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FEDERAL COURT DISMISSES ENVIRONMENTAL GROUP BID TO INITIATE PFAS BIOSOLIDS REGULATIONS

by Nathan E. Vassar

Earlier this fall, in what is widely regarded as a win for wastewater utilities across the country, the U.S. District Court for the District of Columbia sided with the U.S. Environmental Protection Agency ("EPA") and dismissed a petition by an environmental advocacy group and citizens seeking to compel federal regulatory action with respect to PFAS and biosolids. In short, the environmental group's petition pointed to EPA inaction on PFAS regulation and brought both a Clean Water Act claim as well as an Administrative Procedures Act claim against the federal agency. As detailed further below, the implications are far-reaching, as the public utility community and industry groups have pushed for more measured analysis on the front end on PFAS issues, rather than knee-jerk, forced regulations that could upend long-standing biosolids practices.

The Plaintiffs pointed to a set of eighteen (18) PFAS chemicals present in sewage sludge and eleven (11) PFAS chemicals listed in EPA biennial reports, and claimed that the agency acted arbitrarily and capriciously by failing to list certain PFAS chemicals in EPA's biennial report for subsequent regulation. The Court granted EPA's motion to dismiss; however, (and notably, water quality industry group National Association of Clean Water Agencies joined the case as an intervenor-defendant), noting that while the CWA mandates a non-discretionary EPA *review* of regulations on a biennial basis, it does not compel the agency to act on such review by initiating rulemakings or other actions on that same timeframe.

The mere presence of PFAS chemicals in sewage sludge/biosolids has not been widely disputed; however, the question of how and whether to regulate such PFAS as pollutants has been the subject of both state and federal attention. The state of Maine, for example, has enacted a biosolids land application ban, whereas other states, including Texas, have seen legislation introduced (but not passed) that would have carried criminal penalties for knowingly applying PFAS-contained biosolids as fertilizer. In light of statements from EPA Administrator Lee Zeldin on the topic of PFAS and potential regulation (focusing primarily on a "polluter pays" framework), it would not be surprising to see EPA move forward with PFAS regulation in biosolids; however the federal court made clear that EPA inaction so far does not give rise to a claim under either the Clean Water Act or the Administrative Procedures Act.

The case also represents judicial rejection of citizen/environmental group strategies to compel PFAS regulations when EPA has not taken affirmative steps to do so. Although other approaches may result in different outcomes, the agency inaction angle was not one, at least in this case, that merited the court proceeding with the petition (as it dismissed the case under FRCP 12(b)(6) grounds).

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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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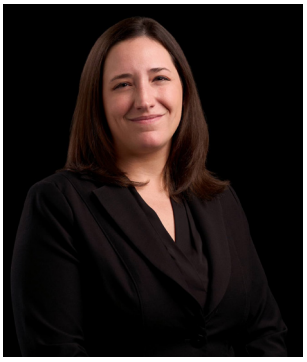
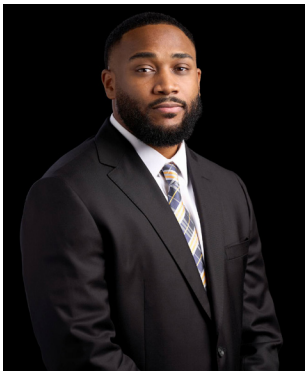
FIRM NEWS



Emily Moyes has joined the Firm's Water Practice Group as an Associate. Emily's practice involves working with environmental matters at the federal, state, and local levels. She assists clients with water quality matters, water resources development, regulatory compliance, permitting, enforcement, and litigation. Emily earned her B.S. in Biology from Baylor University and her J.D. from the University of Kansas School of Law. During law school, Emily refined her interest in environmental law by interning with the Environmental Protection Agency and Kansas Department of Agriculture, leading the Energy and Environmental Law Society, and participating in a national environmental law moot court competition in New York.



Markel Perkins has joined the Firm's Energy and Utility and Water Practice Groups as an Associate. He practices administrative and environmental law at the state and local levels. Markel advises municipalities, utilities, and other local governmental entities on water, wastewater, and electricity utility regulation. His work includes permitting, compliance, enforcement, and policy matters before the TCEQ and the PUC. Prior to joining the Firm, Markel served as an Attorney in the Legal Division of the PUC, where he analyzed and drafted recommendations on contested cases and policy matters regarding telecommunications, electric, water and sewer utilities. He represented the PUC in proceedings before SOAH. Markel's background also includes serving as a Law Clerk for the 16th Judicial District Court in Louisiana, as well as legal internships with the Harris County and Orleans Parish District Attorney's Offices. Markel earned his B.S. in Business Administration (Finance) from the University of Louisiana at Lafayette and he received his J.D., *cum laude,* from Southern University Law Center.

Lisa Silveira has joined the Firm's Districts and Water Practice Groups as an Associate. Lisa assists clients with the governance, organization, and operation of local government entities, including water districts and utilities. Her practice also includes advising clients on regulatory compliance matters, such as the Texas Open Meetings Act and Public Information Act. Lisa earned her B.A. in Communication, *summa cum laude*, from Texas A&M University. She received her J.D. from SMU Dedman School of Law, where she served as President of both the Association for Public Interest Law and the Energy, Environment,

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MUNICIPAL CORNER

Hey, Stop Barking! AG Resolves Question on Municipal Ordinances Regulating Excessive Dog Barking. Tex. Att'y Gen. Op. KP-0491 (2025).

The Bandera County Commissioners Court ("Commissioners Court") requested an opinion from the Texas Attorney General to resolve whether a county commissioners court has the authority to enact an order penalizing a dog owner for causing a public nuisance due to the dog's excessive barking. In 2009, Bandera County adopted an order that defined a public nuisance to include allowing an animal to bark excessively near the private residence of another. Since that order failed to establish consequences for an owner causing a nuisance, the Commissioners Court modified the 2009 order, adopting a 2022 order that penalized dog owners with up to a misdemeanor offense for committing the public nuisance.

The Attorney General first analyzed Bandera County's authority under Article V, Section 18(b) of the Texas Constitution. While county commissioners courts have the authority to exercise power over "county business," the term "county business" does not represent an immediate grant of general power, but rather a limit on the Legislature's ability to confer power on a commissioners court. Though the state government and municipalities possess general police power, a county does not. Ultimately, the legal basis for a commissioners court's actions must come from statutes or the Texas Constitution.

The Commissioners Court contended its 2022 order was valid under the Rabies Control Act of 1981. To control and prevent the spread of rabies, the Act authorizes commissioners courts to adopt ordinances to require that each dog be "restrained" by its owner, making failure to "restrain" punishable as a misdemeanor. The Commissioners Court argued that requiring an owner to "restrain" excessive barking was within the scope of the term, and therefore the county order was permitted under the Act.

The Attorney General disagreed with this argument after considering a dictionary's definition of the word "restrain" and the Act's other uses of the term. According to the dictionary, to "restrain" means to deprive of liberty, with liberty meaning freedom from physical restraint. The Act's references to the term "restrain" focus on an animal's movement, as evidenced by the term "quarantine," which refers to physical confinement. The term "restrain," therefore, does not include barking within its scope because the term contemplates freedom of movement rather than producing noise. The Commissioners Court must accept this definition instead of attempting to expand its meaning beyond the intended scope. Consequently, absent statutory or constitutional authority, a county commissioners court lacks the authority to enact an order penalizing a dog owner for a public nuisance due to the dog's excessive barking.

AG Reviews the Authority of Commissioners Court to Transfer Funding Away from County Attorney's Office. Tex. Att'y Gen. Op. KP-0492 (2025).

The Commissioners Court requested an opinion from the Texas Attorney General to resolve whether the Commissioners Court has the authority to transfer funding or positions away from the county attorney's office and create a new legal support position. The Commissioners Court sought to move the contract and procurement specialist position and its funding from the Aransas County Attorney's Office ("County Attorney") to the Aransas County Auditor's Office ("Auditor"). Additionally, the Commissioners Court sought to create a new attorney position exclusively for its own use by defunding an existing attorney position within the County Attorney's Office.

The Attorney General first provided background on the general authority of a county commissioners court and county officials. A commissioners court has express statutory authority to oversee the fiscal operations of the county, which includes broad discretion over authorizing a budget and making personnel funding decisions. However, state law prohibits a commissioners court from interfering with or usurping other elected county officers' sphere of authority. A sphere of authority consists of an officer's core duties as defined by statutes and the Texas Constitution. A commissioners court may delegate a function to an appropriate county official if it is not exclusively assigned to a particular county official as a core duty.

The question, therefore, is whether the duties of the contract and procurement specialist are core duties of the County Attorney. When a county is included in a district with a district attorney, the Texas Constitution states that the respective duties of county attorneys be regulated by the Legislature. Here, the Legislature assigned the duties imposed on district attorneys by general law to the Aransas County Attorney, which includes representing the state in all criminal cases before the district courts of that

attorney's district. Because the County Attorney has not been assigned the exclusive authority to oversee county procurement processes or manage county contracts as part of their legal and regulatory requirements, the Commissioners Court can reassign the contract and procurement specialist position to the Auditor without usurping the County Attorney's authority. Since the Commissioners Court enjoys broad discretion over the legislative function of making budgetary decisions, the Commissioners Court is also free to decide whether funding associated with the contract and procurement specialist position should be reassigned from the County Attorney to the Auditor.

Similarly, so long as the Commissioners Court does not usurp the statutory duties of other county officials, the Commissioners Court has the authority to create a new attorney position exclusively for its own use, such as a new attorney position.

When a commissioners court sets the budget for a given year, the commissioners court may reconsider whether a funded position is still necessary. Since the Commissioners Court did not describe the duties of the existing civil attorney position, however, the Attorney General declined to assess whether defunding a civil attorney position would usurp the County Attorney's core duties. Generally, a commissioners court may exercise its budgeting power so long as it does not abuse its discretion or usurp the core duties of the elected county officials.

Who Has a Say? AG Considers Who Can Participate in Zoning Disputes. Tex. Att'y Gen. Op. KP-0498 (2025).

The Texas State Senate requested an opinion from the Texas Attorney General to resolve three questions for the City of San Antonio regarding municipal zoning procedures set out in the Texas Local Government Code. The first question is whether property owners within 200 feet of a proposed zoning change, whether inside or outside city limits, are entitled to notification of the change, regardless of their presence on municipal tax rolls. The second question is whether property owners within a designated radius have the right to protest a proposed zoning change, regardless of their presence on municipal tax rolls. The third question asks for clarification on the procedural requirements and use of external records for verifying eligibility concerning notification and protest of a proposed zoning change.

Zoning changes generally involve both the municipality's zoning commission and the governing body. The City of San Antonio, however, is a home-rule municipality in which the governing body does not meet jointly with the zoning commission. The Attorney General limited its opinion accordingly.

The first question concerns a landowner's right to individual written notice of a public hearing before the zoning commission regarding a proposed zoning change. The Texas Local Government Code states that any person or entity listed as the owner of property located within 200 feet of the proposed change is entitled to notice if their ownership is recorded in the municipality's current tax roll. The current tax roll, therefore, establishes whether notice is owed to a given person or entity.

The second question concerns the zoning change process involving the governmental body, such as a municipality, rather than the zoning commission. Under the Texas Local Government Code, a landowner does not need to be listed on the current municipal tax roll to count toward the protest calculation. According to the statute, the term "owner" can include those not listed on the tax roll, and this is consistent with a plain reading of the text. *See* Tex. Local Gov't Code § 211.007(a-c). The Attorney General concluded the Texas Supreme Court, after an analysis of the statute and its history, would likely agree that ownership within the qualifying geographical area satisfies the protest calculation criteria, regardless of an owner's presence on the current tax roll.

The third question requests clarification on the standard procedural requirements for verifying a property owner's eligibility for notification and protest purposes. As the responses to the previous questions explain, an owner's presence on the current tax roll determines whether an owner has a right to written notice, but not whether an owner counts for purposes of calculating a protest. Besides the current tax roll, the Texas Local Government Code neither directs nor prohibits the use of other external records or sets out specific procedures for verifying property ownership. The Attorney General explained that such procedural requirements are typically found in local zoning ordinances. Absent a judicial finding of abuse of discretion, local zoning ordinances and other local regulations determine the method used to verify an owner and provide guidance on whether external records may be used to verify ownership.

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.

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We will continue to track the many developments on the PFAS regulatory front, particularly as the Administration has carved back a handful of drinking water PFAS-related MCLs, and is not looking to change PFOS and PFOA CERCLA designations initially pushed by the Biden EPA. Our team will also remain in tune to state updates on this front, including any legislative interim PFAS biosolids considerations at the state level coming out of two bill filings earlier in 2025 tied to PFAS and biosolids.

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.

SUMMARY OF SAN JACINTO RIVER AUTHORITY V. ROSS

by José de la Fuente

Recently, the 14th Court of Appeals issued an opinion in *San Jacinto River Authority v. Ross*—a case briefed and argued by Lloyd Gosselink—in favor of SJRA on the appeal of one of the numerous takings cases filed by downstream homeowners against SJRA arising from the flooding that occurred along the West Fork San Jacinto River during the Hurricane Harvey rain event. The *Ross* decision provides important and helpful guidance to dam operators (as well as the operators of other flood-control or water-diversion equipment or structures) in Texas that may help dam operators both avoid causing flooding and avoid liability for same.

Several of these flooding cases already have been decided in SJRA's favor by courts of appeals (including the 1st District in Houston and the 9th District in Beaumont), based on hydrological evidence that established that SJRA's operation of the Lake Conroe Dam to pass through incoming Harvey floodwaters did not cause the complained-of downstream flooding. The *Ross* case adds to that body of law, holding that (based on the factual record of that case, including SJRA having a gate operation policy designed to protect the integrity of the dam) passing floodwaters through the dam's gates in a way so that the peak rate of outflow never exceeded the peak rate of inflow was an action taken under a reasonable good faith belief that doing so was necessary to prevent a serious threat to life and property.

The *Ross* case was unique among these takings cases in that it considered a claim brought under Chapter 2007 of the Government Code, asserting that the operation of the dam gates to pass through floodwaters amounted to a "regulatory taking" under that statute. Importantly, that statute has numerous exceptions, including a "good faith" exclusion under section 2007.003(b)(7), which provides that Chapter 2007 does not apply to government actions:

taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property; . . .

During Hurricane Harvey, as a massive volume of floodwater reached Lake Conroe and eventually the Lake Conroe Dam, SJRA passed through such floodwater to prevent the overtopping of both the dam's tainter gates and the dam itself. Based on a record reflecting that (1) SJRA developed its gate operation policy with the intention of protecting the dam and its structures, thus preventing catastrophic dam failure, (2) SJRA relied on engineers and prior court decisions in crafting that policy, and (3) SJRA followed that policy in (4) what was unquestionably an emergency flooding situation, the Court found that the exception was established, and SJRA thus was not liable for a taking under Chapter 2007.

The Court made several holdings and observations of interest and importance to dam operators, including:

- "[R]easonable good faith" requires that the evidence shows that the entity's "decisionmakers subjectively believed that the action at issue was necessary" to prevent a serious threat to life or property, and such belief must be "objectively reasonable under the circumstances when viewed from the perspective of a reasonable dam operator." (Emphasis added).
- SJRA used an engineer (Freese and Nichols) to design its gate operations policy to comport with applicable legal authority, including *Wickham v. SJRA* (a 1998 case generally holding that SJRA did not cause a flood because the dam's peak rate of outflow during the event was lower than the peak rate of inflow).
- The Harvey flood event, a declared natural disaster, presented a grave and immediate threat to life and property.
- Water overtopping the dam and gates "could have resulted in dam failure and a catastrophic release of water," and no engineer would recommend allowing the gates to be overtopped.
- The gate operations policy, which SJRA followed, was designed (1) "to reduce downstream flooding compared to what would naturally occur," (2) "to comport with applicable laws," and (3) "to ensure that the dam did not fail and cause catastrophic destruction downstream."
- The court held that "[g]enerally, a governmental entity's actions taken with intent to comply with valid laws and legal authority are objectively reasonable."
- During a storm emergency, following a gate operations policy "that was intended to minimize threats to life and property and to comply with applicable rules and legal authority" was "objectively reasonable."
- "It was not unreasonable for SJRA to rely on *Wickham*," particularly because SJRA was a party to that case and the Beaumont Court of Appeals has continued to follow the *Wickham* rule.
- While there can almost always be argument that a dam could have been operated differently, better, etc., "given that preventing dam failure is the overriding priority of dam operators," such operators must "exercise discretion in determining when and how much water to release" to protect the dam, and they "cannot be expected to predict rainfall with certainty," a "more relaxed definition of 'necessary'" (as that term is used in the Chapter 2007 exception) is appropriate.
- Thus, the requirement "means at most that SJRA's acts must have been taken out of a reasonable good faith belief that the action would accomplish the purpose of preventing a grave and immediate threat to life or property."
- "There is more than one reasonable way to operate a dam, and operators cannot be

expected to be omniscient."

- When facing a significant weather event, "any dam operator must decide on a course of action based on the information at hand and the reasonable assessments of it."
- "The failure to achieve the least amount of flooding possible, or the choice of one reasonable course of action over another reasonable option, does not remove that act" from the purview of the Chapter 2007 exception.
- "The issue is whether devising and implementing the 2017 Gate Policy as it did during Harvey was outside the scope of reasonable action for a dam operator. We hold it was not."
- "The decision of whether, when, and how much water to release was discretionary," and there was no evidence "that the amount of water released was so extreme as to be objectively unreasonable."

These holdings and observations suggest some key takeaways for dam operators with floodgates or any similar operators with flood control systems/equipment to properly exercise the section 2007.003(b)(7) emergency action exception:

- Utilize an engineer to design a gate operation policy (or similar policy) that—if at all possible—is designed to (1) reduce downstream flooding compared to what would naturally occur (e.g., follow the "peak outflow rate stays below peak inflow rate," or a similar approach); (2) comport with applicable laws, including recent court decisions; and importantly, (3) ensure that the dam and its structures do not fail so as to cause catastrophic damage downstream.
- Maintain records of the reasoning, work done, and any changes made to a gate operation policy, including records of the decisionmakers approving the policy.
- During a flood event, use what would be recognized objectively as good and reliable data in implementing the gate operation policy: flow gage readings (both upstream and downstream as appropriate), actual and/or estimated rainfall amounts and rates from government sources (NWS, NOAA, etc.), measurements of water levels at key locations within the reservoir/at the dam, etc. Maintain records of all such data used in making gate operation decisions, including the time the data was gathered and used.
- Maintain records of the flood event as a whole, including official governmental warnings, declarations, statistics, etc.

While the *Ross* case was a Chapter 2007 case, following these steps, including consulting with engineers and legal counsel in developing such policies, may also help negate the elements of "intent" and being "substantially certain" that the entity's activities will cause flooding in traditional takings cases as well.

Joe de la Fuente is the Chair of the Firm's Litigation, Appellate, and Business Services Practice Groups. If you would like additional information or have questions related to this article or other matters, please contact Joe at 512.322.5849 or jdelafuente@lglawfirm.com.

ERCOT PLANS FOR SURGE IN POWER DEMAND; ONCOR TO DEVELOP MULTIPLE TRANSMISSION PROJECTS

by R.A. "Jake" Dyer

With the emergence of new energy-hungry cryptocurrency mining operations, AI data centers, and hydrogen-related manufacturing plants, ERCOT finds itself experiencing a surge in energy demand like never before. In 2030, for instance, ERCOT foresees peak demand reaching 150 gigawatts. That is about 80 percent more than this year's peak.

This surge will bring new transmission challenges for ERCOT and to plan for them, the grid operator employs both its traditional Regional Transmission Planning process and a separate Permian Basin Reliability Plan. The PUC also has called for the deployment of massive new 765-kV transmission lines for the first time ever. These ultra-high-capacity systems will complement the smaller 138 kV and 345 kV lines traditionally used to serve the state's transmission network.

ERCOT recently released a summary of authorized transmission projects from the latest iteration of its Permian Basin Reliability Plan. This summary, which can be found on the PUC website under Project No. 55718, shows that the Oncor electric utility will be the developer for scores of these facilities.

Separately, ERCOT has also released maps showing the general locations of anticipated lines both within the Permian Basin and statewide. The Steering Committee of Cities Served by Oncor, a municipal coalition, has reproduced clarified versions of those maps that you can find on their website, here. The original maps can be found in a January 2025 ERCOT document found on the PUC website, also under Project No. 55718.

For the most part, the exact routes for all these new lines have not been finalized. That process will be handled by the PUC over the next several years through complex "Certificate of Convenience and Necessity" proceedings that pit the state's power needs against the needs of property owners. Transmission providers and stakeholders — such as municipalities and private citizens — can participate in this process.

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FREE SPEECH, SOCIAL MEDIA, AND EMPLOYMENT LAW FOR GOVERNMENT EMPLOYERS

by Michelle D. White

In the age of social media, it has become much easier for people to express themselves quickly and to a wide audience. As a result, public employees' social media activity has become a growing area of concern for government employers. Unlike private employers, government employers must consider First Amendment protections when developing social media policies or managing the impact of employees posting on social media. Even though the First Amendment protects freedom of speech for public employees, those protections are not unlimited.

Legal Standard

The First Amendment prohibits government actors from restricting speech based on content or viewpoint. This includes public employers who seek to restrict their employees' speech and participation in social media. However, public employers are able to restrict some employee speech by virtue of their employment without interfering with their First Amendment rights.

Case-by-Case Evaluation

Whether an employee's social media posts and speech are protected are dependent upon the facts of the specific circumstances. When evaluating whether a government employer may restrict or discipline an employee for social media speech, courts typically follow a formula in evaluating the specific circumstances. The U.S. Supreme Court has developed a balancing framework that allows government employers to regulate employee speech under certain conditions, especially when that speech interferes with workplace efficiency, discipline, or public trust.

Step 1: Was the employee speaking as a private citizen or as part of their official duties?

As a threshold issue, a determination must be made about whether the speech was made as a private citizen or pursuant to their official duties as an employee. If the speech is part of the employee's job responsibilities, the government can restrict or discipline the employee without violating constitutional rights.[1] In *Garcetti*, the Court held that employees are not speaking as private citizens when employees make statements pursuant to their official duties, and therefore their speech is not protected by the First Amendment.

An employee whose speech is made pursuant to their official duties is not protected from discipline based on the First Amendment. However, if an employee is speaking as a private citizen, the next step will be to determine whether the speech addresses a matter of public concern.

Step 2: Is the speech on a matter of public concern?

The next key issue in evaluating employee speech is determining whether the speech addresses a matter of public concern. Whether an employee's speech addresses a matter of public concern is determined by the content, form, and context of a given statement.[2] Generally speaking, matters of public concern include topics such as government operations, public safety, political issues, social justice, or policy debates. Private concerns such as workplace disputes, grievances, or personal complaints are not protected. While the determination is fact-dependent, some factors that the Court considered in *Connick* included:

- whether the speech was merely an extension of an employment dispute;
- whether the speech occurred at work or on the speaker's own time and outside of the working areas of the office;
- whether the employee "[sought] to bring to light actual or potential wrongdoing or breach of public trust" on the part of superiors.

These considerations were dependent upon the factual considerations of the content, form, and context of the speech in the specific circumstances of the case. It is important to note, however, that the palatability of the speech is not a factor which weighs on this analysis. In other words, speech may be reprehensible to all who hear it, but the subject matter may still be a matter of public concern.

Employee speech on a matter of private concern is not protected from discipline based on the First Amendment. However, if the employee is speaking as a private citizen on a matter of public concern, then the employer's interest in regulating the speech must be weighed against the employee's interest in commenting on matters of public concern.

Step 3: Does the government employer's interest outweigh the employee's free speech rights?

Even protected speech may be subject to discipline if it causes significant disruption or undermines the functioning of the public agency.[3] If the employee is speaking as a private citizen on a matter of public concern, then the court applies the *Pickering* balancing test. The court weighs the employee's interest in commenting on matters of public concern against the government employer's interest in promoting workplace efficiency, discipline, and loyalty.

Under the *Pickering* balancing test, the employer may restrict otherwise protected speech if it:

- Disrupts discipline or harmony among coworkers
- Undermines close working relationships where loyalty and confidentiality are essential
- Interferes with the agency's mission or effectiveness
- Damages the public's trust in the agency
- Impairs the ability of the employee to perform their duties

Courts have given government employers more leeway in regulating speech that directly impacts operational effectiveness, particularly in sensitive or public-facing roles (e.g., law enforcement, education, public health).

Special Considerations for Social Media

When evaluating social media posts, there are a few additional factors that can be taken into consideration under any of the steps of the balancing test. Speech made on a "private" or friends-only social media account may still be subject to scrutiny if it becomes public or is shared widely. If an employee includes a disclaimer in their post or in their social media profile stating that the views are their own, this may help clarify that the speech is personal; however, if the content appears to reflect official duties or damages the agency's credibility, it may not be fully protected.

Best Practices for Public Employers

To navigate these issues proactively, public employers should:

- Develop a clear, content-neutral social media policy that outlines expectations for employees, consistent with constitutional protections.
- Train managers and HR personnel on First Amendment issues in the employment context.
- Evaluate discipline cases on a case-by-case basis, using the balancing test.
- Consult legal counsel before taking adverse action based on employee speech, particularly when it involves matters of public concern.

[1]*Garcetti v. Ceballos*, 547 U.S. 410 (2006).
[2]*Connick v. Myers*, 461 U.S. 138 (1983).
[3]*Pickering v. Board of Education*, 391 U.

Michelle White is an Associate in the Firm's Employment Law Practice Group. If you have questions related to this article or other employment law matters, please contact Michelle at 512.322.5821 or mwhite@lglawfirm.com.

A YEAR IN REVIEW: A LOOK AT TEXAS'S NEW BUSINESS COURT AND FIFTEENTH COURT OF APPEALS

by Gabrielle C. Smith

When Texas lawmakers created two new courts during the 88th Legislative Session in 2023—the Texas Business Court and the Fifteenth Court of Appeals—they promised to reshape the way complex commercial disputes and state-related appeals are handled in the state. On September 1, 2024, both courts officially opened their doors.

Now, one year later, we have the benefit of perspective. With hundreds of cases filed, a handful of key opinions, and legislative fine-tuning already underway, these courts are beginning to leave their imprint on Texas jurisprudence. Below, we look back at how these institutions were set up, what's happened in their first year, and what businesses, litigants, and counsel should expect in the years ahead.

Setting the Stage: Why New Courts?

The legislative package creating these new court didn't replace the state's traditional trial or appellate courts, but rather added new venues designed for a particular category of cases—those involving complex commercial transactions or statewide regulatory issues that can span multiple jurisdictions. Through HB 19 (creating the Business Court) and SB 1045 (establishing the Fifteenth Court of Appeals), the Legislature authorized the formation of new forums to hear designated categories of cases.

The Business Court: How It Works

The Texas Business Court is a statewide trial-level court with jurisdiction over certain high-value and complex commercial disputes. To balance accessibility and specialization, it was divided into 11 divisions across Texas, though only five divisions were operational at launch in September 2024:

- Dallas (First Division)
- Austin (Third Division)
- San Antonio (Fourth Division)
- Fort Worth (Eighth Division)
- Houston (Eleventh Division)

Each division is staffed by two judges appointed by the Governor for two-year terms. A centralized clerk's office in Austin manages filings and docketing, while individual divisions conduct hearings, trials, and case management. Recent changes include restructuring, particularly the addition of Montgomery County to the Eleventh Division and Bastrop County to the Third Division since both of those divisions are online and ready to handle disputes in these growing regions.

Jurisdiction is defined largely by subject matter and monetary thresholds. The court hears disputes involving significant business transactions, corporate governance, securities law, derivative actions, and certain intellectual property or trade secret claims. Originally, most categories required at least $10 million in controversy, but that threshold has since been lowered to $5 million under HB 40 during the 89th Legislative Session, which took effect September 1, 2025. HB 40 also broadened jurisdiction to cover arbitration-related matters and clarified that multiple related transactions can be aggregated to meet the threshold.

Notably, consumer cases remain outside the court's reach, keeping the Business Court focused squarely on sophisticated commercial disputes.

The Fifteenth Court of Appeals: A New Appellate Forum

Running in parallel, the Fifteenth Court of Appeals was created to serve as the intermediate appellate court for:

- Cases involving the State of Texas, its agencies, or state officers acting in their official capacity;
- Challenges to the constitutionality or validity of state laws and regulations; and
- Appeals from the Business Court.

The Fifteenth Court opened with three justices, including a Chief Justice, and is expected to expand to five justices in the future. Like the Business Court judges, these justices were appointed, but unlike the Business Court judges, they will stand for election beginning in 2026.

The court's creation has already been tested. Litigants quickly sought to route appeals of all types into the Fifteenth, hoping to take advantage of its statewide jurisdiction. The Texas Supreme Court shut the door on that approach in *Kelley v. Homminga* and *Devon Energy Production Co. v. Oliver* (March 2025). In those cases, the Court clarified that the Fifteenth Court's jurisdiction is limited to its statutory categories and cases transferred by the Supreme Court to equalize dockets. In other words, it is not a catch-all appellate forum for every civil case in Texas.

The Texas Supreme Court continues to serve as the court of last resort for all civil appeals, including those originating from the Fifteenth Court. Over time, as more opinions are issued, practitioners expect the Fifteenth Court to play an increasingly visible role in shaping the interface between state agencies, regulated entities, and local governments across Texas.

A Year in Review: What We've Seen So Far
Filings and Activity

In its first year, the Business Court drew approximately 185 new cases across its five divisions. Unsurprisingly, filings were concentrated in Texas's commercial hubs. Houston (Eleventh Division) led with the most cases, followed by Dallas (First Division), with the other operational divisions following. Early on, the court used its "docket equalization" authority—moving cases among divisions to balance workloads—though this practice slowed as divisions settled into their rhythms.

Early Jurisprudence

Although jury trials are on the horizon, the Business Court has already issued a meaningful set of written opinions—an intentional design feature to build a body of precedent. Issues addressed include:

- Interpretation of "qualified transactions" and amount-in-controversy thresholds;
- Aggregation of claims across related agreements;
- Remand protocols where jurisdiction is lacking.

On the appellate side, the Fifteenth Court has begun issuing memorandum opinions and orders, clarifying its own jurisdiction and handling a steady diet of state-related appeals. Its early docket already reflects the importance of state agency litigation in Texas, including regulatory enforcement and constitutional challenges.

Legislative Tweaks: HB 40 and Beyond

One striking feature of the first year has been the legislature's responsiveness. HB 40, passed in 2025, lowered jurisdictional thresholds, expanded the types of cases the Business Court can hear, and tasked the Texas Supreme Court with adopting rules to quickly resolve jurisdictional disputes.

These changes reflect feedback from the bench, bar, and business community: while the court is intended for "big business" disputes, the original $10 million threshold risked excluding too many meaningful cases. By lowering it to $5 million and expanding subject matter, lawmakers positioned the Business Court to play a broader role.

Future sessions may bring further refinements—particularly as data on caseloads, speed to resolution, and appellate outcomes accumulate.

Challenges on the Horizon

Despite a strong start, the new courts face a series of open questions:

- **Caseload Distribution:** Equalization tools may be important to avoid uneven burdens.
- **Jury Trials:** The first jury trial in Business Court has yet to occur, but there are a few cases set to go to trial before the end of this year. When they do, logistical and procedural wrinkles will be tested in real time.
- **Forum Shopping:** Litigants are already crafting pleadings and timing filings to gain (or avoid) Business Court jurisdiction. Courts will need to police these strategies without undermining flexibility.
- **Precedential Development:** Both courts are still building their reputations. Which opinions will carry precedential weight, and how consistently they are applied, will determine the long-term stability of this experiment.
- **Elections:** With judicial elections looming in 2026, voters will soon weigh in on the Fifteenth Court's appointed justices. The electoral dynamic could shape not only who sits on the bench but how these courts are perceived in the broader political landscape.

Looking Ahead: What Clients Should Expect

As these courts continue to mature, clients should expect:

- **More Divisions Online:** The Business Court's six inactive divisions may eventually come online, subject to funding

and legislative priorities.

- **Broader Jurisprudence:** Published opinions will grow, especially in areas like fiduciary duty, corporate governance, securities disputes, and trade secrets.
- **Faster Resolution of Threshold Issues:** With the Supreme Court charged to adopt rules, litigants may soon see quicker determinations on whether their case truly belongs in Business Court.
- **Election Dynamics:** The 2026 elections will bring the first real test of how Texas voters view these courts.
- **Continued Legislative Oversight:** Just as HB 40 tweaked thresholds, future legislatures may adjust jurisdiction further as the courts' performance becomes clearer.

Key Takeaways for Businesses

- **Venue Strategy Matters:** When filing suit—or when sued—analyze carefully whether your case fits Business Court jurisdiction. Filing choices may significantly affect timelines, judges, and appellate paths.
- **Contracts Should Evolve:** Consider incorporating Business Court forum-selection clauses where appropriate, especially in large commercial transactions.
- **Stay Informed:** The jurisprudence is young, but precedents are emerging. Tracking Business Court opinions and Fifteenth Court rulings is essential for risk assessment and litigation strategy.

Closing Thought

Texas's Business Court and Fifteenth Court of Appeals are still in their infancy, but they are already reshaping the litigation landscape. Designed to bring specialization, predictability, and efficiency to complex disputes, they also raise new strategic considerations for businesses and counsel alike.

One year in, the story is less about final answers and more about a legal system in motion. As the jurisprudence develops, elections approach, and legislative refinements continue, these courts will only grow in influence. Entities that understand and adapt to this evolving environment will be best positioned to navigate Texas's new judicial terrain.

Gabrielle is a Principal in the Firm's Litigation Practice Group. If you have questions related to this article or other litigation matters, please contact Gabrielle at 512.322.5820 or gsmith@lglawfirm.com.

NOVEMBER 2025 BALLOT PROPOSITIONS

by Toni M. Rask

Because of the regular legislative sessions in Texas, odd-numbered years bring a general election with a series of proposed constitutional amendments ("Propositions") from the Legislature to the voters of Texas. Here at Lloyd Gosselink, we wanted to provide the readers of *The Lone Star Current* with an election guide to the proposed constitutional amendments that impact some of our practice areas—water law, utility law, administrative/municipal law, environmental law, and employment law—appearing on the ballot on Tuesday, November 4, 2025.[1]

Proposition 1 – "The constitutional amendment providing for the creation of the permanent technical institution infrastructure fund and the available workforce education fund to support the capital needs of educational programs offered by the Texas State Technical College System."

Summary: This amendment would establish two separate funds that would provide dedicated funding for capital projects such as new buildings or improvements, and land acquisition and equipment purchases such as books or training equipment used in programs to support schools and programs across the Texas State Technical College ("TSTC") system.[2] TSTCs offer programs that allow a skilled workforce to be trained or retrained affordably in various fields including engineering, electrical linework and management, instrumentation, occupational safety and environmental compliance, process operations, and renewable energy among other technical careers like construction that lawmakers deem vital to the continuity of the "Texas Miracle," and preparing the workforce for the careers demanded.[3]

Proposition 4 – "The constitutional amendment to dedicate a portion of the revenue derived from state sales and use taxes to the Texas water fund and to provide for the allocation and use of that revenue."

Summary: This amendment would require the Texas Comptroller to set aside the first $1 billion (after sales tax revenue exceeds a threshold of $46.5 billion) from net sales and use tax revenue into the Texas Water Fund ("TWF"). The Legislature would also be able to adjust that annual allocation by a two-thirds vote. This is not a tax increase or a separate, new tax—just setting aside tax revenue that is already collected from state sales and use taxes. Think of the TWF as a bucket of water funds available to assist a variety of projects from developing new drinking water supplies, to repairing aging water infrastructure, to flood control projects, to water conservation initiatives, and the clean or drinking water revolving funds.[4]

Proposition 5 – "The constitutional amendment authorizing the legislature to exempt from *ad valorem* taxation tangible personal property consisting of animal feed held by the owner of the property for sale at retail."

Summary: This amendment would allow the Texas Legislature to exempt animal

feed held by the owner for retail sale from property (*ad valorem*) taxation. Supporters argue this exemption would lower costs for feed suppliers and farmers, which could ease expenses in the agricultural sector. However, the exemption would also reduce the taxable property base, which in turn could affect revenue available to local governments, school districts, and special districts that rely on *ad valorem* taxes. A rejection would keep the current system in place, preserving existing tax bases for local government taxing entities.

Proposition 9 – "The constitutional amendment to authorize the legislature to exempt from *ad valorem* taxation a portion of the market value of tangible personal property a person owns that is held or used for the production of income."

Summary: With its accompanying legislation, this constitutional amendment would exempt businesses' inventory or equipment from being taxed by local taxing entities for any value up to $125,000. This increases the exemption from the current $2,500. The fiscal note prepared by the Legislative Budget Board noted that local governments, primarily cities, counties, and special districts that did not or could not increase tax rates would lose out on a total of approximately $440 million in tax revenue in fiscal year 2027.[5] Proponents of the amendment, primarily small businesses, contend that the exemption would spur economic growth.

Early voting begins October 20 and ends October 31. The above are just four of the seventeen Propositions on the ballot in November. Language that will appear on the ballot for each of the 17 propositions and explanations for each can be found at the Secretary of State of Texas's website here.

[1]Proclamation by the Governor of the State of Texas, Aug. 12, 2025, https://www.sos.texas.gov/elections/forms/proclamation-constitutional-amendment-%20elec-nov-2025.pdf.

[2]Tex. S.J. Res. 59, 89th Leg., R.S. (2025) (proposing a constitutional amendment relating to special permanent funds for the capital improvements and education funds for TSTC).

[3]Technically Better for Texas, Tex. State Tech. Coll., https://www.tstc.edu/tstc-is-technically-better-for-texas/ (last accessed Oct. 15, 2025) (detailing the purpose and plans for the dedicated funding streams for TSTC campuses).

[4]Proposition 4 and Texas Water Fund Frequently Asked Questions, Tex. Water Dev. Bd (Sept. 2025), https://www.twdb.texas.gov/financial/programs/TWF/doc/Proposition_4_FAQ.pdf.

[5]Legislative Budget Board, Memorandum IN RE: HB9 by Meyer (Relating to an exemption from *ad valorem* taxation of a portion of the appraised value of tangible personal property that is held or used for the production of income.), as Passed 2nd House (May 15, 2025), https://capitol.texas.gov/tlodocs/89R/fiscalnotes/pdf/HB00009F.pdf (noting that this does not include school districts as the burden of tax revenue loss transfers to the state to make up for the shortfall).

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ASK SARAH

Dear Sarah,

Our supervisors text employees all the time—about schedules, shift changes, or quick reminders. But some texts are getting a little too casual. One manager was texting an employee memes at night, another sent a "happy hour?" invite on a Sunday. Nobody means any harm, but it's starting to feel unprofessional. Is this something we should address?

Signed,
Text Me, Maybe.

Dear Text Me, Maybe,

Absolutely. Texting has entered the workplace chat! It's fast, easy, and often feels friendlier than email. But that same informality can be a problem, especially when a supervisor is texting someone they supervise. What feels casual in the moment can read as too personal, or even intimidating, when the power dynamic is viewed later through a legal lens.

Keep in mind that just because we can communicate with our employees at all hours, doesn't mean we should! Late-night messages about non-urgent issues ("Hey—don't forget your report!") can cross from helpful to intrusive, both in the subject matter and in the timing. Email and remote work capabilities have already blurred the line between work and home and texting an employee ramps this up even further. Supervisors should respect their employees' work hours and understand they should not communicate about non-urgent items via text during off-hours.

This is especially important for non-exempt employees. If a non-exempt employee receives a work-related text from their supervisor, and spends time addressing it, that is compensable time that should be recorded and paid. There are recordkeeping challenges associated with this—do your employees know to record this time? It is best to keep non-urgent communications limited to work time to avoid the possibility of your employees working off the clock.

Additionally, unlike email, text messages are rarely stored or backed up in a way that protects the organization. This is especially true if your organization has a "BYOD - bring your own device" policy, rather than providing phones to employees. In an investigation or lawsuit, texts are discoverable—and once they're gone, they're gone. A "missing" text thread can look like evidence was deleted, even if it wasn't intentional.

Employers should train their supervisors that for anything that involves employee performance, scheduling, complaints, or discipline, supervisors should follow up with an email or note in your official system to create a record, or otherwise save the texts to your internal systems.

Public or governmental employers have additional record keeping responsibilities. If you're a city, county, or other public entity, text messages about work are public records under the Texas Public Information Act—even if they're sent from a personal phone. This means that both the employer and the employee have an obligation to retain those records properly in the organization's file, and if the organization receives an open record request, text messages may be among the responsive documents. Supervisors should assume that any text about work could eventually be read by someone outside the organization.

Finally, folks tend to speak more informally via text message and boundaries can erode quickly. A friendly "happy birthday" can lead to casual weekend chats, which can lead to misunderstandings, perceptions of favoritism, or at worst, allegations of harassment. Additionally, emojis, memes, or jokes that seem harmless can take on a different tone in writing, especially when the sender and the recipient can't see facial expressions or hear tone of voice. Even innocent banter can be misinterpreted if it's private or one-sided.

Frankly, my preference would be to ban texting about work related matters (we already have the ability to call, email, and send an instant message via Teams!), but I am coming around to understanding that that is simply not realistic for some organizations. If texting is imperative for your organization, consider adopting short, practical "texting etiquette" guidelines (or a formal policy, if you prefer). Here are some suggestions:

- Limit texts to operational or time-sensitive issues.
- Keep messages professional and during work hours. Don't discuss discipline, performance, or complaints by text. Follow up important decisions in email or your HR system.
- Assume every text could be read aloud in a deposition—or a council meeting.If you're a public entity—all work-related communications must be timely transferred to the organization's records, or at least one of the devices in the communication must be department-owned (with appropriate record-keeping measures set up).

After you put these measures in place, remember that your rules and policies are only as good as your communication about them! A quick training or reminder at your next supervisor meeting can reinforce expectations and save headaches later.

"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.*

IN THE COURTS

Water Cases

Crystal Clear Special Util. Dist. v. Jackson, 142 F.4th 351 (5th Cir. 2025).

On appeal from the United States District Court for the Western District of Texas, the 5th Circuit Court of Appeals ("5th Circuit") held that 7 U.S.C.S. § 1926(b) does not *expressly* preempt Texas Water Code ("TWC") § 13.2541 but remanded the case back to the district court to determine whether TWC § 13.2541 is preempted by conflict preemption.

Crystal Clear Special Utility District ("Crystal Clear") holds a water certificate of convenience and necessity ("CCN") that encompasses a proposed development in Hays County. The landowner of the proposed development petitioned the Public Utility Commission of Texas ("PUC") for decertification of the property from Crystal Clear's CCN under TWC § 13.2541, which provides that a landowner is entitled to the expedited release of property from a CCN if certain conditions are met. Before the PUC issued an order granting the decertification, Crystal Clear sued the PUC Chair and Commissioners in their official capacity, alleging that the PUC officials' conduct deprived Crystal Clear of its rights under 7 U.S.C.S. § 1926(b), a federal law providing water and sewer utility service providers with federal loans protection for "the service provided or made available" by the indebted provider. The district court granted a preliminary injunction enjoining the PUC from granting the decertification, finding that Crystal Clear was likely entitled to the protections of § 1926(b) based on satisfaction of the "physical ability" test

established in *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (*en banc*) and finding that Crystal Clear was likely to succeed on the merits of its claim that § 1926(b) preempts TWC § 13.2541.

The 5th Circuit held that the district court did not err by concluding that Cystal Clear will likely satisfy *Green Valley's* "physical ability test," but the district court did err to the extent it held that § 1926(b) expressly preempts TWC § 13.2541 since § 1926(b) contains no such explicit preemptive language. Absent express preemption, Congress may nevertheless implicitly preempt state law by directly conflicting with state law such that complying with both federal and state law is impossible or state law creates an impermissible hindrance to the accomplishment of Congress' objectives in passing the federal law. Because the district court did not perform an analysis of conflict preemption, the 5th Circuit declined to consider whether conflict preemption applies in this instance. The 5th Circuit summarizes, "[b]ecause conflict-preemption analysis may confirm that we face an unanswered but important question of law, we REMAND this case to the district court so that it can determine, in the first instance, whether § 1926(b) otherwise preempts TWC § 13.2541 and, relatedly, so that it may assess all relevant preliminary injunction factors as necessary." The 5th Circuit issued an order staying the preliminary injunction and retaining jurisdiction over the limited remand.

Save the Cutoff v. Iron River Ranch II, L.L.C., No. 24-40717, 2025 U.S. App. LEXIS 20005 (5th Cir. 2025).

On appeal from the United States District Court for the Eastern District of Texas, the 5th Circuit affirmed the district court's holding that movement of previously placed fill material by rainfall does not constitute a continuing discharge from a point source under the Clean Water Act.

The question before the 5th Circuit arises from a citizen suit brought by the non-profit organization Save the Cutoff ("STC") against Iron River Ranch II and Ironhorse ("Defendants") on the basis that Defendants violated 33 U.S.C. § 1311(a), which prohibits the "discharge of any pollutant by any person" that is not in compliance with the standards and effluent limitations for point sources established by the Clean Water Act. STC alleges that in February 2022, the Defendants illegally placed fill material in Cedar Creek without first obtaining the proper permits. STC further alleges that fill remains present in Cedar Creek and is discharged when it rains. The district court dismissed STC's claim for lack of subject-matter jurisdiction, which the 5th Circuit reviewed *de novo*.

The 5th Circuit held that the district court did not err in granting Defendants' motion to dismiss. Federal district courts have jurisdiction over citizen suits brought by a plaintiff against any person "who is alleged to be in violation of an effluent standard or limitation" under the Clean Water Act. The Supreme Court of the United States previously held that the language "*to be in violation*" creates the requirement that citizen-plaintiffs must allege "a state of either continuous or intermittent violation" and thus, "wholly past violations" do not suffice. STC argued that though no new fill has been placed in Cedar Creek since 2022, Defendants have engaged in a continuous violation by leaving the fill in place. The 5th Circuit disagreed—identifying the fatal flaw in STC's argument as its failure to allege that Defendants continue to discharge fill from a *point source*. The 5th Circuit reiterated its previous finding that drainage over a broad area caused by rainfall is not a point source and found that the continued movement of fill material is a "residual effect" of a previous discharge rather than a continuing discharge. Accordingly, the 5th Circuit affirmed the district court's judgment dismissing STC's claim for lack of jurisdiction.

Litigation Cases

Morath v. Tex. State Tchrs. Ass'n, 717 S.W.3d 71, 73 (Tex. App.—Austin 2025, pet. filed).

The Third Court of Appeals addressed the validity of a Commissioner's promulgated rule, which included a provision giving the an "operating partner" the "final authority" over its staffing. Because the Court construed "final authority" to effectively mean "unreviewable" by the Court, such a granting of authority was inconsistent with the Legislature's organic statute that authorized the Commissioner's power for administrative rulemaking—thereby declaring the applicable provisions invalid.

However, the provisions that granted the operating partners authority over their own employees were upheld because those employees did not have the same statutory protection as the public school district teachers.

Safelease Ins. Servs. LLC v. Storable, Inc., 2025 Tex. Bus. 28; 2025 TXBC LEXIS 31 (3rd Div. July 18, 2025).

SafeLease sued Storable claiming violation of antitrust law and requested production of the customer list in dispute. Generally, as discussed in detail in the case, production of a purported trade secret may be required if (1) the information is not a trade secret, or (2) if the information is a trade secret, the requesting party meets its burden showing that production of such information is "necessary for a fair adjudication of its claims." In this case, the Court, *in dicta*, indicated that customer lists in Texas "are not inherently trade secrets," because the customers may be a readily ascertainable class. Yet, the Court opined that even if in this case such a list was a trade secret, the requesting party sufficiently established the necessity of production and the Court had power to provide adequate protection against disclosure in any event.

Air and Waste Cases

Private Suit Against the Environmental Protection Agency ("EPA") for Failure to Regulate Per- and Polyfluoroalkyl Substances ("PFAS") Dismissed.

In June 2024, a group of property owners in Johnson County, Texas ("Plaintiffs") filed suit against the EPA under the citizen suit provision of the Clean Water Act ("CWA"), alleging that the EPA has a non-discretionary duty to regulate PFAS in biosolids, which it failed to fulfill. The

Plaintiffs further argued that the CWA directs the EPA to produce a biennial (every two years) report reviewing and discovering new toxins and to promulgate regulations on identified toxins within nine months.

After briefing on the claims, a federal judge dismissed the lawsuit against the EPA in its entirety in late September 2025, finding that the alleged two-year deadline applies only to the review itself, not to identifying or regulating newly identified pollutants, and that the court does not have jurisdiction over the case. The Plaintiffs are undecided on whether they will appeal at this time. *Farmer et al. v. United States Environmental Protection Agency et al.*, No. 1:2024cv01654, (D.D.C. 2025).

The Plaintiffs also have an active case against Synagro Technologies, Inc. and Renda Environmental, Inc. for product liability, negligence, and private nuisance, alleging that the Defendant should have known the fertilizer that they produced, sold, and/or land applied was unreasonably dangerous and failed to provide adequate instructions or warnings. While a motion to dismiss arguing derivative governmental immunity and the right to utilize fertilizers under the Texas Right to Farm Act is pending, the case remains ongoing. *Alessi v. Synagro Technologies Inc.*, No. 3:25-cv-00445. (Dist. Ct., N.D. Texas).

"In the Courts" *is prepared by Samantha Tweet in the Firm's Districts Practice Group, Nathan Marroquin in the Firm's Litigation Practice Group, and Mattie Neira in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Samantha at 512.322.5894 or stweet@lglawfirm.com, or Nathan at 512.322.5886 or nmarroquin@lglawfirm.com, or Mattie at 512.322.5804 or mneira@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA to Maintain PFOA and PFOS Hazardous Substances Designations. Shortly after two PFAS, PFOA and PFOS were listed as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," also known as Superfund) in 2024, various industry leaders filed suit against the designation, questioning whether 1) the EPA's interpretation of regulations was correct regarding retroactive liability, 2) the EPA correctly interpreted the Act, 3) the EUPA should have considered cost associated with the new rule, 4) the EPA provided an adequate notice and comment period, and 5) the rule was arbitrary and capricious. While the case was put on hold during the change in administration, the EPA announced in September 2025 that it had reviewed the rule and decided to leave it in place. As such, it has since requested briefing to resume, while also re-asserting that it will continue to make efforts to codify certain exceptions for *passive receivers such as publicly operated treatment works and municipal solid waste landfills. Chamber of Commerce of the USA, et al. v. EPA, et al.*, No. 24-1193 (D.C. Cir.).

EPA Proposes to Rollback Hydrofluorocarbon ("HFC") Ban Deadline. On September 30, 2029, the EPA proposed a rule to extend the compliance deadline and make other revisions to the 2023 rule banning HFCs in refrigerators, air conditioners, and heating products when more climate friendly alternatives are available. Specifically, if passed, this rule would, among other things: (1) raise the global warming potential threshold for (i) cold storage warehouses from 150 or 300, as applicable, to 700 and (ii) supermarket systems from 150 or 300, as applicable, to 1,400; and (2) shift the compliance deadline for many sectors including residential air conditioning and cold storage warehouses from January 2026 and 2028, as applicable, to January 2030. This rule is published at 90 F.R. 47999, and comments are due before November 17, 2025.

EPA Proposes to End Green House Gas ("GHG") Reporting. On September 22, 2025, the EPA proposed a rule to remove GHG reporting requirements for most source categories, which covers more than 8,000 industrial facilities. The only sector that would still be required to collect and submit data is Petroleum and Natural Gas Systems covered by Subpart W of 40 C.F.R. Part 98. However, that is proposed be suspended until 2034. If passed, this proposal may not, however, prevent private companies from continuing to collect GHG data independently. The data collected from this program has historically been utilized to help develop air emission rules for oil and natural gas facilities and municipal solid waste landfills. As such, the EPA is currently developing an update to municipal solid waste landfill emission rules. This rule is published at 90 F.R. 44591, and comments are due before November 3, 2025. A public hearing was held on October 1, 2025.

Public Utility Commission of Texas ("PUC")

AEP Texas, Inc. ("AEP") Application to Amend Mobile Temporary Emergency Electric Energy Facilities ("TEEEF") Rider. As previously reported, AEP filed an Application to Amend its Rider Mobile TEEEF. Under the Public Utility Regulatory Act, a transmission and distribution utility may lease and operate facilities that provide temporary electric energy to distribution customers during a significant outage. A utility may recover the reasonable and necessary costs of leasing and operating these facilities through a TEEEF Rider.

In its Application, AEP sought a total Rider Mobile TEEEF revenue requirement of $36.2 million. AEP Cities and other parties intervened and reviewed AEP's request. After multiple settlement discussions, a settlement was reached. Filed on August 22, 2025, the settlement reduced AEP's requested Rider Mobile TEEEF revenue requirement to $24.2 million. This is a $12 million reduction from AEP's initial request. The PUC has not approved the settlement and will be considering the settlement at an upcoming Open Meeting. The settlement agreement can be found on the PUC's Interchange in Docket No. 58076.

Energy Efficiency Cost Recovery Factor ("EECRF"). Pursuant to the Public Utility Regulatory Act and the PUC Rules, a utility must establish EECRF that allows it to recover the reasonable costs of providing a portfolio of cost-effective energy efficiency programs. A utility must file an application annually with the PUC to adjust its EECRF in order to recover the utility's forecasted annual energy efficiency program expenditures, the preceding year's over- or under-recovery including interest and municipal and utility EECRF proceeding expenses, any performance bonus earned, and evaluation, measurement, and verification contractor costs allocated to the utility by the Commission for the preceding year.

On May 30, 2025, three investor-owned utilities filed their EECRF applications: AEP Texas, Inc. ("AEP Texas"); Oncor Electric Delivery Company LLC ("Oncor"); and CenterPoint Energy Houston Electric, LLC ("CenterPoint"). In its EECRF application, AEP Texas requested authority to update its EECRF to collect $29,572,509 in 2026, consisting of: (1) forecasted energy-efficiency program costs of $18,859,458 for program year 2026; (2) Evaluation, Measurement and Verification expenses of $254,234 for the evaluation of program year 2025; (3) an adjustment of $431,959 to account for the under-recovery of program year 2024 energy efficiency costs, including interest in the amount of $40,792 and recovery of 2024 EM&V costs; (4) recovery of $10,006,302 representing AEP Texas' earned performance bonus for achieving demand and energy savings that exceeded its minimum goals for program year 2024; and (5) rate case expenses of $20,556 incurred by AEP Texas in Docket No. 56553. Commission Staff conducted discovery and recommended approval of AEP Texas' application with minor adjustments, and the Sierra Club filed direct testimony. All parties have reached a settlement in principle. More information can be found on the PUC's Interchange in Docket No. 58156.

In its EECRF application, CenterPoint requested to recover a total of $95,837,175 through its Rider EECRF in 2026, which consists of: (1) estimated 2026 energy efficiency program costs of $50,155,355; (2) a performance incentive for 2024 program achievements of $40,313,445; (3) $576,924 for 2026 EM&V expenses assigned to AEP Texas by Commission Staff; (4) a charge of $4,298,232 related to the under-recovery of 2024 program costs; (5) a credit of $448,229 for the interest related to the under-recovery; and (6) $44,990 in 2024 EECRF proceeding expenses. A settlement has not been reached and a final order has not been filed. More information can be found on the PUC's Interchange in Docket No. 58185.

In its EECRF application, Oncor requested recovery of $104,807,363, consisting of: (1) $63,800,000 in energy efficiency expenses forecasted for the 2026 program year; (2) allocation of $7,622,221 for the total under-recovery of 2024 energy efficiency costs that includes the required interest payment; (3) inclusion of a $32,560,930 energy efficiency performance bonus based on Oncor's energy efficiency achievements in 2024; and (4) $816,517 for the estimated EM&V costs for the evaluation of program year 2025. Commission Staff conducted discovery, and the parties (including the Steering Committee of Cities Served by Oncor) have reached a settlement in principle. More information can be found on the PUC's Interchange in Docket No. 58182.

On June 27, 2025, Texas-New Mexico Power Company ("TNMP") filed its EECRF application requesting $8,136,795, consisting of: (1) $6,656,727 in energy efficiency expenses forecasted for the 2026 program year; (2) inclusion of a $2,518,347 energy efficiency performance bonus; (3) $57,178 in EM&V expenses for 2026; (4) a refund of $992,009 for over collection in 2024; and (5) a reduction of $103,449 related to interest on over collection. Commission Staff conducted discovery and filed direct testimony. On August 8, 2025, TNMP and Commission Staff filed a settlement agreement which resolves all issues among them. More information can be found on the PUC's Interchange in Docket No. 58140.

Texas-New Mexico Power Company ("TNMP") and CenterPoint Energy Houston Electric, LLC ("CenterPoint") File Application to Amend Distribution Cost Recovery Factor ("DCRF") Riders. On July 31, 2025, Texas-New Mexico Power Company ("TNMP") filed an Application to Amend its Distribution Cost Recovery Factor ("DCRF"). This is TNMP's second DCRF Application in 2025. In the filing, TNMP sought approval for distribution revenues of $102.7 million. This is an incremental increase of approximately $5.3 million. Included in these costs are TNMP's system resiliency plan related costs. In 2023, the Legislature created system resiliency plans as an alternative mechanism for transmission and distribution utilities to recover "system resiliency" related costs. TNMP is the second utility to request recovery of these costs through a DCRF.

Cities Served by TNMP and other stakeholders have intervened and requested discovery regarding the system resiliency related costs and other aspects of TNMP's DCRF. Cities Served by TNMP challenged TNMP's request related to a regulatory asset that

includes the system resiliency costs. Parties participated in settlement discussions; however, a settlement was not reached. Cities Served by TNMP and another city coalition jointly filed a Proposed Order opposing TNMP's Proposed Order reflecting approval of its request. Ultimately, the Administrative Law Judge included TNMP's Proposed Order in its Proposal for Decision recommending the PUC approve TNMP's request.

On October 22, 2025, Chairman Gleeson filed a memorandum, which recommended the Proposal for Decision be approved in part and denied in part. Chairman Gleeson recommended various modifications related to the system resiliency related costs such as extending the amortization period, ensuring the costs are not treated as distribution invested capital, and adjusting the requested weighted average cost of capital to be used to determine carrying costs on the regulatory asset. The PUC approved an Order consistent with Chairman Gleeson's memorandum at the October 23, 2025 Open Meeting. PUC Staff will recalculate the resulting DCRF rate under the new Order. A signed Final Order should be filed by the PUC soon. More information can be found on the PUC's Interchange in Docket No. 58468.

CenterPoint Energy Houston Electric, LLC (CenterPoint) also filed its second Application to Amend its DCRF in 2025. Filed on August 15, 2025, CenterPoint's Application seeks approval for distribution revenues of $178.1 million. This is an incremental increase of approximately $55.4 million. Unlike TNMP's DCRF, CenterPoint does not include the recovery of its system resiliency plan related costs. This is due to the fact that the PUC has not made a final decision on CenterPoint's system resiliency plan. Cities and other stakeholders have intervened and requested discovery regarding other aspects of CenterPoint's DCRF. One intervening party filed testimony recommending adjustments to the request. No settlement was reached, and the PUC filed an Order approving CenterPoint's Application. More information can be found on the PUC's Interchange in Docket No. 58537.

CenterPoint Files Application Seeking Approval to Recover its System Restoration Costs Related to Hurricane Beryl, Hurricane Francine, and Winter Storm Enzo. On May 2, 2025, CenterPoint Energy Houston Electric, LLC (CenterPoint) filed an Application for a determination by the PUC that its Hurricane Beryl, Hurricane Francine, and Winter Storm Enzo system restoration costs (SRCs) were reasonable and necessary. Under the Public Utility Regulatory Act, a utility is able to recover its reasonable and necessary SRCs, including costs for mobilizing, staging, construction, reconstruction, replacement, or repair of electric generation, transmission, distribution, or general plant facilities in order to restore service and infrastructure associated with electric power outages affecting the utility's customers as a result of weather-related events and natural disasters.

In its Application, CenterPoint requested SRCs totaling $1.3 billion. The impact of CenterPoint's request is a $2.13 increase to a typical residential customer's monthly bill. Multiple stakeholders intervened, including Gulf Coast Coalition of Cities, and participated in the evaluation of and conducted discovery on the Application. On July 1, 2025, intervening parties filed direct testimony recommending adjustments to the Application that reflect parties' concerns with the reasonableness of CenterPoint's SRCs. Intervening parties, PUC Staff, and CenterPoint participated in mediation, and ultimately came to a settlement. The settlement resulted in a $22 million reduction, and deferral of $78 million related to a pole and feeder issue. The deferral will allow parties to seek further information and evaluate the requested dollars at a different time. The settlement agreement was filed on August 14, 2025, and the PUC filed a Final Order approving the settlement agreement on October 23, 2025. More information can be found on the PUC's Interchange in Docket No. 58028.

Application of Cross Texas Transmission, LLC ("CTT" or "Cross Texas") for Authority to Change Rates and Tariffs. As previously reported, CTT filed a statement of intent to change rates and tariffs on January 14, 2025, where it sought a revenue requirement of $76,506,194, representing an approximately 7.05% increase over its currently approved revenue requirement. Cross Texas also asked for a return on equity ("ROE") of 10.60%, cost of debt of 3.94%, and CTT's actual capital structure of 55.07% debt and 44.93% equity, which results in a weighted average cost of capital of 6.93%. The Steering Committee of Cities Served by Oncor and other stakeholders conducted discovery and filed testimony. After discussions with Cross Texas and the other parties, all parties reached a settlement agreement resulting in a revenue requirement of $72,631,149, ROE of 9.60%, cost of debt of 3.94%, capital structure of 59% debt and 41% common equity, and overall rate of return of 6.26%. The Commission approved the rates, terms, and conditions set forth in the settlement agreement on September 11, 2025. More information can be found under PUC Docket No. 57467.

PUC Rulemaking Update. In September 2025, PUC Staff updated its calendar to reflect projected rulemaking timelines for the last few months of 2025. The calendar is a robust list of projects covering changes to the PUC's electric and water rules. The updated calendar can be found on the PUC's Interchange under Docket No. 57606. PUC Staff is prioritizing several developments arising out of the 89th legislative session, particularly with regard to Senate Bill 6 addressing large load interconnections.

As of September 19, 2025, the following rulemakings are in progress:

- Project No. 58198 – Rulemaking to Implement Firming Reliability Requirements for Electric Generating Facilities in the ERCOT Region under PURA § 39.1592
- Project No. 58392 – Implementation of SB 231 (89R) Temporary Emergency Electric Energy Facilities
- Project No. 58393 – Annual Report on Dispatchable and Non-Dispatchable Generation Facilities
- Project No. 58436 – Implementation of HB 3476 (87R) – CCN Standards for Water and Sewer Utilities Within the Extraterritorial Boundaries of a Municipality
- Project No. 56789 – Transmission and Distribution Wildfire Mitigation Plans and Self-Insurance Plans

- Project No. 57928 – Review of § 25.53, Electric Service Emergency Operations Plans
- Project No. 58390 – Implementation of SB 1965 (88R) and SB 740 (89R) – Expedited Water STMs
- Project No. 58379 – Review of § 25.504 – Wholesale Market Power in the ERCOT Region
- Project No. 57743 – Review of Energy Efficiency Rules
- Project No. 58479 – Rulemaking for Net Metering Arrangements Involving a Large Load Co-Located with an Existing Generation Resource Under PURA § 39.169
- Large Load Forecasting Criteria
- Project No. 58391 – Implementation of SB 740 (89R) – System Improvement Charge
- Project No. 58402 – CY2025 Updated to Chapter 22 – Procedural Rules, Subchapters K-O
- Project No. 56736 – Retail Sales Report
- Project No. 57883 – Commission Directives to ERCOT
- Project No. 52059 – Review of Commission Filing Requirements
- Project No. 58211 – ERCOT Standard Generation Interconnection Agreement (SGIA)
- Project No. 58434 – Rulemaking for Firm Fuel Supply Service
- Project No. 56199 – Review of Distribution Cost Recovery Factor
- Project No. 58210 – Review of §§ 25.235-.237 – Interim Fuel Adjustments for Utilities Outside of ERCOT
- Project No. 57999 – Review of Chapter 25, Substantive Rules Applicable to Electric Service Providers Under the Administrative Procedure Act § 2001.039
- Project No. TBD – Simplified Customer Complaint Process (Water) – SB 790
- Project No. TBD – TEF Backup Power Package
- Project No. TBD – T&D Pole Standards – SB 1789
- Project No. TBD – Future Test Year – HB 2712

The following rulemakings provided in our last newsletter remain ongoing:

- Project No. 52301 – ERCOT Governance and Related Issues
- Project No. 54233 – Technical Requirements and Interconnection Processes for Distributed Energy Resources
- Project No. 56574 – Rule Review for Chapter 22 – Procedural Rules

The following rulemakings provided in our last newsletter have since been completed and new rules are in effect:

- Project No. 57603 – Unplanned Generation Service Interruption Reporting
- Project No. 57374 – Exemption Process for ERCOT Technical Standards
- Project No. 57602 – Permian Basin Reliability Plan Reporting Requirements and Monitor
- Project No. 57819 – CCN Mapping Resources Webpage Attestation Requirement

Texas Railroad Commission ("RRC")

Texas Gas Service Company, a Division of One Gas, Inc. ("Texas Gas") Files its Statement of Intent to Change Gas Utility Rates. On June 30, 2025, Texas Gas Service Company, a Division of One Gas, Inc. ("Texas Gas") filed its Statement of Intent to Change Gas Utility Rates with the cities in Texas Gas' Central-Gulf, West North, and Rio Grande Valley Service Areas, as well as with the RRC. In its Application, Texas Gas sought approval to consolidate all of its service areas into a single statewide jurisdiction. Texas Gas' proposed rates for all of its customers are based on a system-wide cost of providing service to customers throughout the entirety of Texas. Texas Gas further proposed to increase revenues by $41.1 million.

Cities Served by Texas Gas Service is among the multiple coalitions of cities that have intervened in the case filed with the RRC. Parties have begun their evaluation of the Application and requested discovery on different aspects of the Application. Settlement discussions are ongoing. More information can be found on the RRC's website in GUD Case No. OS-25-00028202.

"Agency Highlights" *is prepared by Toni Rask in the Firm's Water Practice Group; Mattie Neira in the Firm's Air and Waste Practice Group; and Jack Klug 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 Toni at 512.322.5873 or trask@lglawfirm.com, or Mattie at 512.322.5804 or mneira@lglawfirm.com, or Jack at 512.322.5837 or jklug@lglawfirm.com.*

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and Natural Resources Law Society. She also held leadership roles in If/When/How, the Student Bar Association, and the SMU Science and Technology Law Review. Before joining the Firm, Lisa clerked at Lloyd Gosselink and served as a legal extern with the Texas Commission on Environmental Quality, Office of Legal Services.

Jamie Mauldin will present "Policy & Legal: Broadband Update for Texas" at the 2025 Texas Association of Telecommunications Officers and Advisors Conference on November 6 in The Woodlands.

Gabrielle Smith is participating on a panel discussing "Post-Judgment Motions" at the Austin Bar Association 2025 Ultimate Trial Notebook Annual CLE on November 14 in Austin.

Nathan Vassar will participate on a panel discussing "So the Supreme Court Ruled, Now What? Real-World Implications of Supreme Court Decisions on Clean Water Utilities" at the 2025 National Clean Water Law & Enforcement Seminar on November 20 in Nashville.

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