implications for greenhouse gas emissions standards across the nation. In the 54 years since Congress enacted the waiver provision in the Clean Air Act, the EPA has granted California almost every waiver sought, and 17 states have adopted its rigorous tailpipe emissions rules. At this time, the D.C. Circuit Court has not yet ruled on any of the motions to intervene or set a procedural schedule.

Utility Case

In our January 2022 newsletter, we addressed a Texas Supreme Court case asking whether certain statutory rules of construction should also apply to contested case orders: *Public Utility Commission ("PUC") and Southwestern Electric Power Company ("SWEPCO"), Petitioners, v. Texas Industrial Energy Consumers, et al., Respondents.,* No. 21-0817 (Tex. Sep. 20, 2021).

The case arises out of a PUC decision wherein the Commission found a 2008 order regarding SWEPCO's Certificate of Convenience and Necessity ("CCN") ambiguous as to whether carrying costs were included in the cap on capital costs. The Commission relied on evidence from the administrative record to find the cap was not intended to include carrying costs. The trial court affirmed the PUC final order. The Third Court of Appeals then reversed and remanded to the PUC for further proceedings based on an application of the "plain meaning" rule of construction.

The Petition argues against the Third Court of Appeal's application, asserting that contested case orders should consider the evidentiary record.

Since January, TIEC and Cities Advocating for Reasonable Deregulation ("CARD") have filed responses to the Petition. TIEC argues that "[t]he court of appeals properly gave effect to the plain language..." and "applied well-established and uncontroversial interpretative principles, including that unambiguous language should be given effect." TIEC's response focuses on the effect of reversing the court of appeals decision by predicting that such a decision "would leave agency orders open to constant reinterpretation, preventing orders in contested cases from ever becoming final."

CARD makes a similar argument: "While an agency is entitled to interpret its own order for administrative purposes, it may not use the occasion to interpret the order to amend a prior final order." Both TIEC and CARD assert that the Petition fails to present any issue warranting the Court's review.

This case presents the question of what is acceptable, and perhaps required, in rendering contested case orders. Depending upon the answer, it may have lasting implications on the nature and interpretation of agency decisions. We will continue to update as this case continues to evolve.

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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 structured-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 Co-operation and Development ("OECD") and the Interstate Technology Regulatory Council. The National 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 accepted 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 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"), and 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 the EPA and U.S. Army Corps of Engineers's ("Corps's") 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 drinking 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 LSL, 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")

On January 5, 2022, the Corps announced that it will require new and pending dredge-and-fill permits ("404 Permits") to rely on new approved jurisdictional determinations ("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")

PUC Creates New Power Outage Alert Rules. Amended by Senate Bill 3, the new power outage alert rules will establish criteria for the content, activation, and termination of regional and statewide power outage alerts. These rules were adopted by the PUC on May 26, 2022.

These rules include recommendations made by the PUC executive director to the Texas Department of Public Safety regarding issuing, updating, or terminating power outage alerts. Additionally, the Electric Reliability Council of Texas ("ERCOT") must notify the PUC when ERCOT forecasts indicate system-wide generation supply is likely to be insufficient within the next 48 hours, or when ERCOT issues system-wide load shed instructions.

Transmission service providers outside of the ERCOT region must notify PUC when it has received system-wide load shed instructions from the applicable reliability coordinator.

The new rules can be found in the Texas Administrative Code, specifically 16 TAC § 25.57.

Oncor Releases Quarterly Earnings Report and Files Statement of Intent to Increase Rates. Oncor has released its quarterly earnings for the three-month period ending March 31, 2022. During this time, Oncor received a net income of $194 million. This increase has been attributed to increases by the company in invested capital, higher customer consumption, and higher customer growth. Additionally, there has been an 8.1% increase in revenues from residential customers and a 5.3% increase in revenues from commercial and industrial customers. With these results from this quarterly period, Oncor has seen a 7% (approximately $26 million) increase from the same quarter last year.

In addition to releasing its quarterly earnings, Oncor filed a statement of intent to increase rates with the PUC and cities retaining original jurisdiction. Oncor is seeking to increase rates by approximately $251 million. The breakdown of this increase is as follows:

- Oncor would see a 4.5% increase in present revenues;
- Residential customers would see an 11.2% increase in rates;
- Residential customers who use about 1,300 kWh per month would see a bill increase of approx. $6.02 per month; and
- There would be a 1.6% increase in rates for street lighting.

The proposed effective date is August 1, 2022, but several cities with original jurisdiction have taken action to suspend the effective date. The Steering Committee of Cities has intervened in the rate case proceeding.

Update on PUC Rulemaking Projects. PUC Staff's current rulemaking calendar for 2022 can be found under Docket No. 52935. The Commission's current focus is on implementing the statutes proposed by the 87th Legislature.

As of June 16, 2022, the following rulemaking projects are being prioritized:

- Project No. 53380 – Review of Chapter 28 – Rules Applicable to Cable and Video Service Providers
- Project No. 52059 – Review of Commission's Filing Requirements
- Project No. 52405 – Review of Certain Water Customer Protection Rules
- Project No. 53401 – Electric Weather Preparedness Standards – Phase II
- Project No. 53493 – Emergency Response Service
- Project No. 53404 – Power Restoration After Widespread Power Outage
- Project No. 53403 – Review of Chapter 25.101

Other rulemaking projects that are being prioritized but do not yet have a determined schedule include:

- Project No. 52301 – ERCOT Governance and Related Issues
- Project No. 51888 – Critical Load Standards and Processes
- Project No. 52796 – Review of Market Entrant Requirements
- Project No. 53169 – Review of Transmission Rates for Exports from ERCOT

Texas Railroad Commission ("RRC")

RRC Updates Emergency Gas Curtailment Rules. On April 12, 2022, RRC approved amendments to the 1970s-era Emergency Gas Curtailment Rules relating to gas deliveries during events when gas utilities lack sufficient supply to serve all customers. These amendments are made as continuous efforts after Winter Storm Uri to ensure that in emergency events life-saving natural gas for food and heat will continue to flow.

The amendments focus on the prioritization of delivery during emergency events. These priorities include:

- Human needs customers and local distribution systems which serve human needs customers;
- Electric generation facilities;
- Industrial and commercial users of minimum natural gas required to prevent physical harm and/or ensure critical safety to the plant facilities, to plant personnel, or the public when such protection cannot be achieved through the use of an alternative fuel;
- Small industrials and regular commercial loads that use less than 3 million cubic feet of gas per day; and
- Large industrial and commercial users for fuel or as a raw material where an alternative fuel or raw material can be used and operation and plant production would be curtailed or shut down completely when natural gas is curtailed.

These new amendments are set to take place on September 1, 2022 and can be found in the Texas Administrative Code, 16 TAC § 7.455.

Atmos Energy Releases Quarterly Earnings and Files for Rate Increases under the Rate Review Mechanism. On May 5, 2022, Atmos Energy ("Atmos") released its quarterly earnings for the three-month period ending on March 31, 2022. These earnings include a consolidated operating income of $385.1 million (a $3.3 million increase from last year), a distribution operating income of $311.3 million (an $8 million increase from last year), and pipeline and storage income of $73.8 million (a $4.7 million decrease from last year). In addition to these earnings, Atmos released that it projects expenditures to range from $2.4 billion to $2.5 billion during the 2022 fiscal year.

Prior to releasing its quarterly earnings, on April 1, 2022, Atmos Energy filed its Rate Review Mechanism to increase monthly residential rates in its Mid-Tex and West Texas divisions. The Rate Review Mechanism is a process employed by Atmos in seeking the interim rate increases. The process was negotiated by the Atmos Steering Committee and allows

for some regulatory oversight of utility rate requests.

Under this new filing, Atmos Energy would increase monthly residential rates in the Mid-Tex region by an average of $5.64 million and in the West Texas region by an average of $4.39 million. Atmos is seeking to increase Mid-Tex's annual revenues by $102.4 million and associates the increase with $924 million in new capital expenditures from January 2021-December 2021. Atmos also seeks to increase West Texas's annual revenues by $8.7 million and associates the increase with $133 million in new capital expenditures from January 2021-December 2021.

Texas Gas Service Company ("TGS") Files Fourth Cost of Service Adjustment. TGS has filed its 2022 cost of service adjustments for its Rio Grande Valley service area. A cost of service adjustment reflects the annual changes in a gas utility's cost of service and the rate base is calculated using operating expenses, return on investment, and Federal Income Tax.

TGS has proposed an increase in rates of approximately $3 million. Due to this, residential customers who use about 11 Ccf of gas per month would see an increase of approximately $2.25 per month on their bill. This proposal should be adopted by cities no later than July 27, 2022.

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The remaining lineup and projected topics for 2022 are 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
- The Administrative Appeal Process | Gabrielle Smith
- Helping TCEQ Help You: Reflections from Former Agency Attorneys | Roslyn Dubberstein, Jessie Spears, and Nathan Vassar

To-be-released Season Three Episode

- The ABCs of CCNs | David Klein

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