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LOPER BRIGHT AND *CORNER POST* - EFFECT ON TEXAS BUSINESSES AND GOVERNMENTAL ENTITIES

by James F. Parker

In the final three days of the U.S. Supreme Court's term before its summer break, two of the most impactful decisions on federal administrative law in the twenty-first century were announced.

In *Loper Bright*, the Supreme Court eliminated the *Chevron* deference requirement.

First, the *Loper Bright* decision, issued June 28, 2024, overturned the *Chevron* rule by which courts deferred to agency interpretations of ambiguous statutes.[1] The Court cited the Federalist Papers, reasoning that the Framers envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts."[2] The Court also cited the House and Senate Reports from 1946 when the Administrative Procedure Act ("APA") was enacted, noting that the APA provided that "questions of law are for courts *rather than agencies* to decide in the last analysis."[3]

In anticipation of fears that courts are less equipped to interpret technical statutory questions, the Supreme Court noted that courts "do not decide such questions blindly"—instead, the parties and *amici* in such cases are "steeped in the subject matter, and reviewing courts have the benefit of their perspectives."[4] Accordingly, the *Loper Bright* decision allows the judiciary to apply its own independent judgment in deciding whether a federal agency has acted within its statutory authority. It no longer must defer to agency interpretation of the law simply because a statute is ambiguous.

Though overturning *Chevron*—a foundational rule of administrative law for the last four decades—was significant, the *Corner Post* decision issued on July 1, 2024 is the follow-on decision that Justice Jackson states in her dissent allows "every legal claim conceived of in those last four decades—and before" to be brought back before the courts "unleashed from the constraints of any such [*Chevron*] deference."[5]

In *Corner Post*, the Supreme Court eases time limits under the APA statute of limitation.

In *Corner Post*, the Court examined "when a claim brought under the Administrative Procedure Act 'accrues' for purposes" of the six-year default statute of limitations for suits against the United States under 28 U.S.C. § 2401(a).[6] This question arose when Corner Post, a truck stop incorporated in 2017 and open for business in 2018, was displeased with paying hundreds of thousands of dollars in interchange fees for debit card transactions and sued the Federal Reserve Board to challenge "Regulation II." The problem, however, was that the District Court and Eighth Circuit held that Corner Post's claim was barred by the six-year statute of limitation, which accrued in 2011 when the Board first published Regulation II and expired six years later in 2017. In other words, under the lower courts' interpretation, Corner Post's claim expired before any customer ever swiped a debit card.

The Supreme Court disagreed with the District Court and Eighth Circuit, holding that the statute of limitations "begins to run only when the plaintiff has a complete and present cause of action," which can only occur when the specific plaintiff is "injured."[7] In Corner Post's case, it was not injured until a customer swiped a debit card and caused it to

Loper continued on page 3

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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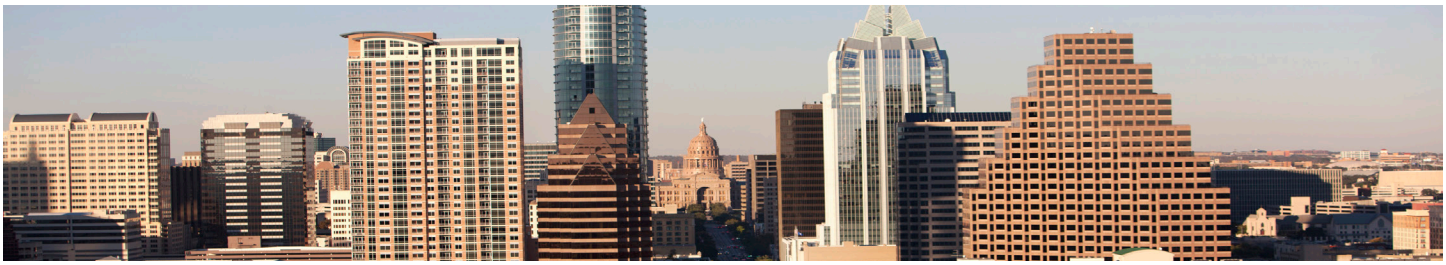
FIRM NEWS

Lauren Thomson has rejoined the Firm's Water, Compliance and Enforcement, and Litigation Practice Groups as an Associate. Lauren's practice involves working with environmental matters at the federal, state, and local levels. Lauren assists clients with issues pertaining to water quality, water resources development, regulatory compliance, enforcement, permitting, and litigation. Lauren has represented clients before the Texas Commission on Environmental Quality, the Texas State Office of Administrative Hearings, the Texas Public Utility Commission, and state and federal district and appellate courts, including the Supreme Court of Texas and the United States Court of Appeals for the Fifth Circuit. Lauren received her doctor of jurisprudence from the Texas A&M University School of Law and her bachelor's degree from Texas A&M University.

Toni Rask has joined the Firm's Water Practice Group as an Associate. Toni's practice involves working in environmental matters at all levels of government. Toni assists clients with all matters relating to water—water rights, permitting, regulatory compliance, water quality matters, resource development, enforcement, and litigation. With a background in public service, Toni is particularly interested in assisting local governments and political subdivisions in these matters. During law school, Toni demonstrated leadership and dedication to the field by serving as president of the Energy & Environmental Law Society as well as interning for the Environmental Protection Agency in Dallas. Toni received her doctor of jurisprudence and LL.M. in environment, energy & natural resources law from the University of Houston Law Center and her bachelor's degree from American University.

Mary Martha Murphy has joined the Firm's Water Practice Group as an Associate. Mary Martha assists clients with issues pertaining to water quality, permitting, enforcement, regulatory compliance, and litigation. Prior to joining Lloyd Gosselink, Mary Martha practiced law for over eight years in the public sector, primarily at the Texas State Board of Pharmacy. During her tenure there, she obtained a wealth of knowledge in all aspects of administrative law and government agency processes and represented the Board in enforcement actions and in contested case hearings before the State Office of Administrative Hearings. Mary Martha received her doctor of jurisprudence from

News continued on page 16



The Attorney General clarifies ambiguities concerning General and Special Law Districts' Board of Directors. Tex. Att'y Gen. Op. KP-0468 (2024).

The Ector County Utility District (the "District") requested an opinion from the Texas Attorney General (the "AG") to resolve several questions regarding the election, appointment, and removal of its Board of Directors. The AG provided guidance on three of the District's questions.

First, the District asked whether an elected official holds their office unlawfully if that official filled out an untruthful or otherwise deficient ballot application. The AG applied Texas Election Code § 141.034(a) to conclude that challenges to a ballot application based on form, content, or procedural insufficiencies are moot if the challenge is brought within 50 days of the election.

Second, the District asked for guidance regarding vacancies on the District's Board of Directors. Specifically, the District sought clarification on whether its Board was disqualified from making an appointment to fill a Board vacancy. Texas Water Code § 49.105(a) states that districts may fill vacancies on the Board within 60 days following the date of vacancy. However, if the district fails to fill the vacancy in 60 days, either the Commissioners Court or TCEQ may fill the seat by appointment. The Board may still fill a vacancy after the expiration of the 60-day statutory timeframe, but that power requires a petition requesting the Board to fill a vacancy that is signed by at least 10% of the voters in the district. In this opinion, the AG found that a court would likely construe Texas Water Code § 49.105 as advisory, rather than mandatory, indicating the District could still fill a Board vacancy after the 60-day statutory timeframe expired if the voters, TCEQ, or Commissioners Court failed to act. The AG explained this interpretation of Texas Water Code § 49.105 fulfills the overall intent of the statute, which is to ensure any vacancies on the Board are promptly filled.

Third, the District asked about its power to remove individuals from its Board of Directors, specifically under Texas Local Government Code § 178.053(a) and Texas Civil Practice and Remedies Code § 66.001. Regarding the Local Government Code, the AG concluded this statute was inapplicable because the subsection in question applies to board members who are wholly or partly appointed, whereas the District's Board of Directors are elected. Regarding the Civil Practice and Remedies Code, the AG explained that Section 66.001 allows for an action in "*quo warranto*" to remove an office holder, which applies to individuals serving on the District's Board of Directors. However, this action in *quo warranto* may not be brought by the District — this action may only be brought by the AG, County Attorney, or District Attorney. The AG explained how Section 66.001 imposes no factual threshold to determine when such action is warranted, which grants the AG, County Attorney, or District Attorney discretion to decide whether to petition the Court in this manner.

Jake Steen is an Associate in the Firm's Water, Districts, and Litigation Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Jake at 512.322.5811 or jsteen@lglawfirm.com.

Loper continued from page 1

incur interchange fees in 2018. This made sense, according to the Court, because a plaintiff does not have a complete and present cause of action until she has the right to file suit and obtain relief. After all, Corner Post would not have been able to challenge Regulation II until it was injured by the regulation. Additionally, the Court explained that it "respects our 'deep-rooted historic tradition that everyone should have [their] own day in court.'"[8]

The Supreme Court therefore held that Corner Post's claim was not barred by the statute of limitations. To show that its decision did not open Pandora's box, the Court also noted that a federal regulation that "makes it six years without being contested [did] not enter a promised land free from legal challenges" in the first place and that "courts entertaining later challenges often will [still] be able to rely on binding Supreme Court or circuit precedent."[9]

Together, these two decisions represent a shift in the established practice of federal administrative law that Justice Jackson foresees will cause a "tsunami of lawsuits against agencies" with "the potential to devastate the functioning of the Federal Government."[10] While only time will show the extent of these decisions' impact, two things are clear: judges no longer need defer to the federal agencies' interpretation of ambiguous statutes and the six-year statute of limitation no longer

takes away a plaintiff's federal cause of action before they have one.

What do *Loper Bright* and *Corner Post* mean for state and local governmental entities and the businesses they regulate?

Like the federal government, Texas has an APA, which allows actions to be brought challenging the validity or applicability of a statute, rule, administrative ruling, or a rule adopted by a Texas agency.

But while the Texas APA is similar to its federal counterpart, the impact of the Supreme Court's decisions in *Loper* and *Corner Post* on the Texas APA is unclear. For starters, Texas has never expressly adopted the *Chevron* deference doctrine. Instead, the Texas Supreme Court has said that Texas courts conduct a similar analysis, "generally uphold[ing] an agency's interpretation of a statute it is charged by the Legislature with enforcing so long as the construction is reasonable and does not contradict the plain language of the statute."[11] Yet while agency interpretations are given "great weight," courts have held that agency interpretations are "not controlling."[12]

Moreover, in sharp contrast to the express statute of limitations in 28 U.S.C. § 2401(a), the Texas APA does not contain an express statute of limitations itself—rather, the statute of limitations depends on what agency or rule is being challenged.

Though *Loper Bright* and *Corner Post* are the most significant federal administrative decisions of the 21st century, their impact on Texas state agencies and local governmental entities and the Texas businesses they regulate is complex. These decisions also raise many questions. For example, will *Loper Bright* further reduce the level of deference that Texas courts give to state agencies? Will *Corner Post* revive claims long thought to be barred? Will Texas state courts experience a "tsunami of lawsuits" as Justice Jackson predicts will happen in the federal courts? And if so, what role will the new Fifteenth Court of Appeals play?

Ultimately, both regulators and regulated parties should be prepared to grapple with this changed landscape in their advocacy before both federal agencies and reviewing state courts.

[1]*Loper Bright Enterprises v. Raimondo*, Nos. 22-451 and 22-1219, 2024 U.S. LEXIS 2882 (June 28, 2024).
[2]*Id*. at *2.
[3]*Id*. at *34.
[4]*Id*. at *47-48.
[5]*Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, No. 22-1008, 2024 U.S. LEXIS 2885, at 89 (July 1, 2024).
[6]*Id*. at *10.
[7]*Id*. at *22.
[8]*Id*. at *10.
[9]*Id*. at *36.
[10]*Id*. at *89.
[11]*R.R. Comm'n v. Citizens Safe Future*, 336 S.W.3d 619, 626 (Tex. 2011).
[12]See *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998) (stating "[w]hile not controlling, the contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.").

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TITLE VII DISCRIMINATION: GETTING BACK TO BASICS

by Sarah T. Glaser

Title VII of the Civil Rights Act of 1964 protects employees from discrimination by their employer. For forty years, Fifth Circuit precedent required a plaintiff under Title VII to show he or she had been subjected to an "ultimate employment decision" to state a cognizable discrimination claim. In other words, the plaintiff must show they were fired, not hired, demoted, etc. and likely would not succeed on a discrimination claim based on a more minor concern, such as unequal treatment with respect to days off, facilities, or other benefits.

Section 2000e-2(a) prohibits discrimination by providing that it shall be an unlawful employment practice for an employer:

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[1]

To establish a *prima facie* case of Title VII discrimination, a plaintiff must show: (1) he/she is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some **adverse employment action** by the employer; and (4) was replaced by someone outside [his/her] protected group or was treated less favorably than other similarly situated employees outside the protected group.[2]

Because the Texas Labor Code's anti-discrimination provision[3] has similar language as Title VII's anti-discrimination provision, it is worth nothing that courts often analyze parallel claims together under the Title VII framework.[4]

Under Title VII's discrimination provision, an "**adverse employment action**" is "discrimination in hiring, firing, compensation, or the 'terms, conditions, or privileges of employment.'"[5] For nearly thirty years, Fifth Circuit precedent required a plaintiff under

Title VII to show he or she had been subjected to an "ultimate employment decision" to state a cognizable discrimination claim.[6] In an August 2023 decision, the Fifth Circuit held that to limit disparate treatment claims to those involving ultimate employment decisions ignored the "terms, conditions, or privileges of employment" language of the provision, significantly expanding application of the statute.[7] The Court did not address exactly what level of harm done by the employment action must be shown.[8]

Shortly after, in April 2024, the United States Supreme Court addressed a significant circuit split over the threshold of harm an employee must show resulted from the employment action, holding that the employee must show "some harm respecting an identifiable term or condition of employment," which is less than "significant" harm (which was the Eighth Circuit's prior standard).[9]

Thus, in the last year, Fifth Circuit precedent regarding what is an "**adverse employment action**" in Title VII discrimination cases turned on its head. Until this recent change, a plaintiff alleging discrimination must meet the high burden of establishing an "ultimate employment decision." This is no longer the case.

Employment lawyers and courts alike have consistently argued that Title VII should not be used and transformed into "a general civility code for the American workplace," and with the *Muldrow* decision requiring some showing of actual harm, this basic premise has not changed. Title VII continues to not permit liability for "*de minimis* workplace trifles."

However, there's no doubt that employers must look closer at the details of the employment relationship—the "terms, conditions, or privileges" and seek to remedy any disparate harm to a particular group of employees stemming from the same. Employers should review any workplace policies or practices which appear on their face or in practice to impact a particular class of people and see if changes can be made to reduce their disparate impact.

[1]42 U.S.C. § 2000e-2(a).
[2]*Traudt v. Data Recognition Corp.*, No. 23-10498, 2024 U.S. LEXIS 2165, at *4 (5th Cir. Jan. 31, 2024); *Willis v. W. Power Sports, Inc.*, No. 23-10687, 2024 U.S. LEXIS 2737, at *3 (5th Cir. Feb. 6, 2024); *Harper v. Lockheed Martin Corp.*, No. 22-10787, 2024 U.S.LEXIS 2159, at *3-4 (5th Cir. Jan. 31, 2024).
[3]In Texas, an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee. Tex. Labor Code § 21.051.
[4]*Willis*, 2024 U.S. LEXIS 2737, at *2.
[5]*Harper*, 2024 U.S.LEXIS 2159, at *4; *Hamilton v. Dallas Cty.*, 79 F.4th 494, 497 (5th Cir. 2023) (*en banc*) ("Despite [Title VII's] broad language, we have long limited the universe of actionable adverse employment actions to so-called 'ultimate employment decisions.' We end that interpretive incongruity today.... [W]e hold that a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the 'terms, conditions, or privileges' of her employment. She need not also show an 'ultimate employment decision,' a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias."); *Johnson v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 90 F.4th 449, 461 (5th Cir. 2024).
[6]*Hamilton*, 79 F.4th at 501.
[7]*Id.*
[8]*Id.* at 505.
[9]*Muldrow v. City of St. Louis*, No. 22-193, 2024 U.S. LEXIS 1816, at *3 (Apr. 17, 2024).).

Sarah Glaser is the Chair of the Firm's Employment 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.

LEGISLATIVE COMMITTEES EVALUATE TEXAS ELECTRIC MARKET DURING INTERIM HEARINGS

by Roslyn M. Dubberstein

In mid-June, the House State Affairs Committee and the Senate Business & Commerce Committee held hearings to evaluate the progress of electric market changes from the 2023 Texas Legislative Session and to begin discussing potential focuses for the 2025 Texas Legislative Session. Both hearings addressed a wide range of issues, from the impact of crypto mining on the Texas grid to the interplay between transmission buildout and the state's continuous load growth. Both committees heard invited testimony from representatives of the Electric Reliability Council of Texas ("ERCOT"), the Independent Market Monitor ("IMM"), the Public Utility Commission of Texas ("PUC"), generators, consumers, and Bitcoin miners, among others.

The dialogue in both hearings repeatedly circled back to a few overarching questions:

- *How can the state manage rapidly growing energy consumption and prioritize reasonable consumer costs?*
- *How can policymakers help facilitate regulatory market certainty?*
- *Does the Performance Credit Mechanism, incorporated into legislation during the 2023 Legislative Session, have a future in the Texas energy-only market?*
- *Is there a need to differentiate between crypto mining operations and data centers*

as these industries continue to move into the Texas grid?

Rapid Load Growth

Legislators were surprised to learn that ERCOT's projected load growth for Texas has increased significantly. ERCOT Chief Executive Officer ("CEO") Pablo Vegas testified that the projected load growth through 2030 was originally 85 gigawatts but has since increased to 150 gigawatts. This means peak demand would effectively double over the course of about six years. Vegas described an "insatiable demand" for electricity to support artificial intelligence, industrial electrification of oil and gas operations, and various industrial operations. According to Vegas, the U.S. Inflation Reduction Act is a major impetus for much of the industrial growth in Texas, particularly as it relates to hydrogen production.

Consumer representatives emphasized the need to consider costs when assessing how to best serve the state's constantly growing demand. Transmission expansion is one avenue for addressing rapidly increasing demand, but allocating and managing the costs of transmission expansion is a concern, particularly given the cost of numerous changes since Winter Storm Uri. Julia Harvey with Texas Electric Cooperatives testified that "costs have to be foreseeable and reasonably commensurate with benefits." Thomas Brocato, on behalf of the Steering Committee of Cities Served by Oncor and the Texas Coalition for Affordable Power, noted that market modifications since Winter Storm Uri have had cost implications, including an increase in transmission and distribution utility rates. Similarly, Courtney Hjaltman with the Office of Public Utility Counsel testified that 30-40% of residential bills are transmission and distribution costs. Given these discussions, finding a balance between demand and cost will likely require continued discussion at the Legislature.

Regulatory Market Certainty and Reliability

Many parties providing testimony emphasized the importance of legislative stability during the upcoming Session. Stakeholders discussed that regulatory market certainty is crucial to stimulate investment. Based on the number of new programs and endeavors since Winter Storm Uri, this testimony seemed to indicate a desire to steer away from broad sweeping electric market reform in the upcoming session.

PUC Chairman Thomas Gleeson testified that the PUC expects to finalize a rule in August that will mandate a particular reliability standard. This will likely contemplate the frequency and magnitude of outages. ERCOT CEO Pablo Vegas said that many parts of the country will be watching the development of Texas's reliability standard as a possible guide.

The Future of the Performance Credit Mechanism

The Senate Business & Commerce Committee ("BCC") was particularly interested in whether the Performance Credit Mechanism ("PCM"), recommended by E3 and incorporated into House Bill 1500 last session, is still an appropriate market reform for Texas. Many legislators, particularly on the Senate BCC, were skeptical of PCM and asked whether it is still a necessary component for the market design in Texas. In response to questions from legislators, ERCOT representatives provided that PCM is not mandatory and may not be a necessary addition to the market but that it is important to do the study work to find out.

PUC Chairman Thomas Gleeson explained that PUC is currently conducting a comment process for stakeholders to weigh in on the appropriate parameters for PCM. Gleeson noted that there will also be a cost-benefit analysis of PCM, as required by statute. On behalf of Texas Industrial Energy Consumers, Katie Coleman expressed concerns about PCM being a move away from the energy-only market. Additionally, there is skepticism about how high the cost of new entry may be to generators if PCM is ultimately implemented.

Crypto Mining and Data Centers

ERCOT Chief Operating Officer Woody Rickerson testified that all crypto mining in Texas equates to about 2,600 megawatts, or the equivalent of the City of Austin. During peak times, however, the crypto mining load drops to about 200 megawatts because crypto has the ability to go offline. The projected crypto load forecast for 2030 is 11,000 megawatts.

Senators on BCC had several probing questions for the crypto mining industry and expressed concerns about conflating crypto operations and data centers. Senator Nichols asked about how to distinguish between the two. One approach would be to distinguish by energy characteristics, such as operation duration; another distinction could be to look at end results. As we approach the 2025 Legislative Session, legislators may be interested in creating distinct definitions for the two terms. The House State Affairs Committee discussed the registration process for crypto miners and whether there should be legislation to limit crypto mining in Texas.

Overall, the interim hearings illustrated that the electric market remains a crucial subject for Texas policymaking as we approach the next legislative session. This is particularly evident given the lingering impacts of Winter Storm Uri and the steady growth throughout the state. The House State Affairs Committee's next interim hearing is scheduled for August 16. The Senate BCC's next interim hearing is scheduled for August 27.

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BOTH U.S. SUPREME COURT AND TEXAS SUPREME COURT MAKE HEADLINES ON SIGNIFICANT ADMINISTRATIVE LAW AND WATER QUALITY ISSUES

by Nathan E. Vassar

Earlier this summer, both the Supreme Court of the United States ("SCOTUS") and the Supreme Court of Texas ("SCOTX") generated headlines that will have implications to the regulated community both in Texas and on a national scale. First, in mid-June, SCOTX announced it would take up the long-fought-over case involving the Texas Commission on Environmental Quality's ("TCEQ's") issuance of a discharge permit to the City of Dripping Springs. *Tex. Comm'n on Env't. Quality v. Save Our Springs All.*, 668 S.W.3d 710, 716 (Tex. App.—El Paso 2022, pet. granted). That case addresses water quality concerns from an environmental organization and asks whether the TCEQ's antidegradation review was sufficient in light of nutrient loadings under the permit. A couple of weeks later, SCOTUS abandoned a long-established precedent of giving deference to administrative agency decisions, ending what has been known for decades as "Chevron deference." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Both cases present important issues for utilities and private entities alike, and may lead to additional litigation down the road over a broad range of topics, including TCEQ processing of TPDES permits as well as any federal rulemaking and guidance decisions. They also both challenge the underlying premise that specialized agencies should have the benefit of the doubt when it comes to following their own rules.

First, on the Texas front, the Dripping Springs case presents novel issues concerning nutrient loadings and the manner in which TCEQ analyzes potential degradation of water quality. The case, which has been ongoing for more than five years at this point, involved Dripping Springs' discharge permit application and TCEQ's issued permit for a discharge into Onion Creek. Following the state approval of the permit, Save our Springs Alliance initiated an administrative appeal, and successfully convinced the Travis County District Court that the TCEQ did not follow required antidegradation rules in light of the total nutrient loadings that would be introduced into the watercourse. Subsequent to that, the appellate court reversed, finding that TCEQ did, in fact, properly issue the permit, and its reliance upon TCEQ Implementation Procedures was appropriate. Now the SCOTX will decide what is a highly technical, but greatly consequential question on whether TCEQ's practice of following its internal protocols in antidegradation review was sufficient for this permit.

The broader implications of the Dripping Springs case affect both water quality permitting issues as well as the bigger question of how much deference TCEQ should be afforded in making permitting decisions. The antidegradation question—hinging on whether water quality would be compromised by more than a "*de minimus*" amount (and *de minimus* is not defined)—could potentially write the script for challenges to TPDES permits statewide if the TCEQ permitting decision is overturned. Does the introduction of nutrients—on its own—mean that water quality is impaired by more than the allowable amount? Many will watch this case carefully in the coming months with an eye toward policy implications.

At the federal level, the *Loper* decision provides earth-shattering changes to the federal practice of administrative law. For those who have not had occasion to engage in the finer points of lawsuits against federal agency decisions, the basics of the previous "Chevron deference" were this prior to June 2024: if a court agreed that a Congressionally-enacted statute was ambiguous, then that court would then ask if the federal agency, in interpreting such statute, had a reasonable basis for interpreting that law in the manner that it did. Thus, there was a finger on the scale supporting an EPA rule or policy decision (to pick one agency). More simply put, if in doubt, then benefit of the doubt goes to the federal agency. That is no longer the case after *Loper*. In the majority opinion (6-3), Chief Justice Roberts wrote the deference presumption is "a fiction," and then observed that federal courts have, for years at this point, effectively ditched the practice of tie-goes-to-the-agency, in light of often-aggressive rulemaking efforts that have pushed the limits of what Congress ever intended for a federal agency to regulate.

What the death of Chevron means for practitioners and utilities alike is two-fold: 1) there will likely be more challenges to EPA, USACE, USFWS (and every federal agency, for that matter) decisions when there is a close question of whether that agency is following Congressional intent; and 2) there will likely be a more constrained agency approach when there are close questions, subject to the directive of the Executive Branch. Although courts themselves will not make policy decisions on underlying environmental regulations, their role in policing agency overreach will be enhanced.

Both the *Dripping Springs* and *Loper* cases present important issues that we will continue to track in the months ahead, as SCOTX evaluates the merits of the TCEQ permitting decision, and as, on the federal side, we see additional challenges to administratively-approved rules.

Nathan Vassar is a Principal in the Firm's Water, Compliance and Enforcement, Litigation, and Appellate Practice Groups. If you have any questions or would like additional information related to this article or other matters, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com.

ASK SARAH

Dear Sarah,

I recently read that the DEA is considering reclassifying marijuana from a Schedule I to a Schedule III substance. I know Texas's Compassionate Use Act permits use of low-THC medical marijuana for certain medical conditions. What impact could a future reclassification have on employers in Texas?

Mary Jane

Dear Mary Jane,

Currently, marijuana is classified as a Schedule I drug under the Controlled Substances Act, indicating that it has a high potential for abuse and no accepted medical use. The Drug Enforcement Administration ("DEA's") proposed reclassification to Schedule III would place it alongside controlled substances with acknowledged medical benefits and lower potential for abuse, like anabolic steroids and certain codeine products.

From my perspective as an employment lawyer, one of the largest impacts will be navigating employee use of medical marijuana, which is already a topic frequently raised in my office. Although medical marijuana use remains illegal at the federal level, it is used in increasing frequency by employees.

Under the Americans with Disabilities Act ("ADA"), employers are required to provide reasonable accommodations to employees with disabilities. Historically, this does not protect individuals engaging in "the illegal use of drugs," which generally means anything listed on Schedules I and II. Due to this, federal courts have previously held that the ADA does not protect individuals with disabilities with valid medical marijuana prescriptions who lose their jobs for testing positive for marijuana use. However, a move to Schedule III would take medical marijuana use outside the "illegal use of drugs" exception to the ADA.

Employees with valid medical prescriptions might request accommodations such as exemptions from drug testing policies. Many of my clients are already receiving such accommodation requests, and in some instances, have implemented procedures for evaluating and granting them when appropriate. As with other prescription medication that can cause impairment, the employee may use medical marijuana off duty but should never be impaired at work. Currently, clients who are not ready to make this leap (for any number of reasons) are able to fall back on the position that the ADA does not obligate it (note that Chapter 21 of the Texas Labor Code also obligates reasonable accommodation and may be evaluated differently from the ADA on this issue). Finally, the ADA requires an interactive process, so you should never outright deny an accommodation request without any conversation with the employee.

In addition to ADA accommodation changes, employers may need to revisit their drug testing policies and health insurance plans. With the proposed reclassification of marijuana to a Schedule III substance, it might be treated similarly to other prescription medications in drug testing. One of the unique challenges with marijuana is the difficulty in testing for current impairment, as opposed to recent off-duty use. Additionally, some health insurance plans might begin to cover medical marijuana, affecting employer-sponsored health benefits and requiring employers to update their benefits packages to align with new coverage options. This may impact healthcare costs, both in terms of premiums and the overall health management of employees using marijuana for medical purposes.

Of course, most of this is speculative, at least for now. The DEA issued a proposed rule in late May, and the comment period runs for 60 days. By law, the agency must review and respond to all comments submitted. Once it reviews these comments, DEA will develop a final rule. Because of the significance of this change, we would expect that DEA will receive thousands of comments. Consequently, it will be months before the agency finalizes its rulemaking.

"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 Jacinto River Auth. v. City of Conroe, 688 S.W.3d 124 (Tex. 2024).

A river authority (the "Authority") entered into a groundwater reduction plan ("GRP"), which set goals for reducing the use of groundwater in Montgomery County. The GRP was intended to help its participants lower the cost of reducing groundwater use by sharing the costs of transitioning from groundwater use to surface water use. The GRP stated that the Authority would build and operate a treatment plant to treat water that the Authority drew out of Lake Conroe; the Authority would then sell this water to the GRP's participants.

Several cities and utilities opted to join the GRP and entered into contracts with the Authority for the provision of drinking water. Following disputes over fees and rates for water, two cities (the "Cities") stopped paying part of the balances owed under their contracts, and the Authority sued to recover the amounts owed. As governmental entities, the Cities are generally immune from suit absent an express legislative waiver. Texas Local Government Code § 271.152 waives governmental immunity for certain breaches of contract. In response to the Authority's suit, the Cities filed pleas to the jurisdiction, arguing that their governmental immunity had not been waived under § 271.152 because the Authority did not follow the pre-suit mediation requirements included in the contracts. The Court granted the pleas and dismissed the Authority's claims. The Authority appealed, arguing that procedures for adjudicating disputes in the contracts do not limit the waiver of governmental immunity.

On appeal, the Texas Supreme Court examined the Authority's arguments, and looked to Local Government Code § 271.154, which states that adjudication procedures, such as alternative dispute resolution ("ADR") proceedings, included in a contract subject to chapter 271 are enforceable and held that such procedures are subject to the § 271.152 waiver of immunity. The Court reasoned that without the waiver of immunity for adjudication procedures, a governmental entity could enforce mandatory ADR against a private party, but the private party would be unable to enforce the same against a governmental entity. The waiver ensures that both parties to the contract are on equal footing for enforcing adjudication procedure provisions. The Court held that the governmental immunity was waived, and the Court retains jurisdiction to order compliance with the pre-suit procedures included in a contract with a governmental entity.

The Court ultimately reversed the lower courts' judgments granting the Cities' pleas to the jurisdiction, and remanded the case, holding that contractual provisions for pre-suit dispute resolutions do not limit the waiver of governmental immunity provided for in Local Government Code § 271.152. Section 271.154 states that contractual provisions for pre-suit dispute resolutions are enforceable, and these two sections co-exist without impinging on the waiver of governmental immunity for breach of contract claims that government entities agree to when entering a contract.

City of Dripping Springs v. Lazy W Conservation Dist., No. 03-22-00296-CV, 2024 Tex. App. LEXIS 3774 (Tex. App.—Austin May 31, 2024, no pet. h.).

The City of Dripping Springs (the "City") brought an eminent domain proceeding against the Lazy W Conservation District (the "District") to condemn a portion of the District's property to install an underground wastewater pipeline. Special commissioners in the condemnation proceeding awarded the City the land in exchange for damages paid to the District, and the District objected. The District then filed a plea to the jurisdiction, arguing that the District was entitled to governmental immunity, and the City was barred from condemning the property under the "paramount public importance doctrine." The trial court granted the plea, and the City appealed.

On appeal, the Third Court of Appeals relied on a 2023 Texas Supreme Court decision which determined that governmental immunity is not applicable in eminent domain proceedings between two governmental entities. The Court determined that entirely immunizing a condemnee would undermine the condemnation power of the condemnor, essentially blocking the condemnor from fulfilling a public need. As such, the Court held that governmental immunity is not applicable to eminent domain proceedings between two governmental entities.

The District claimed that the doctrine of paramount public importance should operate as a jurisdictional bar. This doctrine allows a condemnee to prevent a condemnation of property already in public use if the condemnee establishes that the condemnation would "practically destroy the use" of the property, and the condemnor cannot show a great necessity for the condemnation. The Court held that while the doctrine is a claim that can be raised as a defense to a condemnation proceeding, it has no relevance in the present case to determine the grant of a plea to the jurisdiction.

The Court reversed the trial court's granting of the plea to the jurisdiction, holding that governmental immunity is not applicable in eminent domain proceedings between two governmental entities, and the paramount public importance doctrine is not relevant until after jurisdiction is established.

Litigation Cases

In the October 2023 edition of *The Lone Star Current*, we spotlighted a few cases that were pending before the Texas Supreme Court. The Texas Supreme Court has since released its decision in each of those cases. Along with those updates, the Fifth Circuit has issued a decision relating to Winter Storm Uri, which is relevant in light of the impacts of Hurricane Beryl.

Campbellton Rd., Ltd. v. City of San Antonio, 688 S.W.3d 105 (Tex. 2024).

When the October edition was released, we also pointed out that the Texas Supreme Court had granted Campbellton Road's Petition for Review and would soon be issuing a decision. The Court's decision is now here, and it is significant because it involves the Court denying a governmental entity's plea to the jurisdiction when the developer exercised its option in a Contract years after the apparent Contract expiration.

Specifically, the developer, Campbellton, entered into a Contract with San Antonio Water System ("SAWS") to provide water and sewer connections to a 585-acre development. This Contract was to remain in full force and effect for ten years. In exchange for SAWS's promise to reserve capacity to provide sewer connections to the subdivision, Campbellton promised to build and convey oversized wastewater facilities to SAWS.

But sixteen years later, when Campbellton asked to connect the new subdivision to the sewer system, SAWS asserted that the Contract had expired six years earlier and that it had already allocated capacity to other customers. SAWS contended that the necessary upgrades required six years after the 10-year contract term would cost $7.7 million. Likewise, Campbellton complained that it spent millions participating under the contract and building infrastructure. When Campbellton lost in the administrative appeal, Campbellton sued the City of San Antonio by and through SAWS for breach of contract.

SAWS filed a plea to the jurisdiction asserting its governmental immunity, which the trial court denied. On appeal, the Court of Appeals rejected Campbellton's argument that the Contract Claims Act applied, concluding that the City received no goods or services from the contract and any benefit the City received was merely indirect and not part of the essential terms of the agreement. Without a waiver of immunity, Campbellton would be without a judicial remedy.

On April 12, 2024, the Texas Supreme Court reversed, holding that the Contract Claims Act applied, and waiving SAWS's governmental immunity. The Court held that the parties formed a contract when Campbellton participated in the off-site oversizing project. Despite SAWS's argument that Campbellton's performance was optional and a contract could not form until Campbellton fully performed, the Court ultimately held that Campbellton had participated in and performed the project sufficient to form a contract.

The Court also found that the Contract stated the essential terms of the agreement. Despite SAWS's argument that the Contract did not contain any terms requiring SAWS to pay Campbellton, the Court explained that SAWS and Campbellton agreed to and expressly chose a method of payment: collection credits. The Court further explained that collection credits were valuable because they could be transferred to another development and used to satisfy the assessed collection impact fees.

Finally, the Court found the agreement was for services that were not too indirect or attenuated to fall outside the Contract Claims Act's waiver of immunity. The Court stated that SAWS received the benefit of having its capital improvements financed at the time of construction without any up-front expenditure of governmental funds. Thus, the benefits to SAWS were sufficiently direct and concrete for the contract to waive the governmental entity's immunity.

Though the Court did not discuss the merits of Campbellton's breach of contract claim, the Court stated that Campbellton had pleaded a claim entitling Campbellton to its day in court. The Court's decision raises concerns for water providers that allocate capacity to other customers once a contract appears to expire. Going forward, water providers may choose to be cautious when re-allocating capacity to other customers when option contracts may still be in place.

City of Denton v. Grim, No. 22-1023, 2024 Tex. LEXIS 318 (May 3, 2024).

In our October edition, we also mentioned that the Supreme Court had granted the petition filed by the City of Denton in a case brought by two former employees of its electric utility under the Whistleblower Act.

There, the employees alleged they were fired for accusing a member of the city council of leaking documents to the *Denton Record-Chronicle*. At the district court level, the City argued that the Whistleblower Act did not apply to the employees' claims because the alleged violation of law they reported was not committed "by the employing governmental entity or another public employee" as required by the Whistleblower Act in Texas Government Code § 554.002(a). The trial court was not convinced, and the case proceeded to a jury trial, which resulted in a $4 million judgment against the City. When the City appealed to the Court of Appeals, the Court of Appeals affirmed.

On May 3, 2024, the Texas Supreme Court reversed, holding that the city council member's alleged violation of the law was not a violation "by the employing governmental entity or another public employee." Because city council members are not paid for their service, they are not "another public employee." And because the specific city council member's actions were not imputed to the City in this case, the violation was not "by the employing governmental entity." As a result, the Whistleblower Act's limited waiver of governmental immunity did not apply.

In coming to its decision, the Court clarified the scope of the Whistleblower Act, stating that it is not enough that the alleged violation "concerns city business" or "was committed by the city council member in [their] official capacity" because the Act was not intended to protect all reports of wrongdoing. Instead, the Whistleblower Act protects only express reports to an appropriate law enforcement authority that unambiguously identify the employing governmental entity or another public employee as the violator. Notably, the Court discussed scenarios in which a city council member could be deemed to be acting on behalf of the governmental entity.

While the Supreme Court's ruling in this case turned out in the City's favor and clarified that the Whistleblower Act's waiver of governmental immunity does not extend to rogue city council members or others acting without proper authorization, it should serve as a warning that action by a city council member can be deemed an act of the governmental entity in some scenarios.

La Union Del Pueblo Entero v. Abbott, 93 F.4th 310 (5th Cir. 2024).

In 2021, the Texas Legislature enacted Senate Bill ("S.B.") 1, which related to voter registration, voting by mail, poll watches, and other aspects of election integrity and security. Five lawsuits were filed alleging that S.B. 1 chilled voter registration and was enacted with intent to discriminate against minorities. These lawsuits were consolidated with La Union del Pueblo Entero ("LUPE") as the first named plaintiff in the class and the State of Texas, the Secretary of Texas, the Attorney General of Texas, and several county law enforcement and election officials as defendants. Harris County Republican Party ("HCRP") subsequently intervened as a defendant.

During discovery, LUPE moved to compel HCRP to produce documents and communications relating to S.B. 1 that HCRP had sent or exchanged with the Texas Legislature and various members of the Texas executive branch. HCRP designated Alan Vera as the document custodian, and Vera asserted legislative privilege when the scope of questions sought communications with legislative personnel. LUPE filed a motion to compel, which the district court granted. The legislators appealed to the 5th Circuit.

In its opinion, the 5th Circuit provided an excellent overview of the legislative privilege. In short, legislative privilege protects certain documents and communications from discovery. It is broad, covering all aspects of the legislative process including material prepared for the legislator's understanding of the legislation and materials relating to the potential legislation. Though this privilege is personal to the legislator, this privilege can be invoked on behalf of the legislator by the legislator's aids, assistants, and third parties working with the legislator (i.e., advocacy groups, political interest groups, constituents, etc.).

The 5th Circuit then explained that Vera properly invoked legislative privilege because he was a third party brought into the legislative process and his acts occurred within the sphere of legitimate legislative activity. Namely, the legislators sought his comments on drafts, Vera provided feedback, and Vera emailed senators suggested language for S.B. 1. Consequently, the 5th Circuit held that Vera could invoke legislative privilege for those acts since they were taken at the direction, instruction, or for a legislator.

The 5th Circuit noted that narrow exceptions to legislative privilege exist and provided a three-part test for determining whether these exceptions applied. Ultimately, however, the 5th Circuit held that legislative privilege was properly invoked in this case and that the privilege protected documents and communications shared between the legislators and Vera.

The takeaway for governmental officials is that communications and documents shared with legislators may be protected by legislative privilege, depending on the context of the communications.

City of Houston. v. Sauls, 690 S.W.3d 60 (Tex. 2024).

Around 9:00 p.m. on the night of October 8, 2019, police officers Hewitt and Curtis were patrolling their assigned beat for the Houston Police Department. Following a 911 call "regarding a suicide in progress," Officers Hewitt and Curtis responded, accelerating to 62 miles per hour in a 40-mph speed limit zone. They did so without emergency lights or sirens. This was consistent with common practice—the idea was to avoid agitating the patient who was on the verge of committing suicide. While the Officers could have requested to use lights and sirens for the approach and then turn them off when they neared the patient's location, they did not. At the same time, a bicyclist – Dwayne Foreman – was turning left in the intersection onto the same street as the Officers when Mr. Foreman was hit by the Officers. The accident tragically ended Dwayne Foreman's life.

Foreman's family and estate sued the City for wrongful death, alleging that the City was liable because the City's employee negligently and proximately caused Mr. Foreman's death while operating a motor vehicle. The City filed a motion for summary judgment, arguing that it was immune under the Texas Tort Claims Act because Officer Hewitt was entitled to official immunity. The trial court denied the motion. The City appealed, and the Court of Appeals affirmed.

The Texas Supreme Court reversed, dismissing the case for two reasons. First, the Court held that Officer Hewitt had immunity because he was performing a discretionary duty while acting within his scope of authority in responding to the emergency call. Second, he was acting in good-faith – i.e., he acted just like a reasonably prudent officer in the same or similar circumstances. Though Foreman's estate argued that Officer Hewitt was not responding to an emergency, the Court found that Hewitt was, and noted that Transportation Code authorizes a police officer to disregard certain traffic laws when responding to emergency calls so long as the officer operates the vehicle with the appropriate regard for safety and without reckless disregard.

Though the Texas Supreme Court found in this case that the Houston Police Department was not required to use

alternatives, such as approaching with lights and sirens and then turning them off when nearing the patient's location, this case also highlights that prudent city governments and police departments should weigh their department practices with the possible tragic consequences.

Tex. Tech. Univ. Sys. v. Martinez, No. 22-0843, 2024 LEXIS 463 (Tex. June 14, 2024).

At the age of 72, and after 11 years of working for the Texas Tech University ("TTU") Health Sciences Center ("HSC"), Pureza Martinez was fired by the president for allegedly failing to maintain the new president's confidences. However, only a month before, the president sent an email to the department stating that the TTU System and Board were concerned about the age of its leadership and that there was a need to begin succession planning—i.e., developing a written plan of their transition to retirement.

After Martinez was fired, she later sued the TTU HSC, alleging age discrimination. No one disputed that the TTU HSC was subject to the court's jurisdiction. The issue in this case, however, was whether Martinez's pleadings alleged facts supporting her age discrimination against two other defendants: the TTU System and the TTU System's Board of Regents.

On appeal, the Texas Supreme Court concluded that Martinez's petition did not allege facts demonstrating that the TTU System or the Board were sufficient to waive their immunity for an age discrimination claim because neither employed Martinez directly or controlled access to and interfered with her employment. While the Court noted that the Board had a general right to "direct, manage, and control" the HSC, that did not equate to actual control over Martinez's employment opportunities to waive its immunity. While Martinez's petition included allegations that the Board "wanted to reduce the average age of [the Health Sciences Center's] senior leadership" and that the Board asked the president of the TTU HSC to reduce the age of senior leadership, the Court found these insufficient to waive immunity. The Court held that Martinez might be able to cure the pleading deficiency, however, because of the facts she was already able to allege. Ultimately, the Court remanded back to the trial court so that Martinez could replead.

While this case is instructive in terms of whether a plaintiff can sue a parent company or a governing body in a university system for unlawful discrimination, this case is also an instructive example of what to avoid when succession planning. In a footnote, the Court notes that a better method for preparing a governmental body for new leadership is to "create redundant knowledge within an organization" so that no person is a "single repository of key information."

MIECO, L.L.C. v. Pioneer Nat. Res. USA, Inc., No. 23-10575, 2024 U.S. App. Lexis 17462 (5th Cir. July 16, 2024).

This case arose when MIECO, an energy trading firm specializing in buying and reselling natural gas, incurred an additional $9 million in costs for natural gas during Winter Storm Uri. This increase was a result of gas shortages caused by rapid freeze-offs of wells and pipelines.

Almost a decade before Winter Storm Uri, MIECO contracted with Pioneer Natural Resources, a natural gas producer and retailer. The Parties agreed that Pioneer would sell natural gas to MIECO (the "Firm Contract"). To memorialize the Firm Contract, the Parties used the base contract published by the North American Energy Standards Board ("NAESB"), a contract widely adopted in the oil and gas industry. The Firm Contract allows either party to interrupt its performance without liability "only to the extent that such performance is prevented for reasons of *Force Majeure*." The Firm Contract also defined *Force Majeure* to include "weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe." The Firm Contract also required both Parties to "make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance."

When MIECO sought $9 million in cover damages from Pioneer for the gas it had to purchase on the spot market due to Pioneer's failure to perform, Pioneer claimed that Winter Storm Uri qualified as a *Force Majeure* event. The District Court ruled in favor of Pioneer, finding that Pioneer was not required to purchase available spot market gas to satisfy its contractual obligations, and that Pioneer properly invoked the *Force Majeure* clause. Subsequently, MIECO appealed.

On July 16, 2024, the Fifth Circuit concluded that the Firm Contract did not require Pioneer to prove that performance was impossible, nor did it require Pioneer to purchase available gas on the spot market. The Court did, however, reverse back to the trial court on one issue: whether Pioneer exercised due diligence to overcome Uri's impact on its ability to deliver gas to MIECO.

This case is important because it clarifies that the *Force Majeure* clause in this specific version of the NAESB Firm Contract—which is widely adopted—does not require parties to prove that performance is impossible. Rather, this specific NAESB Firm Contract requires parties to exercise due diligence and make reasonable efforts to overcome the impacts of a *force majeure* event. The Fifth Circuit's decision should remind those in the energy industry that a *Force Majeure* clause is an important provision in their contractual arrangements and while powerful, the *Force Majeure* clause may require due diligence and reasonable efforts to perform even in the presence of a major weather event like Winter Storm Uri or Hurricane Beryl. In the aftermath of Hurricane Beryl, businesses and utility companies should review the *force majeure* clauses in relevant contracts, ensure that they account for climate-related risks, and then make and document efforts to mitigate force majeure events.

"In the Courts" *is prepared by Lora Naismith in the Firm's Water Practice Group and Riley Zoch from the Firm's Litigation 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 Parker at 512.322.5878 or jparker@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

Biden Administration Finalizes First National PFAS Standards for Drinking Water. On April 10, 2024, EPA finalized the first ever national limits on per- and polyfluoroalkyl substances ("PFAS") in drinking water, which requires utilities to reduce PFAS to the lowest feasible levels. The new rule was part of a broader move in EPA's PFAS Strategic Roadmap to protect public health. Despite support for the new rule, industry groups have outlined numerous challenges in implementing the regulations. Although $1 billion has been allocated for the new effort, some state agencies believe that amount is inadequate to sufficiently remove PFAS from water systems given the technical complexity required for effective water treatment. Additionally, suits attempting to block the rule from taking effect have been filed by industry groups, including the National Association of Manufacturers and the American Chemistry Council, as well as the American Water Works Association and the Association of Metropolitan Water Agencies.

EPA to Boost Cybersecurity for Water Utilities. EPA has warned drinking water systems that they may face enforcement action for failures to increase their cyber preparedness. EPA has said that it will step up Safe Drinking Water Act ("SDWA") inspections of Community Water Systems ("CWSs") to ensure they are assessing vulnerabilities in their systems—for both physical and cybersecurity weaknesses. Inspections and subsequent enforcement will cover issues such as failure to prepare an adequate Risk and Resilience Assessments and Emergency Response Plan. The effort is part of a larger Biden Administration priority to boost cybersecurity protections in infrastructure. Such efforts include the March letter issued by EPA and National Security Council ("NSC") to all states which asked for cybersecurity plans from water systems. The deadline for states to respond with such plans is June 28, 2024. The notice followed the White House's launch of a new policy to protect infrastructure sectors from physical and cybersecurity threats, which designates EPA as a Sector Risk Management Agency for water and wastewater systems. This designation requires EPA to craft plans and resources to address cybersecurity risk in such systems. Per EPA, over 70% of the water systems inspected since September 2023 are in violation of basic cybersecurity requirements. Some vulnerabilities included having all employees using the same login information or failing to remove access for former employees. Other federal agencies, including the Federal Bureau of Investigation, National Security Agency, and the Infrastructure Security Agency have issued several advisories regarding cyberattacks. Lawmakers are pushing collaboration with state water utilities to ensure water utilities are up to the new EPA cybersecurity standards.

Maui Guidance Finalized by EPA. EPA's final guidance on Clean Water Act ("CWA") permits for discharges from a point source through groundwater has been sent to the White House Office of Management and Budget ("OMB"). The guidance seeks to apply the Supreme Court's 2020 ruling in *County of Maui v. Hawaii Wildlife Fund*, which established the "functional equivalence" standard for determining whether a point source discharge to a groundwater source is a functional equivalent to a direct discharge and therefore requires coverage under a National Pollutant Discharge Elimination System ("NPDES") permit. Once final, the guidance could require previously unregulated discharges to obtain NPDES permits, including coal ash storage sites and wastewater treatment plants. State and industry groups have already raised concerns over EPA's proposed guidance. The Association of Clean Water Administrators, which represents state regulators, filed complaints in December 2023 criticizing the guidance, arguing the indicators used could lead to misleading conclusions. The guidance also specified factors that cannot be considered when analyzing a discharge from a point source to groundwater including an eighth factor added during the last Administration which directed permit-writers to take system design and performance into consideration.

EPA Identifies Increased Need for Water Infrastructure Funding. EPA has identified over $630 billion in total clean water infrastructure needs over the next twenty years which it reports is a 73% increase from the results of the last Clean Watershed Needs Survey ("CWNS") taken ten years ago. The agency's clean water State Revolving Fund ("SRF") expires in 2026 and may provide an opportunity for Congress to overhaul the fund if it is reauthorized. The most recent CWNS, taken in 2022, is based on reports from states and territories on future capital costs or investments needed to maintain and modernize water infrastructure, including publicly owned treatment works ("POTWs"), stormwater infrastructure, and nonpoint source ("NPS") control. This is the first EPA water survey to have all states and territories participate, which ensures a more accurate representation of the needs across the country, although it is still not a perfect forecast of the overall needs due to the lack of tribal wastewater needs, which are covered by the Indian Health Service. The largest total nationwide need is for wastewater

infrastructure, which accounts for 55% of the needed total of $630 billion. Additional major needs include stormwater management, accounting for 15% of the need, and decentralized wastewater treatment systems, such as septic tanks, which accounted for 11.9% of the overall need. Not all states have similar needs—only six states, including New York, Florida, California, Virginia, Louisiana, and Georgia, account for 42% of the required funds. Texas's need is estimated to be $18.8 billion, or roughly $650 per person.

EPA Finalizes Consumer Confidence Rule for Drinking Water Systems. EPA has revised its rules for drinking water systems' annual Consumer Confidence Reports ("CCRs") with the intention of making data more accessible to consumers. The rule's revised compliance date is set for 2027, instead of the original April 1, 2025 deadline for utilities to come into compliance. The compliance deadline was extended in response to public comments that highlighted challenges systems could encounter meeting the rapidly approaching CCR deadline. The revisions should provide improved clarity and comprehension of CCRs, as well as improved accuracy of the information presented to consumers. Much of the changes originally proposed by EPA in its 2023 draft version of the revision have been adopted, notably the requirement for states, territories, and tribes to report clear and easily understandable Compliance Monitoring Data with language accessibility in reports for communities where the dominant language is not English. Despite these changes, EPA has not changed the type of information required for detected contaminants, such as maximum contaminant levels or maximum contaminant level goals. EPA did include a provision that CCRs must include a brief summary description of the nature of the report, to ensure the public is sufficiently informed of the information in the CCR. Further, EPA removed a proposed provision explicitly prohibiting false or misleading statements for fear of fostering a chilling effect on water systems accurately preparing their reports.

EPA to Coordinate on WOTUS Jurisdictional Determinations. EPA is coordinating with the United States Army Corps of Engineers ("USACE") regarding jurisdictional determinations ("JD") for when waterbodies are considered "waters of the United States" ("WOTUS") following the Supreme Court's decision in *Sackett v. EPA*. The move arises from industry complaints about inconsistency between EPA action and the recent Supreme Court precedent, arguing that EPA was implementing the WOTUS rule contrary to the *Sackett* decision, which held that only wetlands which are indistinguishable from adjacent jurisdictional waterbodies based on a "relatively-permeant" surface connection are subject to WOTUS regulations. Currently, roughly twenty-seven states are operating under the pre-2015 WOTUS regime as a result of litigation against the current EPA rule, whereas the remaining states are subject to the current *Sackett* compliant rule. As such, EPA released an updated memo on April 25, 2024 highlighting the coordination process between EPA and the USACE on JDs. The updated memo states that when approved drafts of JDs are sent to the USACE headquarters for review, a policy memorandum issuing guidance for EPA regional and USACE district offices may be issued, and that such memoranda will be posted online. This new effort is to ensure transparency and accessibility to the public. EPA notes these policy memoranda are not a substitute for regulations or rules but are merely advisory. The current coordination effort, as set out in the memorandum, is to remain in effect until June 27, 2024.

Revised Funding for States' Lead Service Lines Replacements. EPA has released additional allotments of Bipartisan Infrastructure Law funding in the amount of $3 billion appropriated to tackle Lead Service Lines Replacements ("LSLRs") through drinking water state revolving funds for the 2024 fiscal year. The funds are expected to help states comply with the upcoming Lead and Copper Rule Improvements, which proposes the achievement of one hundred percent completion of LSLRs within ten years of adoption. Funding for water infrastructure is generally allocated on a need-based formula, with the largest allocations currently going to Illinois and Florida, both of which are receiving over $200 million each. Despite the use of a need-based formula, not all states and water systems are pleased with the result, claiming funding levels still fall short of LSLR needs. EPA has also released an implementing memorandum to help states identify how to use the funds in order to most effectively reduce exposure to lead in drinking water. The memorandum includes requirements for full LSLRs, strategies and design suggestions, and risk management techniques, and places an emphasis on the importance of public notification during the process. The plan also addresses common roadblocks in LSLR implementation, such as when a homeowner refuses access to their home to replace lead pipes on their property. Water systems have an October 16, 2024 deadline to complete their initial lead service line inventories, which will help to ensure the proper amount of funds are distributed according to need.

EPA Progress on New SDWA Perchlorate Rule. EPA's Office of Ground Water and Drinking Water is primed to adopt a new national primary drinking water standard for perchlorate, which is currently scheduled for proposal by late 2025 and official adoption of a final regulation by mid-2027. The regulation will be developed consistent with an Obama-era consent decree issued in *NRDC v. EPA*. Although perchlorate regulation has been a priority for environmentalists for decades, EPA has been slow to formulate a rule despite first considering regulating perchlorate under SDWA in 1998. Such delay fueled NRDC's suit, which resulted in a new 2019 deadline for EPA to propose perchlorate regulations. Subsequently, EPA during the Trump Administration chose to withdraw altogether the determination that established regulations were needed, stating that perchlorate was no longer present in drinking water at concerning levels. Such withdrawal was then upheld by the Biden Administration but later overruled by the U.S. Court of Appeals for the District of Columbia in a decision siding with environmentalists and setting a precedent that EPA lacked the authority to roll back SDWA regulatory determinations. This decision reinvoked a prior determination from 2011 and remanded the rulemaking process to EPA, which ultimately negotiated the current timeline with environmentalists.

EPA Strengthens National Ambient Air Quality Standards for Particulate Matter. Under the Clean Air Act ("CAA"), EPA must review the National Ambient Air Quality Standards ("NAAQS")

periodically for: (1) carbon monoxide; (2) lead; (3) nitrogen dioxide; (4) ozone; (5) particulate matter; and (6) sulfur dioxide. During each review, EPA evaluates whether updating any standard is necessary to protect public health or welfare. In June 2021, EPA decided to reconsider its 2020 finding that no Particulate Matter ("PM") standards were required to be updated due to several petitions for review and reconsideration as well as newly available scientific evidence. This review and reconsideration resulted in a finding that the primary annual standard for PM2.5 should be lowered from 12 µg/m3 to 9 µg/m3. After a notice and comment period proposing such change, EPA published the final rule on March 6, 2024, with an effective date of May 6, 2024. No other PM standards were revised with this rule implementation.

United States Department of the Treasury

Several Federal Agencies Issue a Joint Policy on Voluntary Guidelines for Carbon Offsets. In May 2024, several key federal governmental parties, including the Secretaries of Treasury, Agriculture, and Energy and several climate advisors, published a joint policy on responsible participation in Voluntary Carbon Markets ("VCMs"). VCMs allow companies that emit unavoidable carbon emissions to compensate (or "offset") those emissions by purchasing carbon credits. Each credit corresponds to one metric ton of removed, avoided, or reduced carbon or equivalent greenhouse gas ("GHG"), and companies can use these credits to help offset their GHG emissions. These principles come in the wake of a finding that many frequently used crediting methodologies have not produced the decarbonization outcomes claimed, and include policies that: (1) credits must represent actual decarbonization and must meet credible atmospheric integrity standards; (2) credit-generating activities should avoid environmental and social harm; (3) corporate entities shouldn't rely solely on credits to achieve "net zero" emissions; (4) credit purchasers should publicly disclose information regarding purchased and "retired" credits; (5) the published information should be accurate regarding the climate impact of retired credits; and (6) participants should help improve market integrity and seek to lower transaction costs through market efficiency. While these principles are non-binding, they may indicate how federal agencies will approach regulations surrounding carbon emissions.

Public Utility Commission of Texas ("PUC")

Transmission and Distribution Utilities File Energy Efficiency Applications. The following Investor-Owned Transmission and Distribution Utilities recently filed applications to adjust their Energy Efficiency Cost Recovery Factor ("EECRF"): Oncor Electric Delivery Company LLC (Docket No. 56682); CenterPoint Energy Houston Electric, LLC (Docket No. 56690); Texas-New Mexico Power Company (Docket No. 56657); and AEP Texas Inc (Docket No. 56553). Under PUC's rules, utilities may establish an EECRF for recovery of reasonable costs for energy efficiency programs and apply no later than June 1 each year to adjust the EECRF.

Oncor and CenterPoint File System Resiliency Plans. In early May, Oncor Electric Delivery Company LLC ("Oncor") and CenterPoint Energy Houston Electric, LLC ("CenterPoint") filed applications for approval of their system resiliency plans. This type of application is a creature of state legislation passed during last year's session in House Bill 2555. Effective February 8, 2024, PUC adopted a rule, pursuant to the legislative change, allowing electric utilities that own and operate a transmission or distribution system to file a resiliency plan and undergo a 180-day review process. Under the rule, utilities may request recovery of costs associated with an approved resiliency plan. Oncor's application is under Docket No. 56545, and CenterPoint's application is under Docket No. 56548.

PUC Rulemaking Update. PUC Staff's current 2024 rulemaking calendar can be found under Docket No. 56060. In our April 2024 issue of *The Lone Star Current*, we provided the list of priority projects as of February 2024. Status updates on the Commission's outstanding rulemakings are provided below.

- Project No. 55812—Texas Energy Fund Completion Bonus Grant Program; new rule effective May 15, 2024
- Project No. 55948—Review of Voluntary Mitigation Plans; new rule effective May 15, 2024
- Project No. 53924—Water and Sewer Utility Rates After Acquisition; new rule effective April 10, 2024
- Project No. 53404—Power Restoration Facilities and Energy Storage Resources for Reliability; Proposal for Publication issued June 8, 2024; comments due July 18, 2024
- Project No. 54224—Cost Recovery for Service to Distributed Energy Resources ("DERs"); Commissioner Glotfelty filed memorandum on June 12, 2024
- Project No. 54584—Reliability Standard for the ERCOT Market; Proposal for Publication issued June 6, 2024; comments due July 15, 2024

Other rulemaking projects awaiting next steps:

- Project No. 52059—Review of PUC's Filing Requirements
- Project No. 56199—Review of Distribution Cost Recovery Factor
- Project No. 54233—Technical Requirements and Interconnection Processes for DERs
- Project No. 52301—ERCOT Governance and Related Issues
- Project No. 55249—Regional Transmission Reliability Plans
- Project No. 51888—Critical Load Standards and Processes
- Project No. 53981—Review of Wholesale Water and Sewer Rate Appeal
- Docket TBD—Water Financial Assurance

Railroad Commission of Texas ("RRC")

TGS CGSA Rate Case Ongoing. On June 3, 2024, Texas Gas Service Company ("TGS") filed a rate application for its Central-Gulf Service Area with RRC and cities retaining original jurisdiction. TGS proposes to increase revenues by $28.5 million (by 15.59%, excluding gas costs). In addition, TGS seeks approval of multiple

new rate riders, implementation of new depreciation rates, and a prudence determination on its capital investment.

CenterPoint Gas Settlement. In 2023, CenterPoint Texas filed an application to change gas rates in its Texas division. As of June 11, 2024, RRC is scheduled to consider a Proposal for Decision based on a settlement of the parties. The Proposal for Decision recommends an overall revenue increase of $5,000,000 from current annual revenues. In addition, the Proposal for Decision recommends a 9.8% Return on Equity (CenterPoint Texas requested 10.5%).

"Agency Highlights" is prepared by Chloe Daniels in the Firm's Water and Districts Practice Groups; Mattie Neira in the Firm's Air and Waste Practice Group; and Roslyn Dubberstein 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 mneira@lglawfirm.com, or Roslyn at 512.322.5802 or rdubberstein@lglawfirm.com.

News continued from page 2

the University of Texas School of Law and her bachelor's at the University of Texas at Austin.

Andres Castillo has joined the Firm's Water, Districts, and Litigation Practice Groups as an Associate. Andres focuses on water-related legal and policy issues, including statutory and regulatory compliance, permitting, water rights, water resource management and development, contested cases, litigation and administrative proceedings, governmental relations, and open government. Andres received his doctor of jurisprudence from the University of Texas School of Law and his bachelor's from the University of Texas at San Antonio.

Lauren Thomson will be participating on a panel discussing "PFAS" at the Southeast Chapter of the Texas American Water Works Association on August 7 in Houston.

Sarah Glaser will be discussing the "Top 10 Mistakes Plaintiffs' Attorneys Love" at the Texas Conference for Employers on August 9 in Austin and at the Montgomery County SHRM MOST Meeting on August 13 in The Woodlands.

Michelle White will be giving an "Update on Accommodations - PWFA, Title VII, and ADA" at the Montgomery County SHRM MOST Meeting on August 13 in The Woodlands.

Lauren Binger will be presenting "Water Utility Regulation" at the Texas Water Rights & Regulations Seminar on August 13 Virtually.

Sarah Glaser will be discussing "Disparate Treatment and Disparate Impact" at the UT CLE - Essential Employment Law: A Practical Course in the Basics on August 23 Virtually.

Sarah Glaser will be giving an "Employment Law Update" at the 2024 CSCD HR Forum on September 5 in San Marcos.

Gabrielle Smith will be presenting "Motion Potion: Crafting Irrefutable Pre-Trial Motions" at the Austin Bar Association's Ultimate Trial Notebook on September 20 in Austin.

Sarah Glaser will be discussing "Sex, Drugs, and Political Patronage: Why Employment Law is so Much Fun" at the TML Annual Conference on October 9 in Houston.

James Parker and Gabrielle Smith will be presenting "The Legal Risks and Potential Liability of Municipalities in Natural Disasters; From Floods to Freezes, and What the Governor Has to Say About It" at the 2024 Texas City Attorneys Association Fall Conference on October 10 in Houston.

Lloyd Gosselink Rochelle & Townsend, P.C. is looking forward to its sixth 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 all five seasons by visiting lg.buzzsprout.com or our website at lglawfirm.com. You can follow us on LinkedIn, X, and Facebook to be notified when the latest episodes are released.

Season 6 Episodes

- The 15th Court of Appeals & The New Business Court | Gabrielle Smith featuring Chief Justice Darlene Byrne
- Employment Law Update | Employment Law Practice Group
- Regionalization | Nathan Vassar and Lora Naismith
- Life as an Associate | Samantha Miller, Jake Steen, and Mattie Neira
- Making an Impact: A Primer on Impact Fees

Season 6 Premiers August 6!

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