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A WRAP ON THE 88th REGULAR SESSION OF THE TEXAS LEGISLATURE BUT SPECIAL SESSIONS CONTINUE

by Madison Huerta and Ty Embrey

While the 88th Regular Session of the Texas Legislature ended when the state legislators adjourned Sine Die on May 29, the work for the state legislators appears to be far from over. The House and Senate adjourned without passing legislation related to property taxes, border security, and public education. As a result, Governor Abbott immediately called the Legislature back for the first called Special Session that started on May 30. Although Governor Abbott has decided there is still work to be done by the 88th Texas Legislature, many laws were passed during the Regular Session that will impact the daily lives of Texans and the operations of municipalities and special districts around Texas.

In this session, legislators grappled with legislation to address many of the significant issues facing Texas. As we can tell from our every-day lives, many of those issues result from an exploding population and growing economy. In addition to these overarching issues, legislation was passed to continue the operations of several state regulatory agencies that impact the every-day lives of Texans, to invest in future water supply, and to increase transparency in environmental permitting. Starting with the state budget, this article focuses on the legislation that was passed by the Texas Legislature that affects Lloyd Gosselink's clients.

I. House Bill ("HB") 1: The Biennial Budget

Among the 8,000+ bills filed during this Regular Session, the passage of the biennial state budget, which will fund the Texas government for the next two fiscal years, is among the most important. The historic $321.3 billion budget takes advantage of Texas's unprecedented budget surplus by allocating over $17 billion for property tax relief, investing $5.1 billion in border security, giving retired teachers a $3.4 billion cost-of-living adjustment, and reserving $1.4 billion for school safety measures. It also appropriates $1.5 billion to a new Texas Broadband Infrastructure Fund, $1 billion to a new Texas Water Fund, $625 million to the Flood Infrastructure Fund, and $125 million to the Clean Water State Revolving Fund.

II. Continuing Key Texas's Regulatory Agencies: TCEQ, TWDB, and PUC

During the 88th Regular Session, the Legislature voted to continue the operations of Texas Commission on Environmental Quality ("TCEQ"), Texas Water Development Board ("TWDB"), and Public Utility Commission of Texas ("PUC"). Each agency was reviewed by the Texas Sunset Advisory Commission (the "Sunset Commission") – a commission of ten state legislators and two private citizens – during the interim legislative period. Based on a comprehensive review of agency functions, the Sunset Commission recommended changes to both agency management and statutory authority. These recommended changes were incorporated into legislation that was finally passed by the Legislature and signed by Governor Abbott.

Texas Commission on Environmental Quality. **Senate Bill ("SB") 1397** will take effect September 1, 2023, and continues the TCEQ for another 12 years. Generally, the bill requires TCEQ to provide outreach and education related to public participation in the permitting process for its air, waste, and water programs; to post permit applications on its website; to increase the amount of the maximum daily administrative penalty for a violation from $25,000 to $40,000; to implement new permitting procedures related to public notice and security at meetings;

Wrap on 88th Legislature continued on page 4

IN THIS ISSUE

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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.

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FIRM NEWS

Thomas Brocato will be giving an "Update on MOU TCOS Filings at the PUC" at the Texas Public Power Association Annual Conference on July 25 in San Antonio.

Jamie Mauldin will be presenting the "Contested Case Hearing Update Panel" at the 35th Annual Environmental Superconference on August 2 in Austin.

Sarah Glaser will be presenting an "Employment Law Update" at the Texas Bar CLE Advanced Government Law on August 4 in Austin.

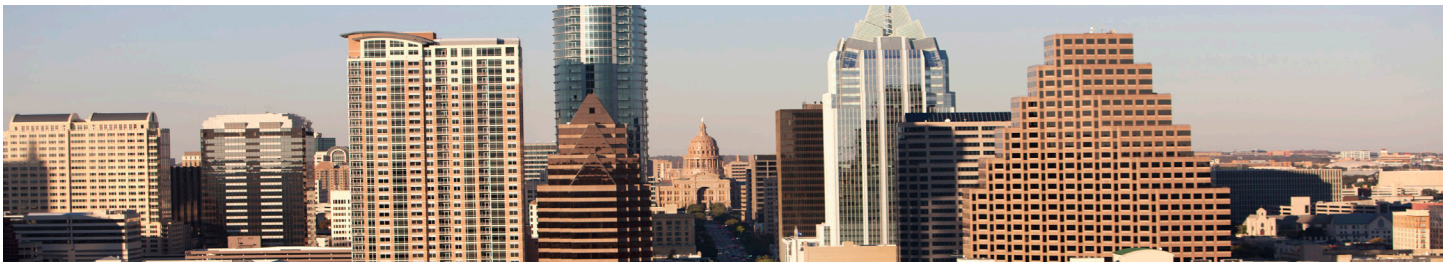
Sarah Glaser will discuss the "Dos and Don'ts of Hiring" at the Texas Workforce Commission Conference for Employers on August 25 in College Station.

Sarah Glaser will be presenting "Effective Performance Management" at the Heart of Texas Chapter Society of Human Resources Management Association Conference on September 7 in Waco.

Sarah Glaser will be presenting "AI for Employers and Attorneys" at the Texas City Attorneys Association Fall Conference on October 5 in Dallas.

Members of the Firm and their families participated in the annual Keep Austin Beautiful Day on April 15, 2023. Each April, Keep Austin Beautiful has hundreds of volunteers for a day of community service throughout Greater Austin to honor Earth Day. This year, over 2,200 people participated in cleanups by removing litter and restoring Austin's beloved green spaces and waterways.

MUNICIPAL CORNER



A municipality may not use maintenance and operations property tax for debt service, nor may it obligate itself to transfer funds to a local government corporation indefinitely. Tex. Att'y Gen. Op. No. KP-0444 (2023).

The Chairman of the Texas Senate Committee on Local Government requested a Texas Attorney General Opinion regarding (1) whether a tax increase election authorizes a municipality to "earmark" use of its maintenance and operations property tax revenue for debt service and (2) whether an increase in a municipality's maintenance and operations property tax may be transferred to a local government corporation. The Attorney General determined that revenue from a maintenance and operations tax may not be used for debt service and that a municipality may not agree to transfer revenue to a local government corporation indefinitely.

In 2020, the City of Austin (the "City") sought to increase its maintenance and operations tax rate to raise funds for a city-wide rapid transit system, known as "Project Connect." Before the required tax-rate increase election in November of that year, the Austin City Council adopted a Resolution to create a contract with the voters. The contract "earmarked" proceeds from increased tax revenue for investment in Project Connect. The Attorney General determined that the Tax Code prohibits the use of maintenance and operations tax for debt service. Therefore, the City may not use revenue from its maintenance and operations tax to invest in Project Connect.

Additionally, the Attorney General determined a court would likely conclude that an agreement binding a municipality to indefinitely transfer revenue to a local government corporation, as was the City's intent to fund Project Connect, is prohibited by article XVI, section 5 of the Texas Constitution. While a municipality is authorized to contract with a local government corporation, the Texas Constitution generally limits contractual terms. Here, it likely prohibits the City from obligating itself to transfer revenue for more than one year.

A member of a municipality's governing body may dually serve as a volunteer for an organization that protects the health, safety, or welfare of the municipality only if an authorizing resolution is adopted. Tex. Att'y Gen. Op. No. KP-0442 (2023).

The 112th Judicial District Attorney requested an opinion from the Texas Attorney General regarding whether a member of the Iraan Volunteer Fire and Rescue Department may simultaneously serve on the Iraan City Council. The City of Iraan sought guidance after both the volunteer fire chief and lieutenant were elected to the City Council. To determine whether such dual service was permitted, the Attorney General analyzed Texas Local Government Code section 21.003.

The Attorney General provided that section 21.003 allows a member of a municipality's governing body to dually serve as a volunteer for an organization that protects the health, safety, or welfare of that municipality only if the governing body adopts a resolution allowing its members to perform such a service. Based on the plain language of section 21.003, the Attorney General determined that – absent a resolution adopted by the Iraan City Council – the dual service of a person as a member of the volunteer fire department and the City Council is prohibited.

A municipality may provide trash collection services outside of its municipal boundary but within its ETJ. Tex. Att'y Gen. Op. No. KP-0438 (2023).

The Starr County Attorney requested a Texas Attorney General opinion regarding whether the City of Escobares (the "City") has authority to provide trash collection services outside of its municipal boundary but within its extraterritorial jurisdiction ("ETJ"). The Attorney General concluded the City likely can provide solid waste disposal service within its ETJ.

The opinion focuses on (1) a public agency's broad contracting authority and (2) the definition of "jurisdiction" in relation to a geographic area. Health and Safety Code section 363.113 provides that counties and municipalities should assure solid waste management services are provided to all persons within its jurisdiction, either by a public agency or a private person. Additionally, Chapter 363 authorizes a public agency, such as a municipality, to enter into contracts to furnish or receive solid waste management services. Further, the common definition of jurisdiction in relation to a geographic boundary likely includes a municipality's ETJ. Therefore, a municipality has the authority to ensure the provision of solid waste disposal services in its jurisdiction, independently or via contract.

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Wrap on 88th Legislature continued from page 1

and to develop criteria for classifying a repeat violator with respect to a person's compliance history.

Further, SB 1397 requires TCEQ to establish a standard permit for temporary concrete plants; to extend the period for public comment and requesting a contested case hearing for permit applications under the Texas Clean Air Act; to ensure the environmental flows advisory group periodically reviews the flow standards for each river basin and bay system; and to provide notice of the creation of certain water districts to the corresponding state representative and state senator. Lastly, the bill makes changes to TCEQ Commissioner training requirements and to the separation of TCEQ and staff responsibilities.

Texas Water Development Board. **HB 1565** will take effect September 1, 2023. In addition to continuing the agency for 12 more years, the bill makes changes to improve the efficiency of TWDB's project review process.

Public Utility Commission. The PUC Sunset legislation, **HB 1500**, goes into effect on September 1, 2023 and continues the agency for only 6 more years at which time the agency will be reviewed again by the Sunset Commission. Initially, HB 1500 focused solely on the management and productivity of the PUC. However, it was amended late in the Regular Session to include several other electric bills. A more in-depth summary of HB 1500 can be found on page 5 in *Utility Takeaways from the 88th Legislative Session*. Regarding the PUC's oversight of water and wastewater, the bill continues to authorize the PUC's regulation of water and sewer service and creates some time limits when the PUC adopts an emergency order to address a failing water or wastewater utility.

III. Notable Passed Legislation

A. Legislation Affecting Municipalities

HB 2127 passed by the 88th Legislature addresses the pre-emption of municipal and county regulation of multiple economic and daily activities despite significant push back from local governments. **HB 2127** prohibits a city from regulating activity already regulated by certain state codes including the Agriculture, Business & Commerce, Finance, Insurance, Labor, Natural Resources, Occupations, and Property Codes. Other notable bills affecting municipalities include SB 2038 that creates a pathway for residents and landowners to request release of an area from a municipality's extraterritorial jurisdiction either by petition or election, and **HB 4082** that defines what is considered a public work for purposes of issuing certificates of obligation or anticipation notes.

B. Legislation Affecting Special Districts & Open Government

HB 2815 makes significant updates to state statutes governing conservation and reclamation districts to which Chapter 49 of the Texas Water Code is applicable. These updates include an increase in the fees of office for district board directors as well as revised district requirements related to public notice, director confirmation and election, bond authorization, and division. In addition to HB 2815, several other bills were passed relating to open government matters that will affect many special districts:

- **HB 1893** requires governmental entities to adopt a policy prohibiting the installation or use of TikTok on any device owned or leased by the entity and requiring the removal of TikTok from those devices;
- **HB 3033** amends the Government Code to require the timely release of public information, to specify certain information related to elections is subject to disclosure, and to streamline the open records request process; and
- **HB 3440** requires governmental bodies to post meeting agendas on the Internet.

C. Legislation Affecting Water & Water Infrastructure

The 88th Regular Session was an important session for water policy and additional investment in water infrastructure in Texas. The first ever Water Caucus was formed and supported the effort to pass **SB 28** authored by Senator Charles Perry and Representative Tracy King. The historical legislation allocates $1 billion for the creation of the Texas Water Fund and the New Water Supply for Texas Fund (collectively, the "Funds"). These Funds will be used to finance new water supply projects involving desalination, produced water, aquifer storage and recovery, and the development of infrastructure to transport new water supplies. A portion of these Funds will also be used to address failing water infrastructure in rural political subdivisions and municipalities. Before SB 28 can fully take effect, the voters of Texas must approve the creation of these Funds during the November 2023 general elections.

The 88th Regular Session also saw the passage of legislation affecting the regulation of surface water and groundwater. A few of these bills are highlighted below:

(1) Surface Water

- **SB 1289** authorizes a facility to dispose of treated wastewater without a permit and directs TCEQ to create rules for the disposal of reclaimed wastewater.
- **HB 2460** requires the TCEQ to work on updated water availability models ("WAMs") for the Guadalupe, Lavaca, Nueces, San Antonio, San Jacinto, and Trinity River basins. Unfortunately, the Texas Legislature did not provide any funding in the state budget for the TCEQ's effort to update the WAMs, so the immediate path forward for the implementation of HB 2460 is being discussed.
- **HB 3810** requires a nonindustrial public water supply system to issue a do-not-use advisory, do-not-consume advisory, or boil water notice upon the occurrence of certain unplanned conditions.

(2) Groundwater

- **SB 2440** requires that certain plat applications for the subdivision of land include groundwater availability certifications by municipalities and counties.
- **HB 1971** speeds up the timeline for when a groundwater conservation district must act on a permit or permit amendment application and makes changes related to quorum and the disqualification of board members.
- **HB 3059** increases the maximum export fee a groundwater conservation district may charge for the export of groundwater to 20 cents per 1,000 gallons with annual increases and allows fees to be used for the maintenance and operation of wells.
- **HB 3278** increases the transparency of the groundwater management area ("GMA") process and revises procedures relating to the compilation, submission, and accessibility of information by a groundwater conservation district after the public comment period on proposed desired future conditions.

IV. Lloyd Gosselink at the Legislature

During the Regular Session, Lloyd Gosselink worked on behalf of multiple clients to protect the clients' interests at the Texas Legislature and, in many cases, to work with legislators to get bills passed. These bills included legislation related to the eligibility of board directors, permissible ballot proposition language in a tax election, a district conversion, and the process for a municipality to approve a change order. Our team also worked with legislators and stakeholders to secure $10 million in funding for the plugging and remediation of abandoned wells in Pecos County. Lloyd Gosselink has a long history at the Texas Legislature and is proud to help our clients successfully navigate the legislative process.

V. What's Next for the 88th Texas Legislature?

In addition to the two Special Called Sessions that have been held this summer to address property tax issues and border security issues, Governor Abbott is expected to call an additional Special Called Session this fall focused on public education issues. Additionally, the Texas Senate announced that Attorney General Paxton's impeachment trial will begin September 5, 2023. This announcement comes after the Texas House of Representatives voted to impeach Attorney General Paxton after hours of debate on the House floor and upon a recommendation of the House General Investigating Committee.

The Governmental Relations Practice Group is proud of our accomplishments on behalf of Lloyd Gosselink's clients during the Regular Session and stands ready to help our clients with any legislative issues they may have both now and in the future.

Madison Huerta is an Associate in the Firm's Governmental Relations, Water, and Districts Practice Groups and Ty Embrey is Chair of the Firm's Governmental Relations Practice Group and a member of the Firm's Water, Districts, and Air and Waste Practice Groups. If you have any questions concerning Legislative tracking and monitoring services or legislative consulting services, please contact Madison at 512.322.5825 or mhuerta@lglawfirm.com, or Ty at 512.322.5829 or tembrey@lglawfirm.com.

UTILITY TAKEAWAYS FROM THE 88th LEGISLATIVE SESSION

by Roslyn Dubberstein

Two years after Winter Storm Uri—the February 2021 winter weather event that left millions without power—utility issues remained a frontrunner during this year's legislative session. Legislators filed approximately 300 bills relating to electric and gas utilities; of those 300, about 40 made it to the finish line.

Lieutenant Governor Dan Patrick, who presides over the Senate, set down an early marker by unveiling a slate of major utility reform bills during a March news conference. These included bills that would have allocated billions of tax dollars for the construction of standby natural gas generation, created a new day-ahead ancillary service, set limits on the Public Utility Commission's ("PUC") Performance Credit Mechanism ("PCM") plan to subsidize power generation, and required the PUC to place limits on how much Texans pay for power producers to connect to the power grids.

Senate Bill ("SB") 6, a bill that would have called upon the state to hire one or more companies to build up to 10,000 megawatts of backup power, was arguably the most controversial. Supported by billionaire investor Warren Buffett, SB 6 called for the expenditure of billions in tax dollars to build natural gas-fired generation that would go almost completely unused. SB 6 made it from the Senate but died after its referral to the House Committee on State Affairs, chaired by Representative Todd Hunter of Corpus Christi.

Notably, the PUC, the Office of Public Utility Counsel ("OPUC"), and the Electric Reliability Council of Texas ("ERCOT") were subject to Sunset review in 2022. The Sunset review process entails a detailed evaluation of agency practices and processes to determine whether the agency should be continued or abolished. A Sunset Commission comprised of legislators considers Sunset staff recommendations and proposes legislation accordingly. As a result, a "Sunset Bill" relating to PUC, OPUC, and ERCOT was passed, and it became the vehicle for buzzer beater electric market reform additions.

House Bill ("HB") 1500 (the "Sunset Bill") by Representative Justin Holland and Senator Charles Schwertner contained the following key provisions related to the PUC and ERCOT:

- Extends the PUC and OPUC through 2029;
- Requires the PUC to allow public testimony on each open meeting agenda item;
- Requires the PUC to develop a strategic communication plan;
- Adds an additional PUC commissioner as an *ex officio* member of the ERCOT Board;
- Provides that changes to ERCOT protocols may not go into effect without PUC approval;
- Limits the ERCOT Board's ability to enter into executive session;
- Restricts informal verbal directives from the PUC to ERCOT to rulemakings, contested cases, or memorandums or written orders adopted by a majority vote of the PUC commissioners. PUC direction to ERCOT must be noted on the open meeting agenda and the PUC must allow for public comment; and
- Requires PUC to formalize informal actions taken during an emergency within 72 hours of the conclusion of the emergency.

In addition to the above Sunset-related reforms, several electric market proposals initially addressed in other bills were incorporated into the Sunset Bill at the last minute. For example, Section 22 of HB 1500 provides a new ancillary service for Dispatchable Reliability Reserve Service, or DRRS. This mechanism was originally proposed in SB 7 and is intended to address uncertainty associated with generation outages and intermittency. Similarly, guardrails on the PUC's proposed PCM were ultimately funneled into Section 23 of HB 1500, providing a $1 billion annual cost cap and specific standards and requirements before PUC-implementation of the PCM. Importantly, cost allocation was a recurring topic of conversation throughout the session, and Section 23 of HB 1500 requires a report to the Legislature by December 2026 regarding whether and how the costs of certain ancillary services should be allocated. One possibility is allocating costs to generators based on their contribution to unreliability during high-risk periods.

While HB 1500 served as the conduit for multiple electric market reforms, others passed as stand-alone bills. For instance, **SB 2627** by Senator Schwertner creates a fund for grants and loans at preferred interest rates for upgrades to, or new construction of, dispatchable generation facilities.

When the Legislature was not evaluating electric market reforms, there was significant attention on the process for Investor-Owned Utility ("IOU") electric rate cases at the PUC. Senator King was a particularly vocal author in this area. Two of Senator King's bills related to electric utility ratemaking passed—**SB 1015** and **SB 1016**. SB 1015 modifies the process for an IOU seeking a periodic rate adjustment, also known as a distribution cost recovery factor. Utilities may now file more frequently and the review will be subject to a rapid 60-day timeline. SB 1016 addresses the inclusion of employee salaries and benefits in electric rates and creates a presumption of reasonableness if the utility produces market compensation studies.

Gas utility issues were less prevalent this session. However, Representative Drew Darby's **HB 2263** did pass, which will allow gas companies to offer energy conservation programs and recover the costs of such programs in rates. This may be an area of gas ratemaking for consumers to monitor. The legislation passed out of both chambers and was signed by Governor Abbott on June 12, effective immediately.

Utilities and the future of the electric market in Texas remain key priorities for policymakers. Given the developments discussed above, the PUC has a lengthy and challenging road ahead. We can likely expect several of these dialogues to resurface throughout the interim and into the 89th Legislative Session.

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U.S. SUPREME COURT SIGNIFICANTLY REDUCES FEDERAL WATERS JURISDICTION

by Jessie Spears and Nathan Vassar

Nearly two years after its decision in *County of Maui v. Hawaii Wildlife Fund* regarding "waters of the United States" ("WOTUS"), the United States Supreme Court issued a decision curtailing the reach of federal WOTUS jurisdiction, which will have major impacts to Clean Water Act ("CWA") federal permitting, mitigation, and enforcement. *Sackett v. EPA*, No. 21-454 (U.S.) (May 25, 2023); *see Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020). In *Sackett v. Environmental Protection Agency ("EPA")*, the Court rejected the 2006 Justice Kennedy plurality-drafted "significant nexus" test in *Rapanos v. United States*, 574 U.S. 715 (2006) that EPA and the U.S. Army Corps of Engineers ("USACE") used in prior jurisdictional waters determinations. The Court instead adopted as the sole requirement—at least for wetlands—that water bodies must be "relatively permanent" or otherwise actually connected to a "relatively permanent" water source to count as federally jurisdictional waters similar to Justice Scalia's approach in *Rapanos*, an approach that had also been previously used in jurisdictional waters determinations post-*Rapanos*. 574 U.S. 715 (2006). Mere proximity to a relatively permanent water body is not enough to confer federal jurisdiction, meaning that isolated wetlands, at issue in the *Sackett* case, are not considered WOTUS.

The definition of WOTUS has been the source of various debates, appeals, and rulemakings since the CWA was amended in 1972. The CWA establishes federal jurisdiction over "navigable waters," defined as the "waters of the United States." CWA § 502(7). Four Supreme

Court decisions have attempted to clarify the definition of WOTUS. In 1985, in *United States v. Riverside Bayview Homes, Inc.*, the Court deferred to USACE's broad assertion of jurisdiction over wetlands adjacent to a traditional navigable water, stating that adjacent wetlands may be regulated under the CWA because they are ''inseparably bound up'' with navigable waters and often have ''significant effects on water quality and the aquatic ecosystem'' in those waters. 474 U.S. 121 (1985). In 2001, the Court again addressed WOTUS and held that the use of "nonnavigable, isolated, intrastate waters" by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the CWA. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps Eng'rs*, 531 U.S. 159, 172 (2001).

More recently, environmental groups advanced rules under both the Obama and Biden Administrations that relied upon hydrologic connections between water bodies, even if such connections were attenuated and sometimes interrupted. This "significant nexus" test was approved by a plurality opinion. *Rapanos*, 574 U.S. 715. Post-*Rapanos*, EPA and USACE claimed broad authority to regulate all wetlands with a "significant nexus" to traditionally navigable waters, which often encompassed wetlands without an apparent surface connection to WOTUS. While both the Trump and the Biden Administrations have attempted to promulgate new definitions of WOTUS, the *Sackett* opinion carves out certain wetlands from the regulatory purview of EPA and USACE and effectively renders the Biden-proposed EPA rule moot (despite the recent request by EPA to revive the rule).

In the *Sackett* case, Michael and Chantell Sackett owned a residential lot near Priest Lake in Idaho and began to fill their lot with dirt and gravel to prepare for construction. In 2007, EPA halted the work (responding to a neighbor's complaint) and threatened penalties of over $40,000 per day for failure to comply. EPA claimed that the Sacketts' lot contained a federally protected wetland and ordered the couple to remove the gravel and cease any further construction without a permit. The Sacketts sued, arguing that the wetland was not a protected "water of the United States" because dry land separated the wetland from other bodies of water, and thus their lot was not subject to EPA regulation.

The *Sackett* opinion addresses some of the uncertainty surrounding on-the-periphery waters that federal regulators might seek to regulate. The CWA applies to adjacent wetlands, and the Court found that a wetland is "adjacent" to a jurisdictional water if the wetland is contiguous to or bordering a covered water. However, the Court stated that isolated wetlands (i.e., wetlands separated from a covered water by a man-made dike or barrier, natural river berm, beach dune, or the like) are not covered under the CWA based on the 5-4 majority opinion. The *Sackett* opinion limits federal regulation of wetlands and finds that the CWA "extends to only wetlands that are as a practical matter indistinguishable from waters of the United States." The Court also noted that relatively permanent, and thus covered waters, may experience "temporary interruptions in surface connection[s]. . . because of phenomena like low tides or dry spells."

Federal agency responses are certainly in development; however, the *Sackett* decision effectively reclassifies thousands of acres of wetlands that were previously subject to the CWA and will downsize wetland footprints tied to permitting, mitigation, and enforcement. The decision also undercuts the Biden Administration's most recent WOTUS rulemaking that included aspects of the hydrological connection approach now rejected by the Court.

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SUMMER CHECKLIST FOR TCEQ COMPLIANCE/PROTECTION

by Nathan Vassar

As the calendar has now moved to summer, there are several tools utilities and other regulated entities should consider for their own enforcement protection, particularly as some options only become available in the late summer months. Among other things, the ability to review one's compliance history in the Texas Commission on Environmental Quality's ("TCEQ's") records is a useful endeavor that can help address potential errors and ensure one's penalty calculations are not higher than they should be on any future enforcement cases. In addition, considering potential first-time applications or renewal applications for TCEQ's Sanitary Sewer Overflow Initiative ("SSOI") as well as conducting an environmental compliance audit can position a utility to anticipate and pre-empt regulatory enforcement and penalties that otherwise might arise.

The context for these tools is against a backdrop of continued, but seemingly increasing trends of noncompliance enforcement, and at a time when TCEQ is being evaluated by EPA on a Petition to revoke Texas's National Pollutant Discharge Elimination System ("NPDES") Permit Program delegation. Although compliance history reviews, the SSOI program, and compliance audits have been available for years, now could be an opportune time to utilize them in light of enhanced scrutiny.

A compliance history review is fairly straightforward, but it involves a notice to TCEQ in August that an entity wishes to review compliance history materials when the "vault" is opened for examination. The exercise includes the opportunity to inspect the TCEQ's list of a regulated entity's assets, plants, sites, and past

noncompliance. If everything checks out, then there is nothing further needed; however, it is not uncommon to find occasional mistakes meriting correction. These can include double-counting of enforcement orders, erroneous information on the regulated entity and/or its associated permit/authorization (one recent permit identified a Texas Land Application Permit for a non-existing site), or mistakes on known agreed orders. When such errors are identified and flagged, TCEQ can make the requested updates, which has the effect of preventing any future noncompliance actions from seeing an artificial increase in penalty amounts, driven by underlying compliance history errors. The review can be conducted cost effectively and keeps a regulated entity's proverbial "report card" accurate.

Beyond compliance history updates, publicly owned treatment works, or POTWs, concerned about enforcement for collection system sanitary sewer overflows ("SSOs") can seek inclusion or renewal in the SSOI program. Many SSOI agreements are coming to expiration, as they were entered into a decade or more ago. For those unfamiliar with the SSOI program, it affords certain state enforcement protection on SSOs if the utility identifies and outlines various maintenance and infrastructure plans over a length of time agreed to by TCEQ. The policy and theory behind the approach is that if a utility is making investments in its sewer collection system and in its cleaning/inspection practices, then during such time as the work is performed, TCEQ does not initiate SSO-driven enforcement (and most utilities tend to see a decline in SSO trends during the SSOI period). As utilities are in the midst of budget season and planning for the next fiscal year, it can be a logical time to consider packaging certain improvements already planned into an SSOI proposal to TCEQ.

Finally, environmental compliance audits afford entities the ability to investigate potential environmental violations that are unknown, and then identify the proposed solutions to return to compliance. Under the applicable state statute, an entity can take a six-month period of time (with extension availability) to explore potential noncompliance across relevant TCEQ statutes, then make a disclosure of the findings, and then report such findings to TCEQ with a schedule for remediation. The reward and benefit of such disclosures is that the entity is shielded from enforcement of those violations identified and corrected.

All three of the above-referenced tools can be useful for utilities considering how to best position themselves against the always-present potential for regulatory enforcement. Although agreed orders can be addressed and complied with when issued, thinking through some of the front-end opportunities for protections can provide both a legal buffer to enforcement as well as peace of mind on certain state enforcement actions.

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ASK SARAH

Dear Sarah:

We employ a community relations manager whose main duty is to go out into the community, attend functions, meet with various groups, and other outside activities. This employee has just informed us that his chronic illness requires him to take medication that makes him unable to drive and sensitive to sunlight. He has asked that we accommodate him by removing all of his duties that require him to attend outdoor events or to drive. He stated he would do his work from the office via telephone, emails, and videoconferencing, and has pointed to his continued success in his role during the height of the COVID-19 pandemic as evidence that he can do his job virtually. However, during COVID-19 most of his in-person obligations were cancelled. Do we have to grant this request?

Signed, Perplexed

Dear Perplexed,

No, you do not have to remove the essential functions of the employee's job as an accommodation, even if those essential functions were temporarily removed or changed during the COVID-19 pandemic. The Equal Employment Opportunity Commission ("EEOC") and recent court decisions have indicated that success in a temporary telework position during COVID-19 could be relevant in considering a request for remote work; however, the ADA requires that employers provide reasonable accommodations so that disabled employees can perform the main functions of their job. Taking away those very functions is not a reasonable accommodation, if the position reverted back to a similar in-person need after the pandemic.

But before you terminate this employee, have a detailed (and documented) discussion with him to confirm that alternate accommodations won't work. Further, if you have any open position in your company that the employee is qualified to perform, such as an inside sales job, you should offer it as an alternative to termination, even if the employee has to take a pay cut.

By the way, if driving was only a small part of an employee's job, such as getting the mail, or doing a bank run, then it will likely be required to remove that function if the employee's disability makes him unable to drive. If the function is not essential to the job, it is reasonable to shift that duty to another employee.

*"*Ask Sarah*" is prepared by Sarah Glaser, 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 Sarah at 512.322.5881 or sglaser@lglawfirm.com.*

Water cases

San Antonio Water Sys. v. Matiraan, Ltd., No. 04-22-00138-CV, 2023 WL 2290301 (Tex. App.—San Antonio Mar. 1, 2023, no pet. h.).

The San Antonio Water System ("SAWS") was granted a conservation easement (the "Easement") for the purpose of limiting any use of the property at issue that will adversely impair or interfere with the recharge of the Edwards Aquifer. A property owner acquired land burdened by the Easement and sought to terminate the Easement. SAWS submitted a plea to the jurisdiction, claiming it was entitled to governmental immunity, which was denied by the trial court. SAWS appealed, and the present case examines whether governmental immunity applies. To make this determination, the court analyzed whether SAWS entered the Easement in its proprietary or governmental capacity.

The court's analysis was guided by the four factors from *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 154 (Tex. 2018): 1) whether SAWS's act of entering into the Easement was mandatory or discretionary; 2) whether the Easement was intended to benefit the general public or only those within SAWS's corporate limits; 3) whether SAWS was acting on the State's behalf or its own behalf when it entered the Easement; and 4) whether SAWS's act of entering into the Easement was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

SAWS concedes that its entry into the Easement was discretionary, so the first factor supports a finding of a proprietary act. The court found that SAWS's action was motivated by benefits to the general public, which supports the determination of a governmental act. Due to the importance of the Edwards Aquifer to Texas, San Antonio's legislative determinations regarding regulation of Edwards Aquifer recharge, and the language of the Easement, the court found that SAWS acted as an arm of the government in entering the Easement. This weighs in favor of the conclusion that SAWS's entry into the Easement was a governmental act. The court also concluded – in agreement with SAWS – that because conservation and protection of the Edwards Aquifer is a key component of SAWS's provision of water service, SAWS's entry into the Easement was related to a governmental function.

In sum, the court held that SAWS's primary purpose in entering the Easement was to benefit the general public. The utility was acting as an arm of government, rather than on its own behalf, when it entered the Easement, and the utility's decision to enter the Easement was related to a governmental function. Because SAWS's entry into the Easement was a governmental act, governmental immunity applies and the denial of SAWS's plea to the jurisdiction was reversed.

Hidalgo County Water Improvement Dist. No. 3 v. Hidalgo County Irrigation Dist. No. 1, No. 21-0507, 2023 WL 3556685 (Tex. May 19, 2023).

A water improvement district and an irrigation district provide water and irrigation services in Hidalgo County. Negotiations between the two for a pipeline extension failed, and the improvement district filed a condemnation action. The irrigation district objected, claiming that the improvement district could not establish the paramount public importance of its pipeline.

The Court typically applies the paramount public importance doctrine in condemnation proceedings. However, in this case, the irrigation district filed a plea to jurisdiction, arguing that it had governmental immunity from the condemnation suit and that the Legislature had not waived that immunity. The trial court agreed, granted the plea, and dismissed the suit. The court of appeals affirmed, and the improvement district filed a petition for review. The question before the Court in this case is whether governmental immunity applies to a condemnation proceeding, and specifically, whether the improvement district's condemnation proceeding is barred by governmental immunity.

The improvement district argued that courts should apply the paramount public importance doctrine to condemnation suits, while the irrigation district claimed that such doctrine only comes into play after a court determines that the Legislature has waived the condemnee's immunity. In its analysis, the Court stated that an important purpose of governmental immunity is to protect the public from potential consequences of "improvident actions of their governments." Condemnation proceedings are not considered an improvident action but are the lawful authority of the government to appropriate property for the benefit of the public. The court noted that applying governmental immunity would undermine the condemnation power that the Legislature specifically granted to condemning authorities to fulfill a public need.

The court held that the long-standing paramount public importance doctrine provides an adequate framework for comparing two public interests, and replacing this framework by applying governmental immunity would skew the analysis in condemnation proceedings to ensure the public condemnee will always prevail. Ultimately, the court held that governmental immunity does not apply in condemnation proceedings, and accordingly reversed and remanded the case.

Litigation Cases

City of League City v. Jimmy Changas, Inc., No. 21-0307, 2023 WL 3909986 (Tex. June 9, 2023).

In *City of League City v. Jimmy Changas, Inc.*, the Texas Supreme Court determined whether a city's participation in an economic development agreement under Chapter 380 of the Texas Local Government Code is a protected governmental function which preserves the City's sovereign immunity, or a proprietary function that makes it subject to actions for breach of contract. In other words, was the City acting on the State's behalf or was it taking an action as a private corporation, for the private advantage and benefit of the locality and its inhabitants.

League City and Jimmy Changas entered into a contract under Chapter 380 of the Texas Local Government Code, which authorizes cities to provide economic incentives to stimulate commercial activity. The agreement stipulated that the city would reimburse certain fees and taxes to Jimmy Changas upon successful establishment of a restaurant and creation of jobs in League City. However, following the completion of the project, League City reneged on its commitment, leading Jimmy Changas to file a lawsuit. In response, the City argued it had immunity due to the assertion that contracts under Chapter 380 were governmental functions, hence immune to litigation, an argument rejected by both the trial court and the court of appeals, who held that the City acted in its proprietary capacity.

At the Supreme Court, League City argued that engaging in the contract was a governmental function because (1) it falls within the statutory list of governmental functions, and (2) even if it doesn't, it falls within the statute and the common law's general definitions. The Supreme Court disagreed with both arguments.

The Court held that Chapter 380 contracts do not parallel those explicitly classified as governmental in the Texas Tort Claims Act ("TTCA"). TTCA identifies *community* development activities under Chapter 373 and *urban renewal* activities under Chapter 374, without any indication that local economic development activities under Chapter 380 should be impliedly included.

Having determined that the act of engaging in a contract for local economic development was not included in the statutory list of governmental functions, the Supreme Court looked to the general definitions. In *Wasson Interests, Ltd. v. City of Jacksonville* (commonly referred to as *Wasson II*), the Texas Supreme Court set forth four factors that determine whether a city's contractual conduct is governmental or proprietary: (1) was the act mandatory or discretionary?; (2) was it intended to benefit the general public or the City's residents?; (3) was it on its own behalf or the behalf of the State?; and (4) was it sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary? The Court held that the decision to enter into a contract with Jimmy Changas was discretionary, it principally served the City's residents, and the City was not acting as a state agent. Moreover, the actions undertaken by the City were not sufficiently related to a governmental function that they could be construed as governmental. As such, the court concluded that the City did not have immunity from the lawsuit.

CPS Energy v. Electric Reliability Council of Tex., No. 22-0056 (Tex. June 23, 2023).

In *CPS Energy v. Electric Reliability Council of Texas*, a consolidated appeal of two cases wherein the Electric Reliability Council of Texas, Inc. ("ERCOT") was the defendant, the Texas Supreme Court answered three questions concerning ERCOT: (1) is ERCOT a governmental unit as defined in the TTCA and thereby entitled to pursue an interlocutory appeal from the denial of a plea to the jurisdiction?; (2) does the Public Utility Commission of Texas ("PUC") have exclusive jurisdiction over the parties' claims against ERCOT?; and (3) is ERCOT entitled to sovereign immunity? The Court answered all three questions in the affirmative.

As stated above, the Court had consolidated two separate cases: *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 arose from the 2021 Winter Storm Uri. In that case, CPS Energy sued ERCOT for various claims related to ERCOT's actions taken during the storm. Additionally, CPS sued ERCOT for requiring load servers such as CPS Energy to make up for payments that should have been made by market participants, except the market participants had defaulted on such payments. Although the payments were only required so that ERCOT could pay generators for load, CPS argued that it required CPS, a publicly-owned entity (owned by the City of San Antonio), to unconstitutionally lend credit to cover private debts.

In *Panda Power*, Panda took issue with ERCOT's "CDR Reports" that, pursuant to PUC rules, ERCOT issues to predict future electricity demand and forecast market participants' ability to meet that demand. According to Panda, ERCOT fabricated its 2011 and 2012 CDR Reports and intentionally "broadcast[ed] false market information throughout Texas" to encourage market participants to build new power generation. Panda asserted that because the CDR Reports predicted a generation shortfall, it invested $2.2 billion to build three new power plants. After Panda initiated construction, ERCOT revised the CDR Reports and, in contrast to its initial forecast, predicted excess generation

capacity. Accordingly, Panda sued ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty.

Although the cases before the Court stemmed from different facts and different parties, they raised the above-mentioned three overlapping jurisdictional questions concerning ERCOT.

IS ERCOT A GOVERNMENTAL UNIT UNDER THE TTCA?

The first question faced by the Court was whether ERCOT is a governmental unit as defined in the TTCA and thereby entitled to pursue an interlocutory appeal from the denial of a plea to the jurisdiction. If ERCOT is deemed a governmental unit under the TTCA, Section 51.014(a)(8) of the Civil Practice and Remedies Code authorizes the interlocutory appeal of a trial court order granting or denying its plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

TTCA defines "governmental unit" to include not only the state and its agencies and political subdivisions, but also "any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution." *Id*. § 101.001(3). The Court held that ERCOT, a utility corporation directly responsible and accountable to the PUC and established pursuant to legislation, was both an "organ of government" and derived its "status and authority" from statute. Thus, ERCOT is a "governmental unit" entitled to take an interlocutory appeal from the denial of a plea to the jurisdiction.

DOES THE PUC HAVE EXCLUSIVE JURISDICTION OVER THE PARTIES' CLAIMS AGAINST ERCOT?

The next question addressed by the Court's decision was whether the PUC has exclusive jurisdiction over the issues underlying both of the parties' claims. To determine whether the legislature has granted an agency exclusive jurisdiction over a particular issue, there must be (1) an express or implied grant of exclusive jurisdiction and (2) the issue must fall within that jurisdictional scope. If the agency's exclusive jurisdiction is established, the claimant must pursue and exhaust all available administrative remedies before turning to the courts.

ERCOT argued that Section 39.151 of the Texas Utilities Code constitutes a pervasive regulatory scheme that imparts exclusive jurisdiction to the PUC. The Court agreed, noting that the statute provides that ERCOT is directly responsible to the PUC, and the PUC has substantial authority over the operations of ERCOT. The Court further agreed that the adjudication of the claims presented—claims concerning ERCOT's execution of its duties—involved functions regulated by the PUC, and therefore properly fell under review via the PUC's adjudication system.

IS ERCOT ENTITLED TO SOVEREIGN IMMUNITY?

The Texas Supreme Court held that ERCOT is entitled to sovereign immunity. The Court held that ERCOT's governmental nature is demonstrated by the level of control and authority the state exercises over it and its accountability to the state. By statute, the state has complete authority over everything ERCOT does to perform its statutory functions. Therefore, the entity is an "arm of the state," and enjoys sovereign immunity.

Utility Case

Court Again Finds that Commission Action Related to Winter Storm Uri Violated Texas Law.

On June 1, 2023, the Third Court of Appeals at Austin, Texas rendered its decision in *RWE Renewables Americas, LLC and TX Hereford Wind, LLC v. Public Utility Commission of Texas*, No. 03-21-00356-CV (Tex. App.—Austin, Jun. 1, 2023). Similar to its recent ruling in *Luminant Energy Co., LLC v. Public Utility Commission of Texas*, the court found that the Public Utility Commission of Texas ("PUC") exceeded its statutory authority during Winter Storm Uri, albeit on different legal grounds.

Following Winter Storm Uri, the Electric Reliability Council of Texas ("ERCOT") filed Nodal Protocol Revision Request ("NPRR") 1081 essentially codifying the Commission's Winter Storm Uri order and, specifically, requiring that ERCOT set system-wide wholesale market prices at $9,000/MWh when it issues an Energy Emergency Alert level 3 ("EEA3"). PUC Staff recommended approval of NPRR 1081 and, on July 16, 2021, the PUC issued its Order approving NPRR 1081 (the "Order").

RWE Renewables Americas, LLC ("RWE") and TX Hereford Wind, LLC ("TX Hereford") filed a direct appeal under Public Utility Regulatory Act ("PURA") § 39.001(e) asserting that the PUC, when it adopted the Order, exceeded its statutory authority and violated rulemaking provisions in the Administrative Procedure Act ("APA").

Ultimately, the Court found that the Order constituted a rule, exceeded the PUC's statutory authority, and was invalid due to the PUC's failure to follow mandatory rulemaking procedures under the APA. Although the court's ruling is subject to an appeal, it has broad policy implications regarding the PUC's authority, rulemaking procedures, and influence over the ERCOT market.

If the ruling ultimately stands, consumers would no longer be subject to a fixed system-wide wholesale market price of $9,000 during EEA3 events and, moreover, may be entitled to some form of reimbursement. On a broader level, the ruling restricts the PUC's ability to unilaterally adopt policy without significant stakeholder and public participation.

"In the Courts" *is prepared by Lora Naismith in the Firm's Water Practice Group; James Parker in the Firm's Litigation Practice Group, 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 Lora at 512.322.5850 or lnaismith@lglawfirm.com, or James at 512.322.5878 or jparker@lglawfirm.com, or Rick at 512.322.5855 or rarnett@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA Proposes More Stringent Effluent Limits for Coal-fired Power Plants. EPA issued a proposed rule that would strengthen wastewater discharge standards for coal-fired power plants through tightened effluent limitation guidelines ("ELGs"). ELGs are technology-based limits created to represent the greatest pollution reductions achievable through economically feasible methods that are implemented by state and EPA-issued National Pollutant Discharge Elimination System permits. Coal-fired power plant ELGs were last revised in 2020. Since the 2020 revision, EPA has identified the possibility of further pollutant reductions through treatment technologies that have become more affordable and available. The proposed rule would establish a zero-discharge limit for all pollutants from flue gas desulfurization, bottom ash transport water, and combustion residual leachate. The proposed rule would also allow permit writers to use "best professional judgment" on limits for power plant "legacy" wastewaters—effluent produced prior to the rule's effective date but stored in impoundments with the possibility of being released later. Non-zero numeric discharge limitations for mercury and arsenic in combustion residual leachate are also included in the proposed rule. Facilities operating under current requirements would be able to avoid these new requirements if they close by 2028, and facilities that have already complied with the 2020 rule would be allowed to keep current technologies without upgrading if they close by 2032. EPA estimates that the proposed rule will reduce discharges of pollutants by 584 million pounds per year.

EPA Accepted Nominations for the CCL 6. EPA sought nominations for the sixth drinking water Contaminant Candidate List ("CCL 6") in February 2023, and the agency is now evaluating the nominations it received and other contaminant data to develop the draft CCL 6 for public review and comment. The CCL includes contaminants that are not subject to drinking water regulations but are likely to occur in public water systems. Contaminants on the list require regulation under the Safe Drinking Water Act in the future and are used by EPA to prioritize research and the determination of whether to regulate specific contaminants. Municipal water groups, including the Association of Metropolitan Water Agencies and the American Water Works Association, have called for EPA to overhaul the contaminant selection process. These stakeholder groups support this overhaul given the unmanageable extensive lists of substances and inclusion of entire chemical groups such as per- and poly-fluoroalkyl substances ("PFAS"), which include thousands of contaminants, in past CCLs. Similarly, after the CCL 5 consultation, EPA's Science Advisory Board recommended that EPA explain its process for deciding which substances to include on the list and clarify why some chemical classes, such as PFAS, are grouped together, while others are not. Stakeholders also recommended that EPA use CCL 6 to communicate priority contaminants within subgroups in order to effectively advance research needs and priorities. EPA is currently evaluating received nominations to determine whether they should be included in the CCL 6 and will summarize the nominations when it publishes the draft CCL 6 in the Federal Register.

EPA Releases Funding Opportunities for Water Infrastructure. EPA recently announced the availability of several funding sources for water infrastructure projects. At the end of April 2023, EPA announced that $41 million is available for technical assistance funding under America's Water Infrastructure Act to address wastewater concerns. This funding will primarily assist rural, small, and Tribal communities. Communities seeking funding may request assistance at EPA's Water Technical Assistance webpage, available at: **https://www.epa.gov/water-infrastructure/water-technical-assistance**. Additional funding of more than $57 million from 2023 Clean Water State Revolving Funds will go towards southern states, including Texas, for water infrastructure improvements. Texas alone will receive more than $34 million. The funding is intended to help communities upgrade wastewater and stormwater systems, and approximately half of this funding is available as grants or principal forgiveness loans.

PFAS CERCLA Liability Exemption Bills Introduced in the Senate. EPA introduced a proposed rule that designates two PFAS—perfluorooctanoic acid and perfluorooctanesulfonic acid—as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The proposed rule would subject passive receivers of PFAS, such as water utilities

and municipal landfills, to strict joint-and-several liability under CERCLA. In response to the proposed rule, water utility groups and other stakeholder groups exposed to liability under the proposed rule have pushed for a statutory exemption from such CERCLA liability. Although EPA has pledged to avoid holding passive receivers of PFAS liable under CERCLA, water utilities maintain that such efforts will not prevent third parties from suing to pass on cleanup costs. A Wyoming Senator, Sen. Cynthia Lummis, has introduced a suite of legislation that, if passed, would shield drinking water and wastewater facilities along with other entities from PFAS-related liability under CERCLA. The senator's proposed legislation includes a resource management bill to shield solid waste management facilities from liability, as well as a water systems bill to protect public water systems, public and private treatment works, municipalities permitted for stormwater discharges, political subdivisions and special districts, and contractors performing management or disposal activities for these entities. The Senate Environment and Public Works Committee is also working to create a bipartisan bill addressing PFAS. It is uncertain whether this proposed legislation exempting water utilities and other entities from CERCLA liability will survive negotiations.

EPA Proposes Federal Baseline Water Quality Standards for Tribal Lands. On May 3, 2023, EPA proposed the first federal baseline water quality standards ("WQS") for waterbodies on Native American reservations. The protections afforded by the Clean Water Act ("CWA") are not currently extended to a majority of U.S. Tribes with Native American reservations. The proposed baseline standards would extend the CWA framework, which currently exists for most other waters of the United States, to include waters of more than 250 Tribes. EPA's proposal comes after decades of coordination between EPA and Tribal communities, and EPA estimates that the proposed standards will provide increased protection for approximately 76,000 miles of rivers and streams and 1.9 million acres of other surface waters within Native American reservations. The proposed Tribal baseline WQS would provide a common set of designated uses and policies for Tribal waters, with the flexibility to enable EPA to tailor the standards to local circumstances. Several Tribal-affiliated organizations support the proposal and note that the Tribal baseline WQS will aid tribal communities in their existing efforts to protect waters on Tribal lands from pollution. EPA will accept comments on the proposed rule until August 3, 2023. EPA will also host two online public hearings for interested parties to provide oral comments, which are scheduled for June 27, 2023 and July 12, 2023.

EPA Requires Inclusion of Cybersecurity in Sanitary Surveys. EPA has issued a final memorandum requiring water utilities to consider cybersecurity vulnerabilities in "sanitary surveys" as part of the Biden Administration's focus on cyber resiliency despite firm stakeholder opposition. The agency issued its final memorandum to state drinking water administrators in March 2023, which adopts a policy requiring periodic "sanitary surveys" to include a cyber security component. EPA has outlined requirements that provide options for water systems to choose from in order to comply with the new mandates and issued a guidance document providing resources to help with implementation. The memorandum and guidance document are available at: **https://www.epa.gov/waterriskassessment/epa-cybersecurity-water-sector#rule**. The EPA's assistant administrator of the Office of Water has stated that cyber-attacks against critical infrastructure, like water systems, have been increasing and that such attacks have the potential to contaminate drinking water and threaten public health. However, industry groups oppose the use of sanitary surveys to address these cybersecurity concerns. They contend that the new mandate goes beyond providing regulatory clarity but rather establishes new regulatory requirements not otherwise imposed under the Safe Drinking Water Act, which requires that sanitary surveys be conducted. The memorandum provides three program options for states to implement additional cybersecurity considerations in order to comply with the new mandates so long as the programs are at least as stringent as a sanitary survey and effectively identify cybersecurity gaps.

EPA Must Complete Landfill Emission Review by January 2024. An April 2023 consent decree between EPA and conservation groups, emerging out of the case *Environmental Integrity Project v. Reagan*, No. 1:22-cv-02243 (D.D.C. March 23, 2023) (order granting joint motion to enter consent decree), requires the agency to take a renewed look at emission factors for municipal solid waste landfills. The conservation groups alleged that EPA failed to examine its emission factors to estimate the quantity of emissions of carbon monoxide, volatile organic compounds, and oxides of nitrogen from municipal solid waste landfills for three years. Per the consent decree, EPA must review and issue draft revisions to the emission factors or a draft determination that a revision is not necessary under Clean Air Act Section 130 by January 15, 2024, and must finalize the revisions or determination by August 15, 2024.

EPA Proposes Rule Changes to Legacy Coal Combustion Residuals ("CCRs") Surface Impoundments and CCR Management Units. In May 2023, EPA proposed changes to CCR regulations for inactive surface impoundments at inactive electric utilities, referred to as "legacy CCR surface impoundments." The proposed rule would require owners and operators of active legacy CCR surface impoundments to comply with requirements applicable to inactive CCR surface impoundments, except for location restrictions and liner design criteria. The proposed rule would also establish groundwater monitoring, corrective action, closure, and post-closure care requirements at all CCR management units. Comments are due on July 17, 2023.

EPA Changes Definition of "Municipal Waste Combustion Unit". In 2020, EPA proposed to modify the Other Solid Waste Incineration definition of "municipal waste combustion unit" in 40 Code of Regulation Sections 60.2977 and 60.3078 by removing pyrolysis/combustion units from the definition, therefore drastically changing regulation of pyrolysis/combustion units.

However, in June 2023, EPA withdrew the proposed change to the definition after reviewing comments on the proposed amendment. This decision maintains the regulated emission limits for municipal solid waste incinerators that combust less than 35 tons per day and stand-alone incinerators for institutional waste.

Federal Clean Air Act ("FCAA") Fee Requirements for Non-Attainment Zones. On April 26, 2023, the Houston-Galveston Area Council of Governments hosted EPA and the Texas Commission on Environmental Quality to discuss federal requirements for major stationary point source penalty fees. The Houston-Galveston-Brazoria ("HGB") was reclassified as a severe ozone nonattainment area in November 2022, and therefore major sources in the HGB area will be subject to a FCAA Section 185 fee if the area fails to attain the 2008 eight-hour National Ambient Air Quality Standard of 0.07 parts per million by July 20, 2027. The fee is required each year following the missed attainment date until the area is redesignated as attainment by EPA – meaning that the Section 185 fee could be imposed as early as 2028 and is estimated to total as much as $154 million. If the state fails to collect the fee, EPA will impose interest on the fee until collected.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Repeals Suspension or Adjustment of Water Rights During Drought. TCEQ repealed Chapter 36 of the Texas Administrative Code ("TAC") in its entirety, effective March 30, 2023. The repeal of this chapter comes after junior rights holders brought a lawsuit against TCEQ for the Executive Director's suspension of only specific water rights for junior water rights holders pursuant to Chapter 36 in response to a priority call by The Dow Chemical Company during the severe drought conditions in 2013. Members of the Texas Farm Bureau were among those with suspended rights who sued TCEQ to challenge the validity of the drought rules under 30 TAC Chapter 36. The Thirteenth Court of Appeals at Corpus Christi, Texas affirmed the district court decision that declared the drought rules invalid. Due to this invalidation of the drought rules, TCEQ published the proposed repeal in the Texas Register in October 2022 and officially repealed Chapter 36 on March 30, 2023.

Public Utility Commission of Texas ("PUC")

PUC Chair Peter Lake Resigns. On June 2, Governor Greg Abbott released a statement indicating that PUC Chair Peter Lake has resigned his post. Chairman Lake will remain at the PUC until July 1.

Chairman Lake was appointed to the PUC by Governor Abbott in April 2021 following the firing of former Chair DeAnn Walker in the aftermath of Winter Storm Uri. The aftermath of Winter Storm Uri prompted the PUC to pursue various ERCOT reform efforts, including the establishment of a new system of tradeable wholesale generation credits intended to incentivize new generation construction.

Lake, in a statement provided to the online Texas Tribune announcing his resignation, said he had inherited a vulnerable power grid but now expressed confidence in it. "Thanks to the hard work of the teams here and at ERCOT, and my fellow commissioners, today, our grid is more reliable than ever," he said.

Commissioner Kathleen Jackson has been appointed by Governor Abbott to serve as Interim Chair of the PUC. Jackson was appointed as a commissioner on August 5, 2022, and confirmed by the Texas Senate on May 26, 2023.

AEP, CenterPoint, and TNMP File DCRF Applications with PUC. In April 2023, AEP Texas ("AEP"), CenterPoint Energy Houston Electric, LLC ("CenterPoint"), and Texas-New Mexico Power Company ("TNMP") filed applications with the PUC to adjust their Distribution Cost Recovery Factor ("DCRF") to recover new investment in distribution equipment.

AEP filed its DCRF Application on April 5 (*Application of AEP Texas Inc., to Amend its Distribution Cost Recovery Factor and Implement Rider Mobile Temporary Emergency Electric Energy Facilities*, Docket No. 54824 (pending)), requesting a DCRF revenue requirement of $142,543,876, an increase of distribution revenues by $39,703,105. AEP additionally requested authority to implement Rider Mobile Temporary Emergency Electric Energy Facilities ("TEEEF"), which results in a request of $30,670,219 associated with the leasing and operating of TEEEF, long-term lease payments, and associated carrying charges on the present value of minimum long-term lease payments. The proposed effective date for both Riders is September 1, 2023.

CenterPoint filed its DCRF Application on April 5 (*Application of CenterPoint Energy Houston Electric, LLC for Approval to Amend its Distribution Cost Recovery Factor*, Docket No. 54825 (pending)), requesting a DCRF revenue requirement of $162,548,833, an increase of distribution revenues by $84,571,868. In addition to its DCRF application, CenterPoint filed an application for approval to amend its TEEEF Rider (*Application of CenterPoint Energy Houston Electric, LLC to Amend its Temporary Emergency Electric Energy Facilities Rider*, Docket No. 54830 (pending)). In this Rider Application, CenterPoint requested a TEEEF revenue requirement of $187,875,401. The proposed effective date for both Riders is September 1, 2023.

TNMP filed its DCRF application on April 5, 2023 (*Application of Texas-New Mexico Power Company to Amend its Distribution Cost Recovery Factor*, Docket No. 54807 (pending)). TNMP requested a DCRF revenue requirement of $49,418,541, an increase of distribution revenues by $14,800,834. The proposed effective date for the proposed rates is September 1, 2023.

AEP, CenterPoint, Oncor, and TNMP File EECRF Applications with PUC. At the end of May and early June 2023, AEP, CenterPoint, Oncor Electric Delivery Company, LLC (Oncor), and TNMP filed applications with PUC to adjust their Energy Efficiency Recovery Cost Factor ("EECRF") to reflect changes in program costs and bonuses, and to correct any over- or under- collection of energy

efficiency costs resulting from the use of the EECRF.

On June 1, AEP filed its 2024 EECRF application with PUC (*Application of AEP Texas, Inc. to Adjust its Energy Efficiency Cost Recovery Factor and Related Relief*, Docket No. 55094 (pending)). AEP is seeking to adjust its EECRF to collect $24,833,529 in 2024.

On June 1, CenterPoint filed its 2024 EECRF application with PUC (*Application of its CenterPoint Energy Houston Electric, LLC to Adjust its Energy Efficiency Cost Recovery Factor*, Docket No. 55088 (pending)). CenterPoint is seeking to adjust its EECRF to collect $52,602,439 in 2024.

On May 31, Oncor filed its 2024 EECRF application with PUC (*Application of Oncor Electric Delivery Company LLC to Adjust its Energy Efficiency Cost Recovery Factor*, Docket No. 55074 (pending)). Oncor is seeking to adjust its EECRF to collect $72,399,769 in 2024.

On May 26, TNMP filed its 2024 EECRF application with PUC (*Application of Texas-New Mexico Power Company to Adjust its Energy Efficiency Cost Recovery Factor and Related Relief*, Docket No. 55034 (pending)). TNMP is seeking to adjust its EECRF to collect $6,625,905 in 2024.

Update on PUC Rulemaking Projects. PUC Staff's current rulemaking calendar for 2023 can be found under Docket No. 54455. As of May 23, 2023, the following rulemaking projects are being prioritized:

- Project No. 52059 – Review of Commission's Filing Requirements
- Project No. 54589 – Review of Chapter 26 – Substantive Rules Applicable to Telecommunications Service Providers
- Project No. 54233 – Technical Requirements and Interconnection Processes for Distributed Energy Resources ("DERs")
- Project No. 53924 – Water and Sewer Utility Rates after Purchase or Acquisition
- Project No. 54932 – Review of § 24.101 – Water Rate Appeals
- Project No. 54844 – Minor and Conforming Rule Updates 2023

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

- Project No. 53404 – Restoration of Electric Service After a Widespread Outage
- Project No. 54584 – Reliability Standard for the ERCOT Market
- Project No. 54585 – Emergency Pricing Program
- 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
- Project No. 54224 – Cost Recovery for Service to DERs

Railroad Commission of Texas ("RRC")

SiEnergy Files Statement of Intent to Increase Gas Utility Rates. On May 5, 2023, SiEnergy, LP ("SiEnergy") filed its Statement of Intent to Increase Gas Utility Rates within the Unincorporated Areas Served by SiEnergy North Central and South Texas with RRC. The total revenue increase is approximately $9,692,854 on a system-wide basis, which results in a $2,667,058 increase in rates in the incorporated service areas served by SiEnergy. As a result of this increase, South and Central Texas Residential Customers will see an increase in customer charges of $8.00, and North Texas Residential Customers will see an increase in customer charges of $7.75. The cities of Grand Prairie, Mansfield, Waxahachie, and Houston Residential Customers will see a $10.00 increase in customer charges. In addition to increasing its rates, SiEnergy is requesting the approval of uniform base rates for all SiEnergy service areas.

The proposed effective date was June 9, 2023. On May 17, 2023, the RRC suspended the effective date for a period of 150 days. The new effective date is now November 6, 2023. More information can be found on the RRC website in Case No. 00013504.

Atmos Pipeline Files for Rate Increase. Atmos Pipeline Texas ("APT"), a division of Atmos Energy Corporation, filed a base rate case with the RRC on May 19 seeking a total base rate of approximately $4.2 billion, which constitutes a $119.4 million increase of annual revenue on a system-wide basis. If approved, the proposed rates will increase APT's annual revenues by 14.40%.

Additionally, APT is requesting the RRC approve the continuation of two Riders and the approval of a new Rider, the System Safety and Integrity ("SSI") Rider. The SSI Rider will allow APT to recover maximum allowable for operating pressure activities performed and testing costs, and expenses incurred to comply with other safety and integrity regulations adopted by the RRC and the Pipeline and Hazardous Materials Safety Administration. The SSI Rider accounting will begin on January 1, 2023.

The proposed effective date for this rate increase is June 23, 2023. On June 13, the RRC suspended the effective date by 150 days. More information can be found on the RRC website in Case No. 00013758.

Atmos Energy Releases Quarterly Earnings and Files for Rate Increases under Rate Review Mechanism. Atmos Energy ("Atmos") released its quarterly earnings for the three-month period ending on March 31, 2023. These earnings include a consolidated operating income of $422.6 million (a $37.5 million increase from the $385.1 million reported during the corresponding prior-year period). Atmos credited rate case outcomes, increased customer consumption, and increased customer growth in its distribution segment for the higher revenues. Atmos additionally reported distribution operating income of $335.3 million (a $24 million increase from the corresponding prior-year period), and pipeline and storage income of $87.4 million (a $13.5 million increase from the corresponding prior-year period).

Additionally, on March 31, Atmos filed for rate increases for its Mid-Tex and West Texas service areas under an interim ratemaking process known as the Rate Review Mechanism ("RRM"). The proposed Mid-Tex filing, if approved, would increase Atmos Mid-Tex's annual revenues for the RRM cities within that division by $141.7 million. This compares to $115 million last

year. The proposed impact on an average residential customer is $7.41 per month. This compares to $4.60 per month last year.

The proposed West Texas filing, if approved, would increase Atmos West Texas's revenues by $12.1 million. The company asserts that this charge would help it recover more than $140 million spent from January 2022 through December 2022. The proposed impact on an average residential customer would be $5.88 per month. This compares to $6.72 million last year resulting in an average residential customer impact of $3.36 per month last year.

Atmos Cities Steering Committee and Atmos-West Texas Cities will begin settlement discussions with Atmos West Texas and Mid-Tex regarding the new RRM filings within the next couple of months. The RRMs are expected to be approved between early August and late September, and the new rates should go into effect by October 1.

"Agency Highlights" *is prepared by Chloe Daniels in the Firm's Water and Districts Practice Groups; Mattie Isturiz in the Firm's Air and Waste Practice Group; and Samantha Miller 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 Chloe at 512.322.5814 or chloe.daniels@lglawfirm.com, or Mattie at 512.322.5804 or misturiz@lglawfirm.com, or Samantha at 512.322.5808 or smiller@lglawfirm.com.*

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