Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 27, NO. 4 OCTOBER 2022

THE LONE STAR CURRENT

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

INCREASED DEPARTMENT OF LABOR AUDITS: WHAT TO EXPECT AND WAYS TO PREPARE

by Sheila B. Gladstone, Sarah T. Glaser, and Jessica A. Maynard

On February 1, 2022, the United States Department of Labor Wage and Hour Division ("DOL") announced plans to hire 100 additional investigators to support its compliance and enforcement efforts. DOL oversees the enforcement of several federal laws, including the Fair Labor Standards Act ("FLSA") and the Family and Medical Leave Act ("FMLA"). We are already seeing a significant increase in on-site DOL audits. With the increase in audits, employers should be proactive in ensuring compliance with federal law because DOL audits can lead to substantial monetary exposure for employers.

What Triggers an Audit

DOL may audit an employer randomly or following an employee complaint. Certain targeted industries are more likely to have random audits, such as food services, construction, agriculture, and healthcare. Additionally, DOL is more likely to randomly audit certain targeted areas, including Texas. Other events that may trigger an audit include union complaints, overlap of W-2 and 1099 forms for the same worker, an unemployment or workers' compensation claim filed by an independent contractor, or receipt of an IRS SS-8 Form seeking government determination of classification status from an independent contractor. DOL does not typically disclose the reason for an investigation to the employer.

What to Expect During an Audit

A DOL audit generally proceeds as follows:

1. Notice and Investigator Arrival

Although not required, in many cases, the investigator provides advance notice of an audit by calling and sending a letter indicating a date and time for the on-site appointment. The letter usually also lists documents the employer should prepare in advance. If the investigator does not give advance notice, the employer may request a period of 72 hours to comply with any investigative demand, such as document production. The employer can further require that the on-site audit be conducted at reasonable times (generally during normal work hours), in a reasonable manner, and within reasonable limits. This notice also gives the employer time to make sure that all required posters are visible in the workplace.

When an investigator arrives, the employer should verify the credentials of the DOL investigator. Employers have the right to have an attorney present during most of the audit, except during interviews of non-management employees.

2. Opening Conference

The investigator will conduct an opening conference to describe the intended scope and duration of the inspection and to request documents and information (if the request was not included in an appointment letter). During this conference, employers should introduce the investigator to the management team, describe document production and employee interview protocols, arrange a private room for the investigator to work in, and schedule daily update meetings for multiple-day investigations.

3. Document Production

The investigator will request documents (such as payroll records, time records, vendor contracts, and personnel policies) at the beginning of and during the investigation, and the employer must timely produce the documents requested. Employers should keep track of all documents produced, and make and keep duplicates of those records. Employers should avoid creating new documents during an inspection, providing more documents than requested, and leaving documents or information in plain sight.

Audit continued on page 4

IN THIS ISSUE

Lloyd Gosselink
ATTORNEYS AT LAW

THE LONE STAR CURRENT

Published by
Lloyd Gosselink
Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
512.322.5800 p
512.472.0532 f
lglawfirm.com

Sara R. Thornton
Managing Editor
sthornton@lglawfirm.com

Jeanne A. Rials
Project Editor

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.

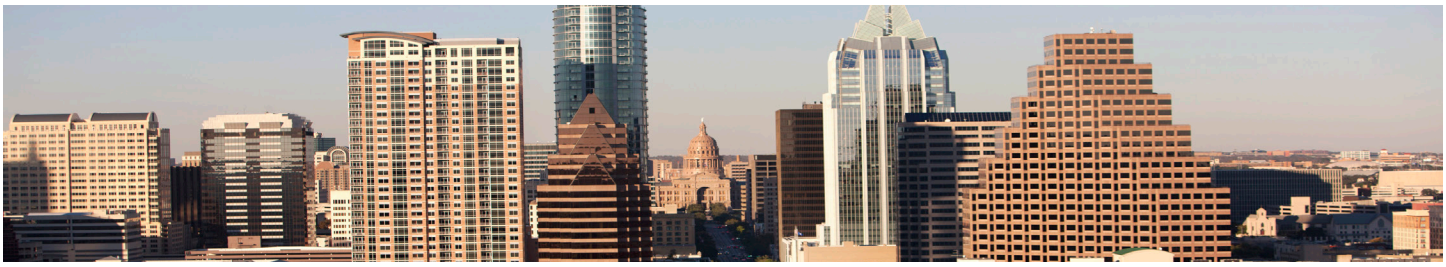
To receive an electronic version of The Lone Star Current *via e-mail, please contact Jeanne Rials at 512.322.5833 or jrials@lglawfirm.com. You can also access* The Lone Star Current *on the Firm's website at www.lglawfirm.com.*

FIRM NEWS

Mattie Isturiz has joined the Firm's Air and Waste Practice Group as an Associate. Mattie's practice involves assisting clients with permitting, enforcement, and remediation matters. Prior to joining the Firm, Mattie was a staff attorney at the Texas Commission on Environmental Quality in the Environmental Law Division, where she represented the Executive Director in waste and water permitting matters such as contested case hearings and rulemakings. Mattie received her doctor of jurisprudence from Texas A&M University School of Law and her bachelor's from Texas A&M University.

Ashley Rich has joined the Firm's Water Practice Group as an Associate. Ashley's practice involves working with environmental matters at the federal, state, and local levels. Ashley assists clients with water quality matters, water resources development, regulatory compliance, permitting, enforcement, and litigation. During law school, Ashley further developed her interest in administrative law by interning with the Texas Attorney General's Office, the United States Attorney's Office for the Northern District of Texas, and other government agencies. Prior to joining the Firm, Ashley was a staff attorney at the Texas Commission on Environmental Quality in the Environmental Law Division. Ashley received her doctor of jurisprudence from Southern Methodist University Dedman School of Law and her bachelor's from the University of Alabama.

Lora Naismith has joined the Firm's Water Practice Group as an Associate. Lora's practice involves working with environmental matters at the federal, state, and local levels. Lora assists clients with water quality matters, water resources development, regulatory compliance, permitting, enforcement, and litigation. During law school, Lora further developed her interest in environmental law by interning with the Environmental Protection Agency, participating in the Natural Resources Clinic at her law school, and publishing three articles on environmental law issues. Prior to joining the Firm, Lora was a staff attorney at the Texas Commission on Environmental Quality in the Litigation Division. Lora received her doctor of jurisprudence from Texas A&M University School of Law and her bachelor's from Texas A&M University.



Anonymous voted ballots are public information and available for inspection; however, personally identifiable information contained in election records remains confidential. Tex. Att'y Gen. Op. No. KP-411 (2022).

State Senator Kelly Hancock and State Representative Matt Krause submitted a request to the Office of the Attorney General asking whether a legislator or a member of the public could inspect or obtain copies of anonymous voted ballots. Anonymous voted ballots is defined as voted ballots that have been redacted to withhold any information that could be used to reveal the identity of the voter.

The Attorney General examined applicable sections of the Texas Constitution and Texas Election Code in its analysis of the question presented. The Attorney General first acknowledged that anonymous voted ballots are election records under the Election Code, and the Legislature has established procedures aimed at both preserving those records and granting public access to them.[1] Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period following an election.

The Attorney General also confirmed that personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections remains confidential and is excepted from public disclosure. Such confidential information included on an anonymous voted ballot must be redacted prior to disclosure in order to protect the constitutional right to a secret ballot.

[1]The Attorney General noted the following: "[u]nder Section 66.058 of the Texas Election Code, anonymous ballots must be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period."

The Attorney General declines to predict with certainty whether a court would conclude that the Legislature equates the term "salary" with "compensation" under Article XVI, subsection 40(b) of the Texas Constitution. Tex. Att'y Gen. Op. No. KP-0414 (2022).

The Honorable Dee Hobbs, Williamson County Attorney, submitted a request for an Attorney General Opinion regarding whether "salary" for purposes of Article XI, subsection 40(b) of the Texas Constitution differed from "compensation" in the City of Hutto's Charter (Section 3.04). The request for an opinion also asked whether the Hutto City Council could construe by ordinance the compensation amount in its charter to be the actual minimum necessary amount for the performance of the duties of public office related to regular council meeting attendance.

Article XVI, subsection 40(b) expressly permits a state employee or an individual who receives compensation from the state to serve as a member of the governing body of a city but prohibits the person from receiving a salary for the latter unless the person receives compensation from the state for work performed in certain capacities. The Attorney General noted that due to the multiple possible meanings of these two terms, the Attorney General could not predict with certainty whether a court would conclude the Legislature equates the term "salary" with "compensation" in subsection 40(b).

Ultimately, the question as to whether the per meeting payment provided under section 3.04 of the Hutto City Charter may be construed to constitute the reimbursement of expenses rather than "salary" for purposes of subsection 40(b) was left to the discretion of appropriate City officials, subject to judicial review. For municipalities or other governmental bodies facing similar issues, the Attorney General provided a helpful framework for statutory interpretation based on the "guiding principle" that interpretation should "give effect to the intent of the voters who adopted it."

The Texas Water Code does not authorize a representative of a limited liability company to vote in an election for a water control and improvement district. Tex. Att'y Gen. Op. No. KP-0415 (2022).

In Maverick County, Texas, a limited liability company owns irrigable farmland and ranchland within the boundaries of Maverick County Water Control & Improvement District No. 1 (the "District") and receives water services from the District. A representative of said company attempted to register to vote in the District's elections. The Honorable Jaime A. Iracheta, a Maverick County Attorney, submitted a request for an Attorney General Opinion regarding whether a representative of a limited liability company was eligible to vote in an election conducted by the District in which property owned by the company was located.

The Attorney General first discussed the requirements under Section 51.221 of the Texas Water Code that authorizes a person who meets certain qualifications to vote in an election conducted by the District. After discussing the statutory language, which referenced a "person" or "individual" as someone eligible to vote in a district election, the Attorney General concluded that a court would likely interpret Section 51.221 as not authorizing the representative of a limited liability company to vote on behalf of the company in an election conducted by that District.

Finally, the Attorney General stated that to vote in such an election for a water control and improvement district under Chapter 51 of the Texas Water Code, a person must meet the eligibility requirements of Section 51.221 in the person's individual capacity. This Opinion is a helpful clarification for political subdivisions and other governmental entities located in areas of increased development and population growth, where real property is commonly owned by private entities.

"Municipal Corner" *is prepared by Kathryn Thiel. Kathryn is an Associate in the Firm's Districts and Water Practice Groups. 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.*

Audit continued from page 1

Employers should also take caution and consult with their counsel before volunteering information to the investigator.

4. On-Site Inspection

During the on-site audit, the investigator may walk around the worksite to observe employee duties and look for wage and hour violations. The investigator may also check for safety concerns and confirm the employer has required workplace posters hung correctly. The employer should ensure that a management employee escorts the investigator at all times, and is cordial and professional while ensuring that disruptions to normal business operations are limited.

5. Employee Interviews

The investigator will likely interview employees to gather information related to misclassification or overtime concerns. Hourly employees have a right to a private interview with the investigator, but the employee may request representation at their own discretion. Management employees do not have a right to a private interview because their statements can be attributed to the employer, and legal counsel or high-level management should attend and take notes. Employees who speak with the investigator are protected from retaliation.

6. Additional Investigation

In between the on-site audit and the closing conference, investigators will review documents and interview notes, and may request follow-up documentation and/or employee interviews. The review process can take several months, or longer.

7. Closing Conference

At the closing conference, the investigator will communicate their findings, explain the employer's post-audit rights, and identify any actions necessary for compliance with federal laws and regulations. This may include a finding that back wages are owed or that the employer must make other changes, such as reclassifying certain employees or updating policies or posters.
During the conference, employers should listen and take detailed notes on the discussion. Employers should avoid agreeing with any observations of violations, conceding admissions, or making promises. Once the investigator concludes, the employer should request clarification (if needed), time to provide supplemental information, and a follow-up conference at a later date.

8. Negotiation/Settlement Conference(s)

After the employer has evaluated its options and provided supplemental information, if appropriate, the employer can engage DOL in informal negotiation and settlement of the alleged violations and penalties. The employer also has the option to appeal the investigator's findings within DOL, negotiate a formal settlement with DOL's counsel or proceed to trial in court.

Ways to Prepare for DOL Audits

Employers can take proactive steps to audit their processes to identify red flags or concerns. The following are important steps employers should consider.

- Conduct regular internal audits.
  - Review job descriptions, FLSA classifications (exempt/non-exempt), independent contractor statuses, and time sheet and payroll records.
    - Ensure proper calculations of hours worked, overtime, and off-the-clock work.
    - Ensure accurate timekeeping methods and records, including for remote workers.
    - Review contractor and vendor agreements to ensure proper classification.
  - Review FMLA practices and forms.
  - Ensure workplace posters are complete, up-to-date, and in the right place.
  - Review and resolve inconsistencies in records and address areas of concern.
- Review handbooks regularly for completeness and legal compliance. Every two years is a good general practice. In particular, DOL will audit FMLA and wage and hour policies.
- Train staff on the basics of FMLA, overtime and timekeeping records.
- Train managers on key wage and hour and FMLA concepts, and familiarize them with DOL's investigation/audit rights.

- Establish a DOL investigation response team and audit protocols.
- Prepare employees for DOL interviews by explaining what to expect, and encouraging truthfulness.

If you have questions about FMLA and wage and hour policies and compliance with federal law, if you wish to conduct an internal audit, or if you are audited by the Department of Labor, contact Lloyd Gosselink's Employment Law Practice Group.

This article was prepared by Lloyd Gosselink's Employment Law Practice Group: Sheila Gladstone, Sarah Glaser, and Jessica Maynard. If you would like more information, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com, Sarah at 512.322.5881 or sglaser@lglawfirm.com, or Jessica at 512.322.5807 or jmaynard@lglawfirm.com.

LEAD AND COPPER RULE REVISIONS: PREPARING FOR MAJOR DEADLINES AHEAD

by Jessie M. Spears

The United States Environmental Protection Agency's ("EPA's") recent Lead and Copper Rule Revisions ("LCRR") have raised many implementation questions for drinking water utilities facing the first major change in the federal regulation since 1991. Under LCRR, Public Water Systems ("PWSs") must submit an initial inventory of all lead service lines to the Texas Commission on Environmental Quality ("TCEQ") by October 16, 2024. The inventory must include both system- and customer-owned service lines and categorize each line as "lead," "galvanized requiring replacement," "lead status unknown," or "non-lead." Understanding that two years will pass quickly, PWSs are assessing how to meet the requirement well in advance of the deadline. Lloyd Gosselink has received questions on compliance strategies in recent months, including questions in light of EPA inventory guidelines published in late summer 2022.

What counts as lead vs. non-lead classifications is critically important in order to carve out assets that do not qualify for the inventory. LCRR defines a lead service line as "a portion of pipe that is made of lead, which connects the water main to the building inlet." A "non-lead" classification must be supported by evidence-based records, methods, or techniques. PWSs must include service line location identifiers, such as street name or intersection, if a service line is categorized as "lead" or "galvanized requiring replacement." In addition to the inventory, all PWSs must submit a list to TCEQ detailing each elementary school and childcare facility the PWS serves and notify such schools and facilities of health risks from lead exposure and a proposed schedule for lead testing.

In order to avoid unnecessary unearthing of lines to create an inventory, EPA allows the use of various desktop information sources to determine the service line's composition, and such review includes PWSs' review of historical records to create the initial inventory. Historical records include previous materials evaluation, construction and plumbing codes/records, water system records, distribution system inspection and records, information obtained through normal operations, and state-specified information to identify the material. Desktop review also includes data collection as encountered in the course of normal operations, such as water meter reading, water meter repair or replacement, service line repair or replacement, water main repair or replacement, backflow prevention inspections, and other street repair or capital projects with open cut excavations.

If the service line material is still unknown after PWSs have gathered information and verified historical records, EPA suggests various investigation methods. PWSs can visually inspect service line materials (e.g., closed-circuit television inspection) and could request public assistance on the customer side of the line (e.g., reporting visual inspection of exposed materials in basements). PWSs can use water quality sampling by flushing out the volume of water in the premise plumbing and collecting a sample from the service line. PWSs can excavate or dig a test pit to expose the line to determine the type of material used. PWSs can use predictive modeling such as geostatistical models that use attributes from known locations to make inferences about areas of unknown conditions.

Once a PWS submits its inventory, TCEQ will release the data to the public and require large PWSs to publicly list their inventory online. The PWS must notify all persons served by "lead," "galvanized requiring replacement," and "lead status unknown" service lines within 30 days and notify those customers on an annual, ongoing basis until the entire service connection is considered to be "non-lead" as a result of replacement.

Identification of materials status is half the battle, as a replacement plan is also required under LCRR. PWSs with one or more "lead," "galvanized requiring replacement," or "lead status unknown" service lines must also submit a lead service line replacement plan to TCEQ by October 16, 2024. The lead service line replacement plan should describe the PWS strategy for replacing at least three percent of the system's lead service lines annually, including "lead," "galvanized requiring replacement," and "lead status unknown" service lines.

These updates will follow with additional rule changes EPA forecasted late last year. Such additional changes to LCRR are anticipated by the end of 2023, but details are mostly unknown at this point, although the agency has signaled some areas of interest. EPA announced that several of the compliance deadlines in LCRR may be altered; however, it is unlikely that the compliance deadline for submitting the lead service line inventory or replacement plan will be revised. EPA announced potential revisions to LCRR, which include: (1) requiring PWS to remove lead service lines at a faster pace than the three percent required by LCRR; (2) lowering LCRR's action and trigger levels

to induce more systems to take corrective action; (3) revising the procedures for tap sampling in an effort to increase the likelihood that lead service lines will show concentrations exceeding the action level; and (4) prioritizing replacement of lead service lines in historically disadvantaged communities.

Jessie Spears is an Associate in the Firm's Water Practice Group. As detailed above, the impacts from LCRR are far-reaching for water systems across Texas. If you have any questions regarding this article, LCRR, or other matters, please contact Jessie at 512.322.5815 or jspears@lglawfirm.com.

SCOTX TO DECIDE ERCOT'S SOVEREIGN-IMMUNITY CLAIM

by James F. Parker

On September 2, the Texas Supreme Court granted the petitions for review in two cases addressing Electric Reliability Council of Texas ("ERCOT") and its operation of the electric grid in Texas: *CPS Energy v. ERCOT*, No. 22-0056 (on appeal from the 4th Court of Appeals, 648 S.W.3d 520) and *ERCOT v. Panda Power Generation Infrastructure Fund, LLC*, No. 22-0196 (on appeal from the 5th Court of Appeals, 641 S.W.3d 893).

CPS Energy arises from the 2021 Winter Storm and the default of a number of market participants. The default of some market participants meant that there was not enough money paid to ERCOT for electricity trades during the 2021 Winter Storm for ERCOT to pay all of the generators for the electricity generated during that time.

In such an event, ERCOT's Nodal Protocols—the rules that govern the electric market that ERCOT oversees—provide that the shortfall is "uplifted" to all entities that serve electric "load." That is to say that the non-defaulting load serving entities are required to pay the shortfall caused by the default of other load serving entities.

Among the load serving entities is CPS Energy, which is the municipally-owned utility of the City of San Antonio. CPS Energy filed suit against ERCOT, alleging various causes of action arising from its actions during the 2021 Winter Storm. CPS Energy also alleged that ERCOT's uplift scheme is unconstitutional as applied to municipally-owned utilities, as it would require the City of San Antonio to unconstitutionally lend its credit to cover private debts.

The district court denied ERCOT's plea to the jurisdiction, which was based on its claim of governmental immunity and, alternatively, Public Utility Commission ("PUC") exclusive jurisdiction. ERCOT filed an interlocutory appeal under Section 51.014(a)(8) of the Civil Practice & Remedies Code, arguing that it is a "governmental unit" that is entitled under that provision to take an interlocutory appeal as a matter of right.

As an initial matter, the San Antonio Court of Appeals agreed that ERCOT is a governmental unit, and thus entitled to an interlocutory appeal. On considering that appeal, the Court of Appeals concluded that PUC has exclusive jurisdiction over CPS Energy's common-law and constitutional claims against ERCOT.

Panda Power arises from a different set of circumstances, but involves many of the same issues. Panda Power sued ERCOT for a variety of claims, alleging that ERCOT's electricity capacity, demand, and reserves reports, which initially projected a likelihood of severe energy shortfalls but were revised to predict excess of generation capacity, misled the power company to invest $2.2 billion in building new power plants. The Dallas Court of Appeals (sitting *en banc*) reached the opposite conclusion from that reached in San Antonio, deciding that PUC did not have exclusive jurisdiction over Panda Power's claims. In addition, the Court of Appeals concluded that ERCOT was not a governmental entity with immunity, and so it can be sued in court for damages.

With numerous cases arising from the Winter Storm still pending, this case will be watched across the state. And beyond the Winter Storm litigation, this case may have a broad effect on the Texas electric market that may ultimately require legislative action.

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 litigation matters, please contact James at 512.322.5878 or jparker@lglawfirm.com.

ASK SHEILA

Dear Readers,

This column will be a little different. Rather than respond to a question, I'll be discussing transitions, and in particular, retirement. First, an announcement. I will be retiring on December 31 of this year, after 35 years practicing employment law. My partner, Sarah Glaser, will be assuming leadership of Lloyd Gosselink's Employment Law Practice Group. Sarah is an experienced employment attorney with whom many of you have had the pleasure of working. I am thrilled to be leaving my practice and clients in such competent hands.

And speaking of retirement, let's talk about your employees who are (or may be) nearing the end of their careers. They may already be eligible for retirement under your plan or eligible for Social Security or Medicare. They may be in a job that is taking a toll on their bodies physically, or are ready to leave the time commitments and stress of a management job. Regardless of their reasons or age, be aware that the decision to retire is theirs, and theirs alone. With rare exceptions, mandatory retirement is illegal age discrimination, and pushing employees toward retirement can subject employers to serious legal liability.

Under the law, an employee cannot be "too old" for a job. That doesn't mean that you can't manage performance based on physical or mental limitations that might be related to age, but age itself should never be the reason to address an employee's departure. A 30-year-old with physical concerns should be treated the same as a 75-year-old with physical concerns. Numerous cases under the federal Age Discrimination in Employment Act ("ADEA") or the similar provision under Texas law (protecting applicants and employees over 40) show that suggestions of retirement or discussions among decision-makers about the aging workforce are used as compelling evidence against employers to show that decisions were motivated by age.

Comments to employees like, "wouldn't you rather be fishing with your grandkids?" and "you are eligible for retirement, why don't you take it?" rather than addressing the performance concerns, make employers vulnerable to age discrimination claims. In one case, evidence that an executive said in a meeting, "sometimes you have to cut down the old trees to let the new ones grow" was devastating to the employer in an age discrimination case stemming from a reduction in force. Even birthday cards signed by decision-makers that reference getting older become "Exhibit A" in age claims. Supervisors have told me that they didn't feel comfortable addressing

serious performance concerns with an older employee because they were taught to be respectful to their elders – but giving a positive performance review and then commenting on retirement before a reduction in force will buy you liability. And supervisors must understand (and be trained) that it is not respectful to hide performance concerns from employees and then terminate them.

The Americans with Disabilities Act also comes into play here, as we often see cases that charge both age and disability discrimination. Avoid these claims by focusing on the employee's actual ability to perform essential job functions, and whether limitations can be reasonably accommodated, rather than the employee's age or overall health. Be sure to engage the employee in discussions about potential accommodation, called the "interactive process" in the ADA regulations.

Watch out for stereotypes about what older or disabled people should be able to do, and instead address the particular employee's abilities. This holds true, not only for your current employees, but also for applicants. Have all candidates show you they can do the job in the hiring process, not just those who are older or appear to have an impairment. And if an older employee is rude to coworkers or customers, address that behavior without calling it "crotchety." Don't be overheard saying "you can't teach an old dog new tricks."

There is a way to encourage retirement without violating the law, but it has some technical landmines and requires close adherence to the law. You can offer an incentive to certain employees to take an early retirement package and sign a release and waiver agreement, so long as you follow the portion of the ADEA called the Older Workers Benefit Protection Act. To be compliant, employers must offer the severance package to all employees in a designated work unit who are eligible under the employer's formula (such as age plus years of service). The waiver agreement must be written without legalese, provide for a 45-day consideration period and a seven-day revocation period, advise lawyer consultation, and provide age and job statistics on who received the offer. And it must be truly voluntary, with no direct or indirect pressure to accept. Not to self-promote, but you do need a lawyer to guide you on this.

With that, I say farewell! Contact us (meaning Sarah and her team) if you need help with employment law compliance, training, investigations or defense.

"Ask Sheila" *was prepared by Sheila Gladstone, Chair of the Firm's Employment Law Practice Group through the end of 2022. If you would like additional information or have questions related to this article or other employment matters, please contact Sarah Glaser at 512.322.5881 or sglaser@lglawfirm.com.*

IN THE COURTS

Water Cases

Weatherford Int'l, LLC v. City of Midland, No. 11-20-00255-CV, 2022 WL 3904001 (Tex. App.—Eastland Aug. 31, 2022, no pet. h.).

This case focuses on whether a company was able to show that the waiver of governmental immunity contained in the Solid Waste Disposal Act ("SWDA") applied to a city. Weatherford International, LLC and Weatherford U.S., L.P. ("Weatherford") purchased a property and discovered that a water well located on the property contained contaminants. Weatherford was unable, however, to determine the source of the contamination. The Texas Commission on Environmental Quality ("TCEQ") determined that Weatherford was the party responsible for the contamination and required Weatherford to engage in monitoring and remediation.

Eventually, Weatherford came to believe that the source of the contamination was a leaking sewer system running adjacent to the property. The City of Midland (the "City") owned and operated the sewer system. Weatherford sued the City, claiming that the City was partially responsible under SWDA for the cleanup costs. The City filed a plea to the jurisdiction arguing that Weatherford's factual allegations did not give rise to any liability under SWDA and that governmental immunity barred Weatherford's claims—the trial court agreed and granted the City's plea. On appeal, the appellate court concluded that SWDA does waive governmental immunity in certain circumstances, but that Weatherford only raised the issue of how the City handled sewage, not solid waste. Critically, Weatherford failed to raise any issue relating to solid waste. In affirming the trial court's decision, the appellate court stated, "we agree with the City that neither its actions nor the allegations in Weatherford's pleadings subject the City to the provisions of SWDA upon which Weatherford relies. Therefore, Weatherford failed to establish a waiver of the City's immunity under the [SWDA]."

Gatehouse Water LLC v. Lost Pines Groundwater Conservation Dist., No. A-22-CV-00131-LY, 2022 WL 3362287 (W.D. Tex. Aug. 15, 2022).

This report and recommendation to Judge Lee Yeakel of the United States District Court of the Western District of Texas by Magistrate Judge Dustin Howell focused on Defendant Lost Pines Groundwater Conservation District's ("LPGCD's") motion to dismiss Plaintiff Gatehouse Water LLC's ("Gatehouse's") complaint for lack of subject matter jurisdiction and for failure to state a claim.

Gatehouse acquired certain wells, groundwater leases, and groundwater permits from its predecessor-in-interest, Forestar. The groundwater permits that Gatehouse acquired from Forestar, under their express terms, required Gatehouse to have a binding contract or contracts to provide at least 12,000 acre-feet of water per year. Gatehouse presented a contract with a third party to LPGCD in an attempt to fulfill this requirement, but LPGCD determined that the contract did not comply with the requirement. This determination effectively halted Gatehouse's ability to use its permits. Gatehouse responded by filing a lawsuit and asserting eight causes of action against LPGCD, including takings claims, an equal protection claim, a procedural due process claim, a substantive due process claim, and *ultra vires* claims. LPGCD moved to dismiss the claims alleging, among other things, that it was protected by legislative immunity, quasi-judicial immunity, and qualified immunity.

This report and recommendation addressed why each of LPGCD's arguments regarding immunity should fail at this stage of the proceeding and addressed the validity of LPGCD's other arguments as to why Gatehouse's claims should each be dismissed for their individual flaws. The recommendation suggested granting LPGCD's motion to dismiss in part and denying it in part. Judge Yeakel has not yet issued a decision on the matter.

Litigation Cases

Texas Supreme Court places substance over form in measuring sufficiency of notice under Texas Tort Claims Act and city charters.

In *Leonarda Leach v. City of Tyler,* the Supreme Court held that a Plaintiff who substantively satisfies the notice requirements of the Texas Tort Claims Act and a city charter will not be denied jurisdiction due to a failure to properly fill out a city's notice form. No. 21-0606, --- S.W.3d ---, ---, 2022 WL 42830382 (Tex. Sept. 16, 2022) (*per curiam*). In providing its reasoning for holding that notice was provided under the city charter despite the failures of the notice form, the Court stated that "[t]he charter is the law; the form merely facilitates its implementation." *Id*. at *3.

According to the allegations, Plaintiff, Leonardo Leach, was driving a truck for his employer, Ameri-Tex Services, when an improperly secured piece of lumber fell off of a truck owned by the City of Tyler. The lumber hit Leach and the company vehicle—both suffered injury. When Leach brought his claim, the City asserted in summary judgment that Leach had failed to provide the City with proper notice of his claim under the Texas Tort Claims Act and the City of Tyler's charter.

Under Texas law, a governmental entity must "receive notice of a claim against it" within six months of the alleged injury. Tex. Civ. Prac. & Rem. Code § 101.101(a). Separate notice requirements under city ordinances and charters that have been ratified and approved by Congress must also be satisfied. *Id*. § 101.101(b). The City of Tyler's charter requires notice of tort claims within thirty days. *See* Tyler, Tex., Charter, art. IX § 79 (1990). Thus, a party attempting to file a tort claim against the City of Tyler must satisfy both. The City of Tyler had promulgated a "Claims Notice" form that claimants could submit to comply with the City Charter's requirement.

Ameri-Tex completed and filed the City's "Claims Notice" form seven days after the incident, attempting to do so on behalf of both Ameri-Tex and Leach. Ameri-Tex made an error in the form, failing to list Leach as an additional claimant under the form's space "Name of Claimant." However, the rest of the document described Leach, provided his contact information, and detailed the injury Leach incurred as a result of the City's failure to secure its lumber. Additionally, under the witness section of the form, Leach was not listed but others were.

The dispute before the Texas Supreme Court was whether this notice was sufficient to satisfy the notice requirements under both Section 101.101(a) and the City Charter. The trial court and the court of appeals held that this form failed to provide the City with timely notice of Leach's claim because it failed to list Leach under the "Name of Claimant" section. The trial court agreed with the City, and found it had no jurisdiction to hear Leach's claim. The Supreme Court reversed and determined notice was sufficient under both Section 101.101(a) and the City Charter.

The Court held that Section 101.101(a) was satisfied because the substance of the notice form, when read as a whole, satisfied the statute's notice requirements. Section 101.101(a) requires that a notice be provided within six months of the incident and "reasonably describe: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." Tex. Civ. Prac. & Rem. Code § 101.101(a). The Court pointed out that Ameri-Tex's filing described Leach's injury, provided the time and place of the injury and the manner in which it occurred. Thus, the substance of the form satisfied the statute's requirement for notice of Leach's claim.

The Court additionally held that, even if the content of the notice was unsatisfactory, it would not matter because Leach filed his lawsuit four months after the incident. *See Colquitt v. Brazoria County*, 324 S.W.3d 539, 541 (Tex. 2010) (addressing Section 101.101(a)'s notice requirement and holding that "a lawsuit itself, served on the governmental unit within six months of the incident and containing all the requisite information, constitutes proper notice under the [Texas Tort Claims] Act").

Under the notice requirement of the City Charter, the Court also held that the form submitted was satisfactory. The City Charter expressly anticipated a third party providing notice and was similarly satisfied by account of Leach's injuries: when and where the incident occurred, how it occurred, and the precise nature of Leach's injuries.

The City argued that this notice was unsatisfactory in light of the fact that Leach was not a named claimant. However, the Court pointed out that Leach's name was repeatedly on the notice, his injury and how it came about were clearly identified and made a focus of the description, his contact information was provided, and he was not listed under the form's space for identifying witnesses. For the Court, the substance of the form showed a clear intent to convey notice of Leach's injury and included the requisite elements required by both the statute and City Charter.

The City further argued that by holding against the City, the Court's decision would run counter to the public policy of the statute and charter which was to provide sufficient investigative information for the City. The Court responded that the City did, in fact, have sufficient information to investigate based on the notice provided. Moreover, the Court pointed out that injured citizens are bound by enacted text, not underlying legislative motivations.

Leach's notice having substantively complied with the plain language of the statute and City Charter, the Court held for Leach and remanded the case to the trial court for further proceedings.

Fourth Circuit Holds Gender Dysphoria is Covered by ADA.

The United States Court of Appeals for the Fourth Circuit recently held that gender dysphoria qualifies as a "disability" under the Americans with Disabilities Act ("ADA"). In *Williams v. Kincaid*, plaintiff Kesha Williams, a transgender woman with gender dysphoria, spent six months incarcerated in a detention center. Initially assigned to women's housing, Williams was transferred to men's housing upon learning that she was transgender and had male genitals. No. 21-2030, 2022 WL 3364824 (4th Cir. Aug. 16, 2022). Williams allegedly experienced delays in medical treatment for her dysphoria (including hormonal treatment) and also claimed to have been harassed by prison staff on the basis of her sexual identity. Williams subsequently filed a lawsuit seeking relief under ADA; however, the trial court dismissed Williams's claim, reasoning that ADA specifically excludes from the definition of "disability" "gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b).

On appeal, the Fourth Circuit reversed, holding that "gender dysphoria" is separate and materially distinct from "gender identity disorder," and that the

distress suffered from gender dysphoria qualifies for protections under ADA. At the time of the enactment of Section 12211(b), the term "gender identity disorder" referred only to the condition of perceiving one's identity to be distinct for that person's sex assigned at birth. The Court reasoned that, unlike gender identity disorder, gender dysphoria "concerns itself with the *distress* and other disabling symptoms, rather than simply being transgender." *Kincaid*, 2022 WL 3364824 at *11-12. The distinction between the state of being transgender and the distress that arises from that state meant that gender dysphoria was not specifically excluded by ADA. While being transgender is not covered by ADA, the court held that gender dysphoria falls under ADA's definition of disability, which includes any "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).

The Court further held that the plaintiff's gender dysphoria resulted from physical impairments because she took hormone therapy for fifteen years to manage and alleviate the condition, and she experienced physical distress without the therapy. Therefore, gender dysphoria "result[ed] from physical impairments," and the condition was not excluded from the definition of disability under ADA.

The Court lastly stated that both gender dysphoria and "gender identity disorder" are very closely connected to transgender identity. The Court opined that a law excluding from ADA protection both "gender identity disorders" and gender dysphoria would discriminate against transgender people as a class, and would likely implicate the Equal Protection Clause of the Fourteenth Amendment.

Utility Cases

Texas Cities Sue Streaming Giants for Franchise Fees.

On August 4, 2022, 25 cities including Austin, Houston, and Dallas sued Netflix, Hulu, and Disney+ for the streaming services' failure to pay municipal franchise fees. Pursuant to the Texas Public Utility Regulatory Act of 2005, if a video service provider delivers programming over wireline facilities located within a municipality's right of way, the service provider must pay the municipality a 5% franchise fee. However, according to the cities, the streaming services have failed to pay these franchise fees dating back to 2007. As such, the cities sued the streaming services seeking reimbursement of franchise fees plus interest.

Traditionally, municipalities rely on fees related to a cable provider's use of physical communication lines over a municipality's right of way. Thus, as telecommunication providers transition from traditional landline to wireless services, municipalities have incurred significant revenue losses. Accordingly, cities around the country have brought similar lawsuits against the streaming giants alleging that, although the streaming services are not traditional cable providers, the providers still use the public right of way and, therefore, are subject to franchise fees. The litigation is ongoing, and we will report more as it proceeds.

In re Brazos Elec. Power Cooperative, Inc., No. 21-30725 (Bankr. S.D. Tex. 2021).

On September 13, 2022, Brazos Electric Power Cooperative ("Brazos") and the Electric Reliability Council of Texas ("ERCOT") reached an agreement regarding Winter Storm Uri related energy costs. During Winter Storm Uri, Brazos incurred $2.1 billion in energy fees after ERCOT capped electricity prices at $9,000 per megawatt hour. Due to these extraordinary charges, Brazos filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of Texas on March 1, 2021. Subsequently, pursuant to its internal procedures, ERCOT recovered Brazos's debt from other market participants.

In its bankruptcy case, Brazos alleged that ERCOT violated the terms of their market participant contract by charging Brazos $9,000 per megawatt hour. As such, according to Brazos, it owed ERCOT $770 million rather than $2.1 billion. ERCOT asserted that, because it was following the Public Utility Commission of Texas's emergency order to implement scarcity prices, it did not violate Brazos's market participant contract. However, Brazos and ERCOT reached a settlement agreement whereby Brazos would pay ERCOT roughly $1.4 billion for the energy consumed during Winter Storm Uri. Pursuant to federal bankruptcy laws, the agreement is now subject to Brazos's creditors' approval.

If Brazos's creditors approve the settlement, ERCOT would reimburse market participants a substantial portion of their initial payments, although the amount is currently unclear. It is apparent, however, that market participants will remain responsible for Brazos's default amount of roughly $700 million.

"In the Courts" *is prepared by James Muela in the Firm's Water Practice Group; Wyatt Conoly in the Firm's Litigation Practice Group; Mattie Isturiz in the Firm's Air and Waste Practice Group; and Samantha Miller and Rick Arnett in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact James at 512.322.5866 or jmuela@lglawfirm.com, or Wyatt at 512.322.5805 or wconoly@lglawfirm.com, or Mattie at 512.322.5804 or misturiz@lglawfirm.com, or Samantha at 512.322.5808 or smiller@lglawfirm.com, or Rick at 512.322.5855 or rarnett@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA's Proposed Clean Water Act ("CWA") Section 401 Water Quality Certification Improvement Rule. On June 9, 2022, EPA published a proposed rule to the CWA Section 401 certification process. The proposed rule would roll back Trump-era changes aimed at narrowing certification decisions but preserve procedural elements of the Trump-era rule ("2020 Rule"). The proposed rule requires each state certification's final action to result in waiver of the process, approval, outright rejection, or approval with conditions. Further, state officials would be given broader authority to impose conditions on a project and EPA would lose its ability to deem certification waived if a state's action is deficient. The proposed rule would also allow states to consider the "activity as a whole" presented by a proposed project, in relation to water quality, thus reversing the 2020 Rule's approach of considering only the project's immediate water pollution releases. EPA also proposes to expand certification review to include state waters beyond those that are navigable. The proposed rule would also establish new standards to determine "a reasonable amount of time" for certification, with a default reasonableness period of 60 days and a maximum limit of one year. Additionally, the new rule would allow states to decide when a Section 401 application is complete by establishing state-specific criteria and would require that a permittee have a draft federal permit before the review period officially begins.

EPA Reorganizes Office of Ground Water and Drinking Water. EPA recently reorganized its Office of Ground Water and Drinking Water to create a new division and to rename two existing divisions to better align with its work on drinking water capacity and infrastructure and cybersecurity. The new Drinking Water Capacity and Compliance Assistance Division will focus on water system compliance with existing and new drinking water rules regarding per- and polyfluoroalkyl substances ("PFAS") and other contaminants. EPA has yet to name a director for this division, but Ron Bergman will serve as deputy director. The Drinking Water Protection Division has been renamed the Drinking Water Infrastructure Development Division and will continue to be led by Anita Thompkins. The Water Security Division has been renamed the Water Infrastructure and Cyber Resilience Division and will continue to be led by David Travers. Lastly, the Standards and Risk Management Division, led by Eric Burneson, remains unchanged. This reorganization comes as EPA begins to distribute funds from the 2021 Bipartisan Infrastructure Law ("BIL") through the Drinking Water State Revolving Fund ("DWSRF") and Small and Disadvantaged Emerging Contaminant Grants, which requires an increase in agency staff in order to more efficiently distribute money to state funds.

EPA Launches BIL Pilot Programs. EPA has started a series of pilot programs to distribute water funding from the BIL. The first program is a partnership with the U.S. Department of Agriculture and several states to target communities with insufficient wastewater infrastructure. EPA plans to launch two other programs this year. The second program, called the H2O Community Solutions Pilot Program, will identify 30 communities with technical assistance needs and provide technical assistance to apply for EPA water infrastructure funding. The third program will partner with four states with lead service line replacement programs to prepare their lead service line inventory and build up their replacement program though workforce development.

EPA Publishes Lead Service Line ("LSL") Inventory Guidance. On August 4, 2022, EPA released its new "Guidance for Developing and Maintaining a Service Line Inventory." The guidance (1) provides best practices for inventory development and risk communications, (2) contains case studies on developing, reviewing, and communicating about inventories, (3) includes a template for water systems, states, and Tribes to create their own inventory, and (4) highlights the importance of prioritizing inventory development in disadvantaged communities where children live and play. Public water systems are required to prepare and maintain an inventory of service line materials by October 16, 2024. The guidance is available for download here and EPA's inventory template is available for download on its Ground Water and Drinking Water, Revised Lead and Copper Rule page here. EPA hosted a webinar on August 10, 2022 to provide an overview of the guidance and information on addressing lead with the DWSRF and BIL funds. A recording of the webinar is available here.

EPA Issues Proposed Safer Communities by Chemical Accident Prevention Rule to Revise Its Risk Management Program. On August 18, 2022, the EPA Administrator signed the Safer Communities by Chemical Accident Prevention ("SCCAP") rule which proposes revisions to the Risk Management Program ("RMP") to further protect communities from chemical accidents. Among the many changes to RMP, the SCCAP Proposed Rule would emphasize that natural hazards and loss of power are among the hazards that must be addressed in hazard reviews and process hazard analyses, and will require justification in the

Risk Management Plan when recommendations are not adopted. The rule will also require a Safer Technologies and Alternative Analysis and practicability of inherently safe technologies and designs considered for certain RMP-regulated processes. SCCAP also requires employee participation in resolving hazard analyses, compliance audit, and incident investigation and findings and empowers employees to participate in safety decisions. Communities would also be notified of accidental releases, and notification data of such releases must be provided to local responders, including notification data of the 10-year frequency for emergency response field exercises unless infeasible. EPA's RMP Proposed Rule Fact Sheet is available here. The public may comment on the SCCAP Proposed Rule at www.regulations.gov (Docket ID No.: EPA-HQ-OLEM-2022-0174) until October 31, 2022. EPA also held virtual public hearings on the rule on September 26, 27, and 28, 2022.

EPA Creates Technical Cybersecurity Support Plan for Public Water Systems. EPA recently prepared a cybersecurity support plan for public water systems ("PWS"), as required by BIL. The report, entitled "Technical Cybersecurity Support Plan for Public Water Systems," identifies two categories of PWSs that have an elevated need for cybersecurity support. The first category includes smaller PWSs for which EPA plans to develop a checklist of best practices with guidance on how to implement them and associated training. The second category includes PWSs that have undergone cybersecurity risk assessment that require technical support to address vulnerabilities identified in the assessment. EPA plans to offer technical support beginning in 2023 and will deliver the cybersecurity checklist and guidance when available in 2023 on an ongoing basis.

Updates on PFAS. EPA previously issued interim lifetime health advisory levels ("HALs") for perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") set at 0.004 parts per trillion ("ppt") and 0.02 ppt, respectively—much stricter than the detection level. The agency also set HALs for perfluorobutane sulfonic acid ("PFBS") at 2,000 ppt and hexafluoropropylene oxide dimer acid and its ammonium salt ("GenX chemicals") at 10 ppt. The announcement caused concern in the water industry about the undetectable levels, but EPA has instructed PWSs to test utilizing the current detection method at 4 ppt and if PFAS is detected, discuss with the state regulator about further sampling and monitoring to protect human health. While HALs are not enforceable, EPA believes that the interim HALs are necessary to emphasize the risk of PFAS and clarify that the replacement chemical is less toxic. Additionally, EPA intends to finalize a risk assessment for PFOA and PFOS in biosolids in late 2024, which will be the basis for determining whether regulation of PFOA and PFOS in biosolids is appropriate.

New rules designate certain PFAS as CERCLA hazardous substances. In early September, EPA released a proposed rule designating perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") as hazardous substances under CERCLA. PFOA and PFOS are two of several PFAS chemicals. If finalized as proposed, CERCLA liability for cleanup costs will apply to PFOA and PFOS. The rule also includes a reporting requirement so that any person in charge of a facility or vessel must report a release of 1 pound or more of PFOA or PFOS within a 24-hour period. While some exemptions exist, there is no explicit exemption for landfills or wastewater treatment facilities. However, the proposed rule does not require testing for PFOA or PFOS at these facilities or otherwise provide any indication of whether it will be required. Comments are due October 6, 2022.

EPA pre-publication rule reclassifies Dallas-Fort Worth ("DFW") and Houston-Galveston-Brazoria ("HGB") as "severe nonattainment areas" under the 2008 ozone standard. DFW and HGB's current 2008 8-hour Ozone classification is "serious nonattainment." Their attainment deadlines passed in the summer of 2021, and EPA has provided a pre-publication rule which will reclassify both areas as "severe nonattainment" areas. Though TCEQ requested a year-long extension of the attainment date for the HGB area, and an exceptional event for DFW, EPA denied the exceptional event designation and proposes to deny the extension request in its pre-publication rule. Environmental justice ("EJ") factors were a contributing factor for denial of the exceptional event designation, which is the first time EJ factors were considered for this type of determination. With the change from serious to severe nonattainment zones, DFW and HGB areas will have a lower major source threshold for volatile organic compounds ("VOC") and nitrogen oxides ("NOX") emissions. The threshold will change from 50 tons per year to 25, and sources higher than 25 will need to obtain a federal operating permit. The change will also require an increase of emission offsets from 1.2 to 1.3. The new attainment date is expected to be no later than July 2027.

EPA conducts flyovers for emissions monitoring. In August 2022, EPA conducted helicopter flyovers of oil and gas operations in the Permian Basin utilizing infrared cameras and other technology. The flyovers were intended to help identify and enforce unauthorized emissions of methane and VOCs. After analyzing the data collected, EPA intends to send out notices of noncompliance.

EPA proposes amendments to the Clean Air Act Risk Management Program. On August 31, 2022, EPA published a proposed rule to amend 40 C.F.R. Part 68 that would restore and enhance several provisions enacted by the Obama Administration but later rescinded by the Trump Administration. The proposed rule includes explicit requirements for companies subject to the Clean Air Act Section 112(r) (the Risk Management Program or "RMP") to consider external events such as natural hazards, including those caused by climate change, as they review their safety programs, with an emphasis on impacts on environmental justice communities. The rule also proposes to reinstate requirements that owners and operators of RMP facilities provide specific chemical hazard information to the public upon request and to implement a community notification system generally. Facilities with Program 2 and 3 processes would be required to provide specific employee participation in some decision-making processes. Those facilities would also need to conduct audits using third-party auditors after certain qualifying release events, or when EPA determines that conditions exist that could lead to an accidental release, and to conduct a root cause analysis for each incident investigation and consider near

miss incidents. EPA is requesting comments on a definition of near miss. Comments are due October 31, 2022.

United States Pentagon

Pentagon to release PFAS-free replacement specifications for firefighting foam AFFF. For years firefighters in the U.S. military have been putting out fires at their airports with aqueous film-forming foam ("AFFF"), a white chemical foam that contains per-and polyfluoroalkyl ("PFAS") chemicals. Removal of PFAS from the environment has become a priority for EPA. As a result, the Pentagon will release specifications for a PFAS-free AFFF replacement in January 2023. All new foams the U.S. military buys must meet those specifications by October 2023, and the Defense Department must cease using all PFAS-based foam by October 2024. The change is expected to flow through to civilian firefighter use over time, on a state-by-state basis. However, disposal costs and potential liability may be affected by EPA's new Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" – also known as Superfund) designation. Read more about this designation in EPA Agency Highlights.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Begins Discussion on Draft Guidance on Regionalization. In September 2022, TCEQ published its draft regulatory guidance titled "Evaluating Regionalization for Potential New Wastewater Systems" on its Water Quality Advisory Work Group website. The guidance generally states that regionalization is feasible unless one of three situations apply to a proposed system: (1) there are no other wastewater systems within 3 miles of the proposed system; (2) the proposed system has requested service from neighboring systems and has been denied; or (3) the proposed system can successfully demonstrate that it has a valid basis to be granted an exception to the regionalization policy based on its cost analysis. On September 20, 2022, TCEQ hosted a stakeholder meeting to review and discuss the draft guidance. TCEQ has asked stakeholders to submit any comments on the draft guidance to Outreach@tceq.texas.gov (email titled "Draft Regionalization Guidance Document") by October 23, 2022.

Electric Reliability Council of Texas ("ERCOT")

ERCOT's New Chief Executive Takes the Reins. Starting on October 1, 2022, Pablo Vegas began work in his new position as CEO of ERCOT. Vegas has had a great deal of experience in the utility field, working with IBM, PricewaterhouseCoopers, and Anderson Consulting. More recently, Vegas has served as group president for NiSource Utilities and as president of AEP Texas. Vegas has a Bachelor of Science degree in mechanical engineering from the University of Michigan and attended the Advanced Management Program at Harvard Business School.

Brad Jones, ERCOT's interim CEO, will assist Vegas as he transitions into this new role. Brad Jones has been serving as ERCOT's interim CEO after the previous ERCOT CEO, Bill Magness, was fired following the 2021 statewide electricity outages.

Public Utility Commission of Texas ("PUC")

PUC Proposes to Amend 16 TAC § 25.101. Focusing on amendments made to the Public Utility Regulatory Act ("PURA") as revised by Senate Bill ("SB") 1281, PUC has proposed to amend 16 TAC § 25.101. These amendments include:

- Establishing a congestion cost savings test for evaluating economic transmission projects;
- Requiring PUC to consider historical load, forecasted load growth, and additional load seeking interconnection when evaluating the need for additional ERCOT transmission projects;
- Providing exemptions to the certificate of convenience and necessity ("CCN") requirements for certain transmission projects; and
- Requiring ERCOT to conduct a biennial assessment of the ERCOT power grid's reliability and resiliency in extreme weather scenarios.

Commissioner Cobos and Commissioner Glofelty both weighed in on the subject matter of the amendments in separate memorandums. Commissioner Cobos pointed out the high priority of establishing a congestion cost savings test as an economic criterion when evaluating transmission projects. Both commissioners also emphasized the importance of establishing a definition for resiliency. These memorandums were discussed at the August 25, 2022 PUC Open Meeting.

At this August Open Meeting, the most recent proposal for publication was approved and later posted on August 26, 2022 with public comments due on September 22, 2022.

Update on PUC Rulemaking Projects. PUC Staff's current rulemaking calendar for the remainder of 2022 can be found under Docket No. 52935. As of September 15, 2022, the following projects are being prioritized:

- Project No. 52405 – Review of Certain Water Customer Protection Rules
- Project No. 53820 – Review of Rates Available to Provider of Last Resort ("POLR") Service
- Project No. 53169 – Review of Transmission Rates for Exports from ERCOT
- Project No. 53401 – Electric Weather Preparedness Standards- Phase II
- Project No. 53404 – Restoration of Electric Service After a Widespread Outage
- Project No. 52796 – Review of Market Entrant Requirements

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

- Project No. 52059 – Review of Commission's Filing Requirements
- Project No. 52301 – ERCOT Governance and Related Issues
- Project No. 51888 – Critical Load Standards and Processes
- Project No. 53981 – Review of Wholesale Water and Sewer Rate Appeals

Railroad Commission ("RRC")

RRC Amends the Critical Designation of Natural Gas Infrastructure Rule. On August 30, 2022, RRC published in the *Texas Register* Proposed Amendments to 16 TAC § 3.65, relating to Critical Designation of Natural Gas Infrastructure. The rule designates certain facilities as critical during weather emergencies and authorizes additional facilities to apply to RRC for a critical designation. Based on the current criteria, RRC received 95,000 critical designation requests in the past year. The excessive number of critical facilities could render the designation superfluous and, during times of grid constraint, counterproductive. Accordingly, RRC initiated the rulemaking to limit the number of critical facilities and clarify the scope of § 3.65. Key amendments in the rulemaking include:

- Narrows the definition of an event with "potential to result in firm load shed" to provide operators more certainty as to when an energy emergency is occurring;
- Excludes from the list of critical gas suppliers (1) gas wells producing an average of 250 Mcf (or one thousand cubic feet) of natural gas per day or less and (2) oil leases producing an average of 500 Mcf of natural gas per day or less; and
- Authorizes a facility designated as critical to request an exception under limited circumstances.

The comment period on the proposed amendments closed on October 7, 2022. The Atmos Cities Steering Committee submitted comments on the rulemaking with concerns and recommendations.

RRC Adopts Weatherization Rule. On August 30, 2022, RRC adopted the "Weather Emergency Preparedness Standards" Rule, codified at 16 TAC § 3.66. In 2021, the 87th Texas Legislature passed Senate Bill 3, a sweeping response to Winter Storm Uri that, among other things, instructed RRC to impose mandatory operating procedures on gas supply facilities. The Weather Emergency Preparedness Standards Rule, which requires certain gas supply facilities to weatherize and establishes an administrative enforcement process, is a significant step towards ensuring grid reliability. Key provisions in the rule include:

- Natural gas facilities that are (1) on the electricity supply chain map created under Section 38.023 of the Texas Utilities Code and (2) designated as critical under 16 TAC § 3.65 must comply with RRC weatherization rules;
- Each facility subject to the rule is also subject to routine inspections by the RRC's Critical Infrastructure Division; and
- Non-compliant natural gas facilities are subject to penalties of up to $1 million.

RRC's Critical Infrastructure Division will begin inspections on December 1, 2022.

"Agency Highlights" *is prepared by Danielle Lam in the Firm's Water and Districts Practice Groups; Mattie Isturiz in the Firm's Air and Waste Practice Group; and Samantha Miller and Rick Arnett 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, or Mattie at 512.322.5804 or misturiz@lglawfirm.com, or Samantha at 512.322.5808 or smiller@lglawfirm.com, or Rick at 512.322.5855 or rarnett@lglawfirm.com.*

Lloyd Gosselink Rochelle & Townsend, P.C. is is about to launch its fourth season of *Listen In With Lloyd Gosselink: A Texas Law Firm*, featuring various topics/attorneys throughout the Firm's practice groups. You can listen to the previous seasons by visiting lg.buzzsprout.com or our website at lglawfirm.com. You can follow us on Twitter, LinkedIn, and Facebook to be notified when the latest episodes are released.

We are interested in the topics you want to hear. Please send your requests to editor@lglawfirm.com to let us know topics of interest to you. You can also send us an email at that same address to be added to the podcast distribution list.

The projected lineup for Season 4 is below:

- Legislative Update | Ty Embrey and Madison Huerta
- The ABCs of CCNs | David Klein
- Employment Law Stories | Sheila Gladstone
- The Associate Perspective: Working at LG | Cole Ruiz and Wyatt Conoly
- Reflections | Lambeth Townsend

Lloyd Gosselink
ATTORNEYS AT LAW

816 Congress Avenue
Suite 1900
Austin, Texas 78701