



THE LONE STAR CURRENT

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

RECAP OF THE REGULAR SESSION OF THE 86TH TEXAS LEGISLATURE

by Ty Embrey and Troupe Brewer

The Regular Session of the Texas Legislature ended on May 27th when the Legislature adjourned Sine Die. The Legislature kicked off on January 8th with the election of a new Speaker of the Texas House, Dennis Bonnen. Speaker Bonnen is a Republican from Angleton who has served as a state representative for 22 years. Speaker Bonnen held a joint press conference on January 9th with Governor Abbott and Lieutenant Governor Patrick during which Governor Abbott declared that the three leaders “are here today to send a very strong, profound and unequivocal message — that the governor, lieutenant governor and speaker are working in collaboration together on a very bold agenda that will be transformative for the state of Texas.”

In the days before the start of the Regular Session, State Comptroller Glen Hegar announced a biennial revenue estimate of nearly \$120 billion, and stated that Texas’ “Rainy Day Fund” was at an all-time high of nearly \$15 billion. With those financial resources at their disposal, the Legislators addressed several significant issues facing Texas. A total of 7,541 bills and joint resolutions were filed during the Regular Session, 58 bills were vetoed by Governor Abbott, and 1,383 bills and joint resolutions became effective as Texas law. The Legislature passed legislation addressing issues significant with state-wide implications, such as legislation that makes reforms to the public school finance and property tax systems, helps

Texas deal with disaster relief preparation for the next natural disaster, and funds the Texas state government for the next 2 years (through the adoption of a biennial state budget).

This article summarizes the major legislation that impacted disaster relief and preparedness, groundwater, water utilities, and solid waste.

I. Disaster Relief and Preparedness

The Legislature passed a significant package of bills related to Disaster Relief and Preparedness. Governor Abbott cited some \$1.6 billion going towards flooding relief, planning, and mitigation projects. The bills below are the major pieces of legislation that accomplished that objective:

- **SB 6 (Kolkhorst)** - *Relating to emergency and disaster management, response, and recovery.* This bill requires the Texas Department of Emergency Management (“TDEM”) to develop a disaster response model guide and a wet debris study group for local communities. It also creates a disaster recovery loan program for communities that suffer significant infrastructure damage during flooding and related weather events.
- **SB 7 (Creighton)** - *Relating to flood planning, mitigation, and infrastructure projects.* This bill

establishes two new funds, the Texas Infrastructure Resiliency Fund and the Flood Infrastructure Fund, to address the effects of Hurricane Harvey and prepare for future flooding and disasters.

- **SB 8 (Perry)** - *Relating to state and regional flood planning.* This bill creates a framework for a “state flood plan” through a network of regional flood planning groups, similar to the regional water supply planning process.
- **HB 5 (Phelan)** - *Relating to debris management and other disaster*

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Lloyd Gosselink, Rochelle & Townsend, P.C., provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

Based in Austin, the Firm's attorneys represent clients before major utility and environmental agencies, in arbitration proceedings, in all levels of state and federal courts, and before the Legislature. The Firm's clients include private businesses, individuals, associations, municipalities, and other political subdivisions.

The Lone Star Current reviews items of interest in the areas of environmental, utility, municipal, construction, and employment law. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

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FIRM NEWS



Gabrielle Smith has joined the Firm's Litigation Practice Group as an Associate. Gabrielle assists clients in litigation matters in state and federal courts. She provides guidance to clients as they navigate through the steps of the process both at trial and appellate levels. Gabrielle also has experience in alternative dispute resolution, exploring options through both pre-litigation and litigation routes. She works to determine assessment of rise, potential outcomes, and cost-efficient solutions. Prior to joining Lloyd Gosselink, Gabrielle represented federal government employees in their discrimination complaints and appeals of adverse personnel actions before the Equal Employment Opportunity Commission and Merit Systems Protections Board. Gabrielle received her doctor of jurisprudence from the University of Texas School of Law and her bachelor's degree from Texas A&M University.

Jacqueline Perrin will discuss "Enforcement Authority for Stormwater Permitting Requirements" at the EPA Region 6 Stormwater Conference on July 29 in Denton, Texas.

Maris Chambers will be co-presenting "Technical and Legal Perspectives on Odor and Biosolids Enforcement" at the WEAT Biosolids/Odor & Corrosion Control Conference on July 31 in San Marcos, Texas.

Sheila Gladstone will give an "Employment Law Update" at the Williamson County Human Resources Association on August 9 in Round Rock, Texas.

Georgia Crump will be providing a legislative update on "Transportation, Electric, Telecommunications, and Cable" at the Legislative Update Seminar sponsored by the Texas Municipal Clerks Association and the Texas Municipal Clerks Certification Program on August 22-23 in San Marcos, Texas.

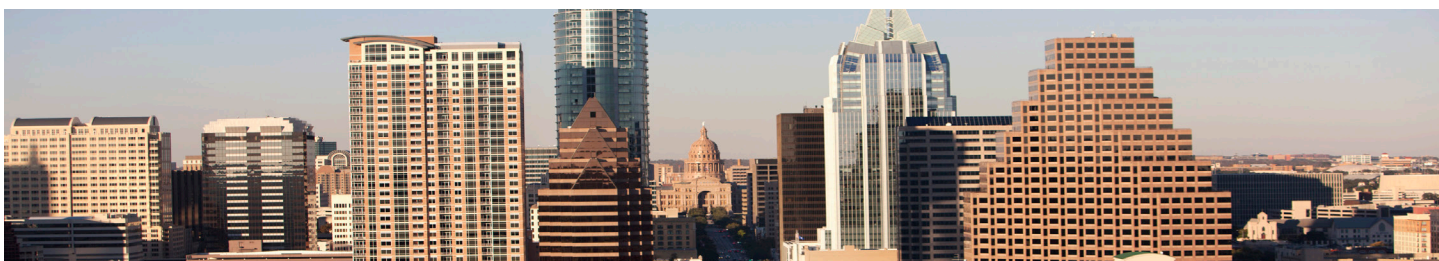
Sheila Gladstone will present an "Employment Law Update" at the Sam Houston State University Human Resources Forum on October 3 in San Marcos, Texas.

Sheila Gladstone will discuss "Workplace Behavior" at the Texas Municipal League/Texas Municipal Human Resources Association Annual Conference on October 10 in San Antonio, Texas.

Lloyd Gosselink collected donations for the Austin Family Eldercare Fan Drive again this year. The Summer Fan Drive provides new box and oscillating fans to seniors, adults with disabilities, and families with children in Central Texas. These fans offer heat relief from dangerous Texas Summer heat, a service that is critical to vulnerable clients, especially the medically fragile, very old, or very young.



MUNICIPAL CORNER



Having involvement with an agreement that might benefit property belonging to city officials does not run afoul of the conflicts provisions of the Local Government Code when those city officials lack the authority to vote on the relevant agreement. Tex. Att’y Gen. Op. No. KP-0244 (2019).

The City of Conroe (the “City”) sought an opinion by the Attorney General (“AG”) to determine whether the City Attorney and City Administrator were local public officials subject to the conflicts provisions of Chapter 171 of the Texas Local Government Code (“TLGC”).

On behalf of the City, the City Attorney and City Administrator negotiated an agreement whereby a landowner would donate public park lands in exchange for an exception from the City’s tree preservation ordinance and consent to include the landowner’s property in a municipal utility district, in accordance with the owner’s planned development.

Concerns arose from the fact that the City Attorney and City Administrator owned homes adjacent to the relevant property. If approved, some wondered whether the terms of the agreement would yield economic benefits for the properties owned by the City Attorney and the City Administrator.

TLGC § 171.004 prohibits a “local public official” from participating in a vote or decision involving property in which the official has a substantial interest. A “local public official” is a member of the governing body or another officer of a municipality whose responsibilities are more than advisory in nature. TLGC § 171.001.

In this opinion, the AG declared that an individual may be subject to the conflicts provisions if the individual (1) has a substantial interest in real property that may be involved in municipal action; (2) is a local public official of the municipality as that term is statutorily defined; and (3) votes or makes a decision on a matter that will have a special economic effect on the value of the individual’s property. Tex. Att’y Gen. Op. No. KP-0244 (2019) at 2. Finding that home ownership may constitute a “substantial interest in real property,” the first element was fulfilled.

However, because the City Attorney and City Administrator lacked the authority to vote on the agreement, the AG determined the inquiry as to whether they were “local public officials” was unnecessary. Thus, the City Attorney and City Administrator were

not subject to the requirements of TLGC § 171.004 with respect to the agreement, despite the fact that they had economic ties to the agreement they negotiated. The AG ended by cautioning that conflicts such as these are fact specific and should be evaluated on a case-by-case basis as they relate to particular government actions.

The AG and the newly passed SB 1640 effectively clarify the definition of a walking quorum to cure it of its former constitutional vagueness. Tex. Att’y Gen. Op. KP-0254 (2019).

The Texas Education Agency (“TEA”) sought an opinion from the AG to determine whether the Texas Open Meetings Act (“TOMA”) continues to prohibit a quorum of a governmental body from deliberating on an item of public business outside of an authorized meeting through multiple communications, each involving less than a quorum—a so-called “walking quorum.”

In a recent opinion by the Court of Criminal Appeals in *State v. Doyal*, the Court struck a criminal provision of the TOMA on the grounds that it was unconstitutionally vague. 2019 WL 944022 (Tex. Crim. App. Feb. 27, 2019). The section provided that a “member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent [the TOMA] by meeting in numbers less than quorum for the purpose of secret deliberations.” Texas Government Code (“TGC”) § 551.143(a). The purpose of the TOMA is to encourage good government by ending closed-door sessions where deals are cut without public scrutiny.

Statutorily, the TOMA requires each “regular, special, or called meeting of a governmental body” to be open to the public, except as provided by the TOMA. TGC § 551.002. Accordingly, the AG stated that, “a meeting occurs when a quorum of a governmental body has a verbal exchange about public business or policy within the jurisdiction of the governmental body.” Tex. Att’y Gen. Op. No. KP-0254 (2019) at 2. Here, the AG found that a deliberation need not occur simultaneously or in the same location to constitute a meeting. In *Esperanza Peace & Justice Center. v. City of San Antonio*, the City Council made illegal budget reductions when members conducted multiple meetings, each less than a quorum, to reach a consensus on their budget, signing a consensus memorandum at the conclusion of those meetings. 316 F. Supp.2d 433, 471-78 (W.D. Tex. 2001).

Previous AG opinions have also concluded that TOMA violations can occur even when there is no physical presence of a quorum in a single place at the same time. Tex. Att’y Gen. Op. No. JC-0307 (2000) at 5. Even a series of emails may sometimes constitute a deliberation and a meeting. Tex. Att’y Gen. Op. No. GA-0896 (2011) at 3–4. In *Acker v. Texas Water Commission*, the Texas Supreme Court highlighted that there is either formal consideration in compliance with the TOMA or an illegal meeting. 790 S.W.2d 299, 300 (Tex. 1990).

Although the Court in *State v. Doyal* struck the criminal penalty for a walking quorum, civil remedies for the TOMA remain. Actions taken in violation of the TOMA are voidable and any interested person may still file suit for mandamus or injunctive relief.

The TEA also inquired about its authority to conduct regulatory investigations of a school district. The AG confirmed that TEA could bring a civil action if it found that school district officials

violated their duty to act only by a majority vote of members present at a meeting held in compliance with the Texas Education Code.

Senate Bill 1640, effective as of June 10, 2019, amends TGC § 551.143 in response to the constitutional infirmities raised by the Court of Criminal Appeals in *State v. Doyal*. A member of a governmental body now commits an offense if the member knowingly engages in at least one of a series of communications that ultimately amounts to a quorum if such communications are outside a public meeting and concerning an issue within the body’s jurisdiction. An offense can result in a fine and/or jail time.

Municipal Corner is prepared by Jacqueline Perrin. Jacqueline is an Associate in the Firm’s Districts Practice Group. If you would like additional information or have any questions related to these or other matters, please contact Jacqueline at 512.322.5839 or jperrin@lglawfirm.com.

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recovery efforts. This bill requires TDEM to develop a catastrophic debris management plan and related training programs, as well as creates a work group to advise local governments on how they can assist with recovery efforts.

- **HB 7 (Morrison)** – *Relating to disaster preparation for state agencies and political subdivisions.* This bill requires the Governor’s office to maintain a list of regulatory statutes and rules that may require suspension during a disaster. It also requires TDEM to develop a plan to assist political subdivisions in executing contracts for services following a disaster in an expeditious manner.
- **HB 26 (Metcalf)** – *Relating to the notification of affected persons of certain releases of water from certain dams.* This bill would require the owner or operator of a state regulated dam that has a spillway with gates used to regulate flood waters to notify local emergency operation centers in downstream communities when spillway releases are made to regulate floodwaters, according to Texas Commission on Environmental Quality (“TCEQ”) action plan guidelines. Emergency operation centers must then provide prescribed information to the public. A notice may not be

considered an admission of liability and may not be used in any suit related to the releases. Not later than 1/1/2020, the TCEQ shall provide guidance for developing a notification plan through a dam owner’s emergency action plan.

- **HJR 4 (Phelan)** – *Proposing a constitutional amendment providing for the creation of the flood infrastructure fund to assist in the financing of drainage, flood mitigation, and flood control projects.* This bill would ask the Texas voters to amend the Texas Constitution to create a new flood infrastructure fund. If passed, the Texas Water Development Board (“TWDB”) would administer and use money from the fund for drainage, flood mitigation, or flood control projects, including: (1) planning and design activities; (2) work to obtain regulatory approval to provide nonstructural and structural flood mitigation and drainage; or (3) construction of structural flood mitigation and drainage infrastructure.
- **SB 500 (Nelson)** - *Relating to making supplemental appropriations and reductions in appropriations and giving direction, including direction regarding reimbursement, and adjustment authority regarding appropriations.* This bill is the supplemental appropriations bill and has multiple provisions and funding mechanisms addressing flood-related issues, including flood planning, flood

mapping, and flood projects.

II. Groundwater

- **HB 720 (Larson)** – *Relating to appropriations of water for use in aquifer storage and recovery projects (“ASR”).* This bill amends various chapters of the Texas Water Code (“TWC”) to allow the appropriation, storage, or diversion of state water for “aquifer recharge.” It provides that TCEQ may authorize an appropriation for ASR if it determines the water is not needed to meet downstream or freshwater inflow needs, and clarifies that TCEQ has exclusive jurisdiction over Class V injection wells.
- **HB 721 (Larson)** - *Relating to the duty of the TWDB to conduct studies of and prepare and submit reports on aquifer storage and recovery and ASR projects.* This bill requires the TWDB to work with certain specified stakeholders to conduct studies of aquifer storage and recovery projects and aquifer recharge projects identified in the state water plan or by interested persons and to report the results of each such study to regional water planning groups. It also requires the TWDB to conduct a statewide survey to identify the relative suitability of various major and minor aquifers for use in ASR projects or aquifer recharge projects based on consideration of certain specified factors.

- **HB 722 (Larson)** – *Relating to the development of brackish groundwater.* This bill amends Chapter 36 of the TWC to allow a groundwater conservation district (“GCD”) over a designated “brackish groundwater production zone” (“BGPZ”) to adopt rules to govern the issuance of permits for production with a BGPZ on its own volition or upon receipt of a petition to do so. If a rulemaking is initiated, then the bill provides specific required rules related to the permit term, monitoring requirements, well field design, etc. The bill specifically clarifies that the authorized BGPZ production is in addition to the MAG of a given GCD.
- **HB 1066 (Ashby)** – *Relating to extensions of an expired permit for the transfer of groundwater from a groundwater conservation district.* This bill amends TWC, Chapter 36 as it pertains to export permits, requiring a GCD to extend an export permit to a term no shorter than the term of the related operating permit. The bill also clarifies that approval/denial of an extension is based only on rules that were in effect at the time the application was submitted.

Bills that failed to pass:

- **HB 726 (Larson)** – *Relating to the regulation of groundwater.*
- **HB 2123 (Harris)** - *Relating to authorizing petitions to change certain rules adopted by groundwater conservation districts.*
- **HB 2125 (Burns) / SB 851 (Perry)** – *Relating to the award of attorney’s fees and other costs in certain suits involving a groundwater conservation district.*
- **SB 1010 (Perry)** - *Relating to rules adopted by groundwater conservation districts overlying a common aquifer.*
- **SB 2027 (Perry)** - *Relating to the standard of judicial review for a suit involving a groundwater conservation district.*

- **SB 2026 (Perry) / HB 2122 (Harris) / HB 2249 (Lucio III)** - *Relating to regulation of the production of retail public utility wells by a GCD.*

III. Water and Water Utilities

- **HB 3339 (Dominguez)** – *Relating to requirements for programs of water conservation and water conservation plans.* This bill amends TWC Chapters 15, 16, and 17 to require political subdivisions or water supply corporations (“WSC”) to include a water conservation plan in an application for financial assistance to the TWDB. Such a plan must incorporate certain practices, techniques, and technologies; address local conditions; and include five- and ten-year targets for water savings. The bill also provides for discretionary elements an applicant may include in the plan, and it provides exceptions to plan requirement in certain circumstances.
- **HB 3542 (Phelan)** – *Relating to the provision of water and sewer services by certain retail public utilities.* This bill amends TWC, Chapter 13 to require a utility that provides retail water or sewer service to less than 10,000 taps or connections to report its financial, managerial, and technical capacity to the Public Utility Commission (“PUC”) within three years of violating certain TCEQ orders. The bill provides the triggering events and process for establishing the temporary management of such violators. Lastly, the bill outlines the process to determine the fair market value of a utility, which includes appraisals by three utility valuation experts from a list to be maintained by the PUC.
- **SB 530 (Birdwell)** – *Relating to civil and administrative penalties assessed or imposed for violations of laws protecting drinking water, public water supplies, and bodies of water.* This bill amends Chapter 341 of the Texas Health and Safety Code (“THSC”) to amend the range of civil penalty for violating Subchapter C (sanitary standards of drinking water, protection of public water supplies, and bodies of

water) from \$50 to \$5,000 (previously capped at \$1,000 per violation).

- **SB 700 (Nichols)** – *Relating to the regulation of certain classes of retail public water utilities.* This bill amends Chapters 5 and 13 of the TWC, to redefine Class B and C utilities and to create a new class of utility, Class D (for utilities with fewer than 500 connections). The bill also authorizes the PUC to issue emergency orders and to establish reasonable compensation for a related emergency interconnection.
- **SB 2272 (Nichols)** – *Relating to the procedure for amending or revoking certificates of public convenience and necessity issued to certain water utilities.* This bill amends TWC, Chapter 13 to address CCN decertification requirements. The bill prohibits a new retail public utility from rendering service in a decertified area unless just and adequate compensation has been paid to the decertified retail public utility. The bill also provides that a certificate holder may not initiate an application to borrow money under a federal loan program after the date a decertification petition is filed until the PUC issues a decision on the petition.

Bills Vetoed by Governor Abbott:

- **HB 1059 (Lucio III)** - *Relating to a biennial report on stormwater infrastructure in this state.* This bill would have required the TCEQ to appoint a Green Stormwater Infrastructure and Low Impact Development Report Group each state fiscal biennium to prepare a report on the use of green stormwater infrastructure and low impact development in this state.
- **HB 1806 (King)** - *Relating to the use of water withdrawn from the Edwards Aquifer by certain entities.* This bill would have provided new exceptions to the rule that water withdrawn from the Edwards Aquifer must be within the boundaries of the Edwards Aquifer Authority for a retail public utility and a municipally owned utility owned by San Antonio Water System.

- **SB 1575 (Alvarado)** – *Relating to governmental immunity for and adjudication of claims arising from a local governmental entity's disaster recovery contract.* This bill would have given municipalities governmental immunity to suit and from liability for a cause of action arising from a declaration of disaster for an unspecified period.

Bills that failed to pass:

- **HB 1506 (Perez)** - *Relating to authorizing a regulatory authority to establish reduced water and sewer utility rates funded by donations for the benefit of certain low-income customers.*
- **HB 1868 (Lozano)** - *Relating to the creation of the Texas Rural Water Advisory Council.*

IV. Solid Waste

- **HB 61 (White)** – This bill is the “Slow Down To Get Around” legislation. The bill contains language that establishes, when approaching a stationary vehicle used exclusively to transport municipal solid waste, as defined by Texas Health and Safety Code (“THSC”) § 361.003, or recyclable material, as defined by THSC § 361.421, while being operated in connection with the removal or transportation of municipal solid waste or recyclable material from a location adjacent to the highway, an operator, unless otherwise directed by a police officer, shall vacate the lane closest to the vehicle when driving on a highway with two or more lanes traveling in the direction of the vehicle; or slow to a speed not to exceed: 20 miles per hour less than the posted speed limit when the posted speed limit is 25 miles per hour or more; or five miles per hour when the posted speed limit is less than 25 miles per hour. A violation of the Slow Down To Get Around provisions of the Texas Transportation Code would result in a misdemeanor, and the severity of the misdemeanor and its punishment would be determined by the extent of damage that occurred – either property damage or bodily injury.
- **HB 1331 (Thompson, Ed)** – This bill authorizes the TCEQ to charge an applicant for a permit for a municipal solid waste facility an application fee of \$2,000.
- **HB 1435 (Thompson, Ed)** – This bill establishes a requirement in the THSC for the TCEQ to inspect the facility or site before a permit for a proposed municipal solid waste management facility is issued, amended, extended, or renewed. TCEQ to adopt rules prescribing information to be included in permit applications to confirm inspections have occurred.
- **HB 1953 (Thompson, Ed)** – This bill amends THSC, Chapter 361 to add new definitions and provisions related to recycling post-



use polymers and recoverable feedstocks. The bill prohibits the TCEQ from treating post-use polymers or recoverable feedstocks as solid waste if the substances are converted (by using pyrolysis or gasification) into other valuable products and requires the TCEQ to promote the development and use of pyrolysis and gasification processes, facilities, and related technology. The bill also requires the TCEQ to study the use and proliferation of these processes, and submit the study to the legislature within two years of the effective date of the bill.

- **SB 649 (Zaffirini)** – This bill amends THSC, Chapter 361 to require the TCEQ to produce a plan to, “stimulate the use of recyclable materials as feedstock in manufacturing.” The plan must identify and/or estimate: (1) quantity and type of recyclable materials that are/not being recycled; (2) current economic benefits of recycling; (3) location and processing capacity of existing manufacturers that use recyclable materials as feedstock; (4) barriers to increasing the use of recyclable materials as feedstock for manufacturers; and (5) type of manufacturing facilities necessary to consume the existing and potential volumes of recyclable materials. The plan must recommend institutional/financial/administrative processes that could be applied to increase the use of recyclable materials and to stimulate the use of those materials by manufacturers; and, the plan must be updated every five years.

The bill also requires the TCEQ to develop an educational program outlining all the ways that recycling provides economic benefits to the state; spotlighting collectors and processors of recyclable materials and manufactures that are using recyclable materials as feedstock; and detailing the detrimental effects of contamination in the recyclables materials stream and the need to reduce those effects.

Conclusion

It does not appear likely that Governor Abbott will call the Texas Legislature into a special session in the near future. The state Legislators will start working on preparing the list of issues and subject matters the Legislators would like to study and hold public hearings on during the legislative interim time period. The Legislators will use the information they gain during their interim committee work to prepare legislation for the next Regular Session of the Texas Legislature, which will begin in January 2021.

Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups and Troupe Brewer is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com, or Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

LEGISLATION RELATING TO THE TEXAS PUBLIC INFORMATION ACT AND OPEN GOVERNMENT

by Stefanie Albright and Jacqueline Perrin

Legislation Affecting the *Boeing Co. v. Paxton* Texas Supreme Court Decision and the Texas Public Information Act ("TPIA")

The 2019 Legislative Session was again impactful on water districts and other political subdivisions of the State of Texas. This article highlights some of the bills that will certainly impact those entities with respect to maintaining and disclosing public information under the TPIA, and conducting open meetings under the Texas Open Meetings Act ("TOMA").

- **SB 943 (Watson)** The broad exception to the TPIA created by the 2015 *Boeing* case has been narrowed by SB 943, effective on January 1, 2020. The decision in the *Boeing* case generally impacted the TPIA exception for competitive bidding information and allowed information to be withheld that would give a competitive advantage to one entity over another. SB 943 makes "contracting information" public unless covered by an exception under the TPIA. Perhaps most surprising, the bill even subjects non-governmental bodies to public information requests if they contract with governmental bodies for large amounts.

SB 943 created a new category of "contracting information" that must be released by the governmental entity, unless specifically excepted from disclosure by a TPIA exception. "Contracting information" includes information maintained by a governmental body or sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor, including (1) information in a voucher or contract relating to use of public funds; (2) solicitation or bid documents relating to a government contract; (3) communications during the solicitation, evaluation, or negotiation of a government contract; (4) documents, including bid tabulations, showing bid evaluation criteria and, if applicable, an explanation of the selection; and (5) communications and other information related to the performance of a final contract or work performed on behalf of the governmental body.

SB 943 also modifies the section 552.104 "Competitive Bidding Exception" under the TPIA, requiring a governmental body or third party to show not only that the release of information would provide an advantage to a competitor or bidder, but also that the harm would be in the context of a particular ongoing or recurring competitive situation. The bill also broadens the section 552.110 "Trade Secret Exception" under the TPIA and creates a new "Proprietary Information Exception" relating to the withholding of certain bidding information.

Finally, SB 943 requires a non-governmental body that contracts with a governmental body for \$1 million in public funds in a fiscal year to comply with disclosure rules for contracting information, and allows governmental bodies to terminate contracts upon certain violations of this section.

- **HB 2840 (Canales)** relates to the right of a member of the public to address the governing body of a political subdivision at an open meeting of the body. It amends the TOMA to allow each member of the public to address a governmental body regarding an agenda item at the meeting before or during the body's consideration of the item. The body may adopt rules, including time limitations, but it may not prohibit public criticism of the body. HB 2840 also requires additional speaking time for speakers using a translator.
- **SB 494 (Huffman)** addresses certain provisions relating to open meetings and public information in an emergency. Notice for emergency items must be posted at least one hour before the meeting is convened, and the matter must be directly related to the emergency response or an urgent public necessity identified in the notice. Violations may result in injunction or mandamus by the Attorney General ("AG").

This bill also allows a governmental body to suspend public information rules if currently impacted by a catastrophe. The body must provide notice to the AG and the public, and the AG must continuously post such notices online for one year. The initial suspension period lasts seven days, and the governmental body is allowed one extension. Any public information requests received during a suspension period are considered received on the first business day after the period ends.

- **SB 944 (Watson)** provides preservation rules for public information maintained on privately owned devices. Such information must be transferred to the governmental body to be preserved, or it must be preserved in its original form in a backup or archive. To encourage compliance, governmental entities should enact policies to ensure that officers and employees, both current and former, are aware of these new requirements and create a process to ensure proper retention of public information in the future. SB 944 also allows public information requests to be made by mail, email, hand delivery, or any other appropriate method approved by the governmental body. The governmental body may designate a mailing and email address for requests, and if posted as required, response to public information requests is required only if received in the approved format and at the approved address.

Stefanie Albright is a Principal in the Firm's Districts and Water Practice Groups and Jacqueline Perrin is an Associate in the Firm's Districts and Water Practice Groups. If you have any questions concerning legislative issues affecting Districts or would like additional information, please contact Stefanie at 512.322.5814 or salbright@lglawfirm.com, or Jacqueline at 512.322.5839 or jperrin@lglawfirm.com.

ENERGY AND UTILITY LEGISLATIVE UPDATE

by Thomas Brocato, Georgia Crump, and Patrick Dinnin

During the 86th Texas Legislature, lawmakers filed more than 100 bills relating to gas and electric service and scores more pertaining to issues of interest to municipalities. We have closely monitored this year's legislative activity, and we can now report the final disposition of several key bills. Some of these legislative outcomes will benefit cities and ratepayers, while others present setbacks.

Gas Utility Matters

- **HB 1767 (Murphy)** – directs the Railroad Commission to presume the cost of employee compensation and benefits are reasonable for rate-setting purposes if those expenses are consistent with recent market compensation studies. Our analysis shows this legislation could lead to higher-than-necessary utility rates and potentially undermine reliability. This legislation was passed by the Legislature, and it was signed by the Governor on June 15. Effective date – immediately.
- **HB 864 and HB 866 (Anchia)** – These two bills are among a dozen or so filed by Rep. Rafael Anchia in response to a 2018 gas explosion that killed a 12-year-old girl in Dallas. HB 864 relates to reporting requirements for pipeline incidents. HB 866 relates to the replacement of certain gas pipelines with plastic pipes. Both bills were passed by the Legislature and were signed by the Governor. HB 864 is effective on September 1, 2019; HB 866 is effective immediately, as of June 2, 2019.

Electric Retail Customer Issues

- **HB 1408 (Patterson)** – This legislation would have barred the state from operating “a website that lists retail electric service plans or providers for the purpose of enabling or assisting a customer’s selection of a retail electric service plan.” This describes a key function of PowerToChoose.org, the state-sponsored website for electricity shopping. HB 1408 drew fire from *The Dallas Morning News*, who noted that the bill would effectively kill the PowerToChoose website that over the years has benefited consumers. This is our view also. This legislation died without receiving a hearing.
- **SB 2066 (Menendez)** – This is a consumer protection bill. SB 2066 would have created additional rules for distributed generation and solar contractors. While the Senate adopted this bill, it died in the House.
- **SB 1497 (Zaffirini)** – This legislation requires the registration and regulation of energy brokers at the Public Utility Commission (PUC). SB 1487 was passed by the legislature and signed by the Governor. Effective date – September 1, 2019.
- **HB 1766 and HB 1768 (both Murphy)** – These bills would have directed the PUC to presume the cost of employee compensation and benefits are reasonable and necessary for rate-setting purposes if those expenses are consistent with

recent market compensation studies. Although this may sound reasonable on its face, this legislation could lead to higher-than-necessary rates. HB 1767 also included a similar provision for gas utility rates. Both HB 1766 and HB 1768 died without receiving a legislative hearing.

- **SB 1941 (Hancock)** – This bill would allow transmission and distribution utilities to enter into an agreement with generators to provide power from energy storage facilities. This legislation stems from a recommendation by the PUC that lately has contended with thorny requests from regulated transmission utilities seeking permission to operate utility-scale batteries. While the Senate adopted SB 1941, it died before getting to the House.
- **SB 1211 (Hancock)** – This bill concerns mergers and consolidations of power generation companies, and it follows a recommendation from the PUC’s Scope of Competition Report. Under this bill, a power generation company merging with another power generation company within ERCOT must receive PUC authorization if it’s projected that the newly merged company will own or control more than 10 percent of installed generation capacity within ERCOT. This is in contrast to current rules, in which the PUC reviews much smaller mergers. SB 1211 was passed by the legislature and was signed by the Governor. Effective date – September 1, 2019.
- **SB 1938 (Hancock)** – This bill relates “to certificates of convenience and necessity for the construction of transmission facilities.” The bill limits the ability of non-incumbent utilities to own and operate transmission facilities. That is, the legislation favors incumbent monopolies like Oncor and CenterPoint over transmission-only companies. This legislation has drawn opposition from the Trump Administration. SB 1938 was passed by the Legislature and was signed by the Governor on May 16, 2019. Effective – immediately.
- **HB 1595 (Paddie)** – This legislation concerns the deployment of advanced metering and meter information networks in certain areas outside ERCOT. HB 1595 is one of several bills intended to encourage the roll out of advanced meter networks by non-ERCOT utilities. The Legislature passed HB 1595 and Governor Abbott signed it on May 14. Effective date – immediately.

Electric Grid Security

- **SB 936 (Hancock)** – This bill “relat[es] to cybersecurity monitor[ing] for certain electric utilities,” and allows the PUC to create a new “cybersecurity monitor.” This monitor will manage a comprehensive cybersecurity outreach program for monitored utilities; meet regularly with monitored utilities to discuss emerging threats, best business practices, and training opportunities; review self-assessments by monitored utilities of cybersecurity efforts; research and develop best business practices regarding cybersecurity; and report to the PUC on

monitored utility cybersecurity preparedness. SB 936 was passed by the Legislature and signed by the Governor. Effective date – September 1, 2019.

- **SB 475 (Hancock)** – This bill establishes the Texas Electric Grid Security Council to facilitate the creation and dissemination of grid security best practices for the electric industry. The bill authorizes a council member to apply for federal secret security clearance and prohibits a member from accessing classified information or participating in a briefing or meeting involving classified information unless the member has such clearance. The bill authorizes the Council to prepare a non-classified report and deliver it to the Governor, Lieutenant Governor, and Legislature immediately preceding the next regular session of the Legislature. The Legislature passed SB 475 and Governor Abbott signed it on June 7, 2019. Effective date – immediately.

Renewable Energy and Federal Tax Credits

- **HB 2908 (Patterson)** – This bill would have required the PUC and ERCOT to study how federal tax credits for wind production distort electric pricing within ERCOT. The study would also include consideration of peak price formation, negative pricing, ancillary services, congestion, reserve margins and transmission and distribution costs. As originally crafted, the legislation would have directed the PUC to draft rules to eliminate the effect of such renewable energy tax credits, and craft rules to eliminate the effect of the Operational Reserve Demand Curve. The House Committee on State Affairs adopted the committee substitute on April 12, but HB 2908 died without proceeding further in the legislative process.
- **SB 2232 (Hancock)** – This bill would have directed the PUC to study the effects of renewable energy subsidies on the ERCOT market. The legislation also would direct the PUC to identify a range of potential actions to eliminate the effects of these subsidies, and it would require the PUC to report its findings back to the Legislature. The Senate adopted SB 2232 on April 24, but it died without having received consideration in the House.

Issue of Interest to Municipalities

- **HB 795 (Patterson)** – This bill concerned a municipality’s ability to enforce zoning and other land-use regulations against electric companies. Identical to unsuccessful legislation filed in 2017, this bill provided additional clarity regarding the rights of a city to enforce zoning laws, even if those laws conflict with PUC decisions. The City of The Colony has been embroiled in such a dispute with an electric cooperative, and that dispute remains pending on appeal. This bill died in the House.
- **HB 2263 (Phelan)** – This bill related to the sale of electric power to certain customers. HB 2263 eliminated the energy sales program operated by the General Land Office, a program that sells power to cities and other political subdivisions. The legislation also prohibits the charging of the miscellaneous

gross receipts tax (“MGRT”) on electric sales to school districts. It does not extend this prohibition against charging the MGRT to other political subdivisions, such as cities. The Legislature passed this bill and Governor Abbott signed it on May 17, 2019. This bill is effective immediately, except Section 182.022(d) of the Texas Tax Code, which takes effect January 1, 2024.

- **HB 281 (Middleton)** – This bill would bar the governing body of a political subdivision from spending public money to influence or attempt to influence state legislation. It would not bar an officer or employee of a political subdivision from attempting to influence legislation. This bill died in the House.
- **SB 702 (Bettencourt)** – This bill would require political subdivisions that spend money on lobbying to receive authorization for those expenditures through a vote of the political subdivision’s governing body during an open meeting and as a stand-alone item. The governing body must report to the Texas Ethics Commission the identity of their lobbyists, the amount of money used for lobbying, and an electronic copy of any contract for services. While this bill received Senate approval, it died before making it to the House.
- **SB 29 (Bettencourt)** – This legislation, as originally drafted, would prohibit cities and other political subdivisions from spending money on lobbyists. SB 29 received approval in the Senate but it died when the House voted it down.
- **SB 65 (Nelson)** – This bill relates to oversight of state agency contracting and procurement. However, a House amendment to the bill would require “a political subdivision that enters or has entered into a contract for consulting services with a state agency” to disclose lobby contracts in budget documents and on political subdivision websites. The Legislature passed SB 65 with the House’s amendment, and Governor Abbott signed it on June 14, 2019. Effective Date – September 1, 2019.

Telecommunications, Cable, and Broadband

- **SB 1152 (Hancock)** – While cities are still coming to terms with HB 1004 from the 85th Legislative Session, which drastically reduced the right-of-way rental revenues received by cities from wireless providers occupying the public right-of-way, they are now faced with losing even more revenues as a result of SB 1152. This bill amends Texas Local Government Code § 283.051, and Texas Utilities Code § 66.005. These statutory provisions require telecommunications providers and cable television providers to pay access line fees and cable franchise fees, respectively, to municipalities for the privilege of occupying the public rights-of-way for the conduct of their businesses. However, the amendments to these laws mean that any company that is a member of an “affiliated group” whose members provide both telecommunications and cable television services will only have to pay one of the fees. The affiliated group will aggregate all of the fees paid to all of the cities in the state under both provisions, and will only pay the higher of the fees. As a result, cities stand to lose either access line fees or cable franchise fees from these companies. And,

cities won't know until October 1 of each year which of the two fees they will receive from each company for the upcoming calendar year. The law goes into effect on September 1, 2019, and it applies to payments made on or after January 1, 2020, based on the amounts actually paid between July 1, 2018 and June 30, 2019.

- **SB 14 (Nichols)** – Electric cooperatives wanting to install fiber optic cable and other facilities to provide broadband services to their members may now use easements, rights-of-way, licenses, and other property rights they own or use in order to do so under this new law, which adds § 181.048 to the Texas Utilities Code. Originally intended to provide a blanket expansion of the permitted uses of easements for electric transmission and distribution, the law as passed contains provisions that require the cooperative to first provide written notice to the property owner of its intent to expand the use of the easement, and prohibit the installation if the property owner protests the use of the easement or other property right for that purpose.
- **HB 1960 (Perry)** – This bill adds a new Chapter 490H to the Texas Government Code, which creates the Governor's Broadband Development Council. This new Council is tasked with researching the progress of broadband development

in unserved areas, identifying barriers to residential and commercial deployment in such areas, studying technology-neutral solutions to overcome these barriers, and analyzing how statewide access to broadband would benefit (i) economic development, (ii) the delivery of educational opportunities, (iii) state and local law enforcement, (iv) state emergency preparedness, and (v) the delivery of health care services, including telemedicine and telehealth. The Council will have 17 voting members, including representatives from internet service provider industry associations, the health information technology industry, agricultural advocacy organizations, hospital and medical advocacy organizations, county and municipal elected officials, higher education institutions, school districts and libraries, and state senate and house members. The first annual report from the Council to the Governor and the Legislature is due November 1, 2020.

Thomas Brocato is a Principal, Georgia Crump is the Chair, and Patrick Dinnin is an Associate in the Firm's Energy and Utility Practice Group. If you have any questions concerning legislative issues affecting Energy and Utilities or would like additional information, please contact Thomas at 512.322.5857 or tbrocato@lglawfirm.com, Georgia at 512.322.5832 or gcrump@lglawfirm.com, or Patrick at 512.322.5848 or pdinnin@lglawfirm.com.



ASK SHEILA

Dear Sheila,

We have some juicy rumors swirling around the office these days. According to the rumor mill, one of our employees, who was recently promoted, received her promotion because she is having a sexual relationship with her manager! Her coworkers are gossiping about it and some are upset that she may have received a promotion based on something other than merit. Apparently the rumors have gotten back to her and some of her coworkers are not being subtle about what they think.

What is the best way to handle this situation? Should we take a second look at the promotion decision and her qualifications? We don't want someone to get ahead on anything other than merit!

*Sincerely,
Too Much Drama*

Dear Too Much Drama,

It sounds like you have some investigating to do, but don't first focus on this woman's qualifications. Begin by investigating the source of the rumor and whether there is any truth to the existence of a relationship, which is likely against your employee policies. Do not assume that the rumor is true.

If there is a relationship, you should address it in accordance with your policies, which should prohibit relationships between employees in reporting relationships, and usually place more

responsibility on the senior employee to refrain from the conduct. You may at that point also want to review the merits of the promotion decision. The promoted employee might also allege a "quid pro quo" offer by the manager, which, if true, would create legal liability for the employer.

If there is no relationship, you should take action to quash the gossip. A recent federal appellate case held that an employer can be liable for sex-based coworker harassment and hostile work environment based on false rumors circulated that the plaintiff had obtained a promotion as a result of a sexual relationship. Other courts have held the same way in the past. You should take steps to shut the rumor mill down and make sure the employee's coworkers are not treating her differently because of the (false) rumors.

Don't forget that an employer can be liable for illegal harassment if it does not take appropriate and timely steps to remedy it, even if it is not perpetuated by a supervisor. For this reason, avoiding snap judgments and taking immediate action to thoroughly investigate and resolve complaints is an important way to mitigate risk. If you track down the source of the false rumors, disciplinary action may be appropriate.

"Ask Sheila" is prepared by Sheila Gladstone, Chair of the Firm's Employment Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com.



IN THE COURTS



Water Cases

State of Texas, et al v. United States Environmental Protection Agency, et al, No. 3:15-CV-00162, 2019 WL 2272464 (S.D. Tex. May 28, 2019).

The Court granted motions for summary judgment filed by the plaintiff states of Texas, Louisiana, and Mississippi and by over a dozen prominent national trade association plaintiffs, holding that the joint rulemaking undertaken by the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“USACE”) in 2015 to redefine “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”) violated the Administrative Procedure Act (“APA”) by providing inadequate opportunity for public comment. The Court enjoined the final WOTUS rule and remanded it to the EPA and USACE. Because the Court ruled based on APA violations, it did not address substantive challenges to the final WOTUS rule that were also raised by Plaintiffs. Under the APA, federal agencies are required to publish notice of proposed rulemakings in the Federal Register and allow interested persons an opportunity to comment prior to agency promulgation of a final rule. The proposed WOTUS rule carried with it a three-month public comment period during which the public was able to comment on, among all other aspects of the proposed rule, its jurisdictional grouping scheme. However, following closure of the public comment period, EPA and USACE issued a revised, final version of a technical report regarding connectivity that was unaccompanied by a public comment opportunity and that subsequently provided the basis for an aspect of the final WOTUS rule that departed from the proposed rule—the

proposed rule defined “adjacent waters” using ecologic and hydrologic criteria, whereas the final rule defined “adjacent waters” using numerical, distance-based criteria. The failure of EPA and USACE to re-open the public comment period following finalization of the report meant that the proposed rule was never open for public comment after the underlying technical report became publicly available in its final form. Further, the final WOTUS rule was the first time that EPA and USACE gave notice that they intended to define adjacency by precise, numerical, distance-based criteria. The Court found that the final WOTUS rule violated the notice-and-comment requirements of the APA, because: (1) the final rule’s definition of “adjacent waters” was sufficiently different in kind and degree from that of the proposed rule that it could not be considered a “logical outgrowth” of the rule proposed or be reasonably anticipated by the public; and (2) the final rule denied interested parties an opportunity to comment on the scientific studies that served as the technical basis for the rule.

County of Maui, Hawaii v. Hawai’i Wildlife Fund, et al., No. 18-260 (2019).

The April 2019 issue of *The Lone Star Current* reported that the U.S. Supreme Court granted *certiorari* to address the question of whether a discharge of pollutants to groundwater that is hydrologically connected to surface waters can constitute a regulated discharge within the meaning of CWA section 402 and is subject to the National Pollutant Discharge Elimination (“NPDES”) permit program. Following the filing of an *amicus curiae* brief by the Solicitor General on January 3, 2019, which encouraged

the Court to take up the case, the Court has received briefs on the merits from the Petitioner County of Maui as well as 18 amicus briefs from numerous trade associations, federal and state lawmakers, think tanks, private companies, and others. Briefing will continue throughout the summer, although the case has yet to be placed on the Court’s calendar for oral argument. However, news reports indicate that the Maui City Council is considering a resolution to settle the lawsuit before the Supreme Court hears the case. In April, the EPA issued an interpretive statement to clarify its interpretation that releases of pollutants to groundwater are categorically excluded from the CWA’s permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities (for greater detail about the EPA’s interpretive statement, please see the Agency Highlights section of *The Lone Star Current*). Issuance of this interpretive statement caused some concern among local Maui leaders that have since pushed County of Maui officials to withdraw the appeal out of concern that an unfavorable ruling could constrict the currently-expansive reach of the CWA in the Ninth Circuit and could damage the County’s reputation. While the Maui County Council has deferred the issue, it has indicated that it expects to take it up again. Meanwhile, the briefing schedule continues apace through the summer, with the Respondent’s brief on the merits due July 12.

Crystal Clear Special Utility District v. Walker, No. 1:17-CV-254-LY (W.D.Tex. March 27, 2019).

On March 27, 2019, the Western District

of Texas found that federal law preempted provisions of the Texas Water Code (“TWC”) used by landowners to release their land from a special utility district’s water certificate of convenience and necessity (“CCN”) service area. Crystal Clear Special Utility District (“Crystal Clear”), a federally-indebted utility provider, filed a 42 U.S.C. § 1983 claim against the Commissioners of the Public Utility Commission (“PUC”) and the landowner seeking CCN decertification, Las Colinas San Marcos Phase I, LLC (“Las Colinas”). Crystal Clear claimed its federal statutory rights were violated when the PUC granted Las Colinas’s application for decertification under TWC § 13.254(a-5) despite federal law 7 U.S.C. § 1926(b), which protects federally-indebted utilities in certain situations. Under TWC § 13.254(a-5), a landowner is entitled to a “streamlined expedited release” from a retail public utility’s CCN if the landowner, among other qualifications, is not receiving water or sewer service from the utility. Under TWC § 13.254(a-6), the PUC must grant an (a-5) petition within 60 days and cannot deny a petition based on the fact the CCN holder is a borrower under a federal loan program. However, under federal law, 7 U.S.C. § 1926(b), a federally-indebted utility, “shall not be curtailed or limited by... the granting of any private franchise for similar service within such an area during the term of such loan.” Here, the court found that § 1926(b) preempts TWC §§ 13.254(a-5) and (a-6). In the court’s Final Judgment, it found that the PUC’s order granting Las Colinas’s (a-5) release from Crystal Clear’s CCN was in violation of 7 U.S.C. § 1926(b), and therefore the PUC’s order was declared void. In addition, the court voided § 13.254(a-5) and also voided the portion of § 13.254(a-6) that reads, “[t]he utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program,” because these sections are preempted by federal law, 7 U.S.C. § 1926. The PUC filed a motion to amend judgment on April 24, 2019, arguing for the first time in the case that binding Fifth Circuit precedent established that political subdivisions may not file 42 U.S.C. § 1983 claims. In *City of Safe Harbor v. Birchfield*, the Fifth

Circuit held that a political subdivision was not a proper party for § 1983 claims under the Civil Rights Act. However, the Court denied the PUC’s motion for being untimely because it is not the proper vehicle for rehashing evidence, legal theories, or arguments that should have been raised before the entry of the court’s order. This is an often-litigated issue, and further cases on CCN releases and the applicability of USDA § 1926(b) loans will certainly follow.

Takings and Governmental Immunity Cases

Texas Supreme Court declines to find waiver of immunity for monetary damages in a suit by the State against a political subdivision.

Chambers-Liberty Ctys. Nav. Dist. v. State, 17-0365, 2019 WL 2063575 (Tex. May 10, 2019).

In *Chambers-Liberty Ctys. Nav. Dist. v. State*, the Texas Supreme Court reversed in part the judgment of the Court of Appeals allowing the State to pursue a claim against a political subdivision for money damages under the Texas Parks and Wildlife Code (“TPWC”). Petitioners, Chambers–Liberty Counties Navigation District (the “District”), represented by Lloyd Gosselink, leased submerged land to Sustainable Texas Oyster Resource Management, L.L.C. (“STORM”), for oyster production. The State of Texas sued the District and STORM, seeking to invalidate the lease on *ultra vires* grounds and sought monetary relief under portions of the TPWC that authorizes the State to sue and recover damages from “a person who kills, catches, takes, possesses, or injures any fish, shellfish, reptile, amphibian, bird, or animal in violation of this code.” The State argued, and the Court of Appeals held, that—although the District is generally immune from suit even when the State is the plaintiff—the sections of the TPWC combine to waive the District’s immunity and authorize the State to pursue money damages. The Supreme Court disagreed, citing to the Code Construction Act in concluding that “a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected

by clear and unambiguous language... and that the use of ‘person’ as defined to include governmental entities does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.” The Court held that the TPWC provisions had other reasonable constructions and therefore did not waive governmental immunity, barring the State’s money-damage claims against the District. The Court also rejected the State’s argument that because its claim was statutory “restitution” it should be distinguished from the general bright line rule of immunity barring monetary claims against the government. Hence, even though the District could not lease its land for the purpose of oystering, the State could not sue it for monetary recovery (however styled). This case raises further questions about whether the State will be able to recover restitution, penalties, or other monetary recovery from governmental entities going forward absent a clear and unambiguous waiver of immunity.

Knick v. Twp. of Scott, Penn., No. 17-647, 2019 WL 2552486 (U.S. June 21, 2019).

On June 21, 2019 the United States Supreme Court reversed its long-standing precedent that property owners must seek just compensation under state law in state court before bringing a federal takings claim, overruling *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). Petitioner Rose Mary Knick owned land containing a small family graveyard. Knick received notice that she was in violation of the law after a local township passed an ordinance requiring all cemeteries be kept open and accessible to the general public during daylight hours. Knick brought a state court claim alleging a taking of her property. Her state law claims were dismissed for failing to show irreparable harm after the Township withdrew the notice of violation. She did not file a state-law compensation claim. Knick then filed a claim in federal court alleging the ordinance violated the Takings Clause of the Fifth Amendment; the district court dismissed her claims and the Third Circuit affirmed, citing

Williamson County. Reversing *Williamson County*, the Supreme Court reasoned that a government violates the Takings Clause when it takes property without compensation and therefore a property owner may bring a federal takings claim at that time. The Court emphasized that under the Fifth Amendment, a property owner acquires a right to compensation immediately upon the uncompensated taking because the taking itself violates the Fifth Amendment, rather than the conclusion in *Williamson County* that the Fifth Amendment gives rise to a state law procedure that will result in compensation. The Court emphasized that the *Williamson County* precedent was “unworkable” and based on “shaky foundations” and “conflicts with much of the Court’s takings jurisprudence.” As a result of this case, local governments should anticipate more takings claims will end up in federal, rather than state, court.

Hughes v. Tom Green Cty., 17-0409, 2019 WL 1119904 (Tex. Mar. 8, 2019), reh’g denied (May 31, 2019).

This is seemingly the first case to combine two unique contours of immunity law. In *Lawson* the Texas Supreme Court held that if a government entity agrees to settle a suit for a claim from which they are not immune, it cannot then claim immunity from suit for a breach of that settlement agreement. In *Reata*, the Texas Supreme Court held that governmental entities petitioning a court for affirmative relief cannot then assert immunity to the opposing party’s counterclaim to offset the damage sought by the government. But no court had ever married *Lawson* to *Reata*...until now. *Hughes v. Tom Green County* contained a unique set of facts allowing both of these precedents to be applicable in the same proceeding. Importantly, the Court used the *Reata* immunity waiver to reach the *Lawson* rule that the County can’t assert immunity when sued for breaching a settlement agreement. *Hughes* thus clarifies the outer bounds of both the *Reata* and *Lawson* holdings. In the underlying litigation to *Hughes*, the County intervened in a probate proceeding, during which the heirs and the County signed an agreement to share equally in any recovery in order

to combine forces against the third opposing party in the proceeding. The heirs and County both claimed rights to the remainder of the same mineral estate from a university. The heirs later sued the County for breach of their agreement; the County asserted immunity to the breach of contract claims. Using *Reata*, the Court reasoned that because the County voluntarily interjected itself into probate litigation to claim title to property, they had asserted an affirmative claim, and that the County had abrogated immunity as to competing title claims—like that of the heirs in the prior litigation. Significantly, the Texas Supreme Court clarified that *Reata*’s application is not dependent on the assertion of monetary damages, but rather on the relationship of the adverse claims. Based on the decision that the County was not entitled to immunity via *Reata*, the court applied *Lawson* to bar the County’s claim of immunity based on their alleged breach of the agreement. The Court reasoned that the Mutual Partial Assignment (“MPA”) agreement made between the heirs and the County settled the adverse and mutually exclusive claims of the parties via the cross assignment of any litigation proceeds. The Court reasoned that the MPA worked to “eliminate or reduce the claims or rights of its signatories” and “settled the adversity that existed between the County and the Heirs” in the underlying litigation, and therefore *Lawson* was applicable. However, a concurrence authored by Justice Boyd argues that *Reata* was not relevant to the proceedings at all and that the County’s immunity should have never been implicated. He argues the County’s claim was a competing claim and that there was no adverse claim against a political subdivision necessitating immunity analysis at all, making *Reata* an unnecessary predicate to get to the *Lawson* question in the case. In our assessment, Justice Boyd was correct, and this case creates some troubling questions going forward. Under *Reata*, the counter-claimant against the government can only get an offset against anything the government is awarded in its claim against the counter-claimant. In other words, if the government sues for \$100,000 and the defendant files a counterclaim, then the defendant can only offset against

the government’s \$100,000 claim. If the defendant wins and is awarded \$2 billion, it can’t collect—all it can do is offset against the government’s claim. What does *Hughes* do to that rule? We don’t really know. It seems that if the government were to settle that hypothetical case and breach its settlement agreement, the erstwhile defendant could now sue (and recover) its \$2 billion. That, at least, is the implication of *Hughes*. This case presented a unique set of facts that are unlikely to be often repeated. So perhaps we need not dwell on such hypotheticals. But the court’s decision contains enough question marks that we can comfortably predict that it will lead to many more decisions from the Supreme Court to clarify the law.

City of New Braunfels v. Carowest Land Ltd., No. 03-17-00696-CV, 2019 WL 2127743 (Tex. App.—Austin May 16, 2019).

In another governmental immunity case, the Texas Court of Appeals held that the City of New Braunfels’ immunity was not waived, reversing the district court’s order denying the City’s plea to the jurisdiction. Carowest conveyed property to the City for construction of a drainage channel (the “South Tributary Project”), and the City then hired Yantis Company to construct the project. When the project did not proceed smoothly, the City and Carowest signed a Letter Agreement to modify the project. Under the Letter Agreement, Carowest would receive all the fill from the South Tributary Project and some fill from another project—the North Tributary Project (also constructed by Yantis). In exchange, Carowest agreed to indemnify the City and hold it harmless for any claims brought by Yantis for any modification costs, including costs of delay. Yantis submitted a delay claim to the City for work attributed to the South Tributary Project, which the City forwarded to Carowest to handle. Disregarding a Partial Waiver and Release of Lien it signed with the City, Yantis later resubmitted its delay claim. The City informed Yantis that it had previously waived all costs associated with change, including delay costs. Carowest then sued the City and Yantis because Yantis did not abandon its delay claim and the City never rescinded its request to

Carowest to handle that claim. The parties severed the claims into two cases.

In Carowest I, the Texas Court of Appeals concluded that there was no immunity regarding the South Tributary Project declaratory judgment claims because it was a breach of contract matter and the court had limited jurisdiction by virtue of the City's counterclaims for monetary relief.

However, in Carowest II, the Texas Court of Appeals found that immunity barred the North Tributary Project declaratory-judgment claims since the Texas Open Meetings Act only waived immunity for injunctive and mandamus relief, while a breach of contract action only waived immunity for injunctive relief. Neither waived immunity for declaratory relief.

In this third action, Carowest claimed the trial court had jurisdiction over a portion of its claim because the City asserted counterclaims for affirmative relief against Carowest and therefore waived immunity. In the parent claim, the City asserted claims for monetary relief. Within the severed claim on appeal, however, the City had not asserted a claim for monetary relief, only declaratory relief. Since this appeal concerned a bare claim for declaratory relief, unlike in Carowest I where the City asserted counterclaims for monetary relief, immunity was not waived. Extending the reasoning in *Reata*, the court distinguished the present claim for declaratory relief from the City's counterclaims in Carowest I breach of contract action, and it did not find a waiver of governmental immunity.

Air and Waste Cases

Atlantic Richfield Co. v. Christian, No. 17-1498, 2019 WL 2412911 (June 10, 2019, granting cert.).

In June 2019, the U.S. Supreme Court granted *certiorari* in *Atlantic Richfield Co. v. Christian*, agreeing to review a case arising out of the Montana Supreme Court, which may have a significant impact on Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") cleanup efforts across the country. The main issue revolves around

whether CERCLA preempts common law claims for environmental remediation of sites undergoing cleanup. The Montana Supreme Court held that CERCLA does not preempt state law restoration claims. The U.S. Supreme Court is being asked to consider (1) whether CERCLA preempts state common law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies; and (2) whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA before engaging in remedial action. We will monitor the developments in this case and provide updates in the future, as they arise.

Sierra Club v. EPA, 925 F.3d 490 (D.C. Cir. 2019).

In May 2019, the U.S. Court of Appeals D.C. Circuit held that the EPA's 2014 rule revising state air monitoring requirements was lawful, despite Sierra Club's arguments to the contrary. Sierra Club claimed the rule would unlawfully place state air monitoring network plans outside the state implementation plan review process, but the court ruled this claim was time-barred. In addition, the court held Sierra Club lacked standing for its claim that the 2014 rule illegally permitted EPA regional administrators to give case-by-case approval for reductions in the minimum required sampling frequency for fine particulate matter. Finally, the court rejected Sierra Club's argument that the revisions made to quality assurance requirements for monitoring in prevention of significant deterioration areas would undermine monitoring efforts.

State of California v. EPA, No. 18-cv-03237-HSG, 2019 WL 1995769 (N.D. Cal. May 2019).

In May 2019, a California U.S. District Court ruled that the EPA is required to promulgate a federal plan to implement the 2016 Municipal Solid Waste Landfill Emission Guidelines by November 6, 2019 for states that have not submitted a state plan (Texas has not). The ruling came as a result of a lawsuit brought by eight states (California, Pennsylvania, Illinois, Maryland, New Mexico, Oregon, Rhode Island, and Vermont), claiming that the

EPA has a mandatory duty to review and act on any state plans submitted and to impose a federal plan for those that did not submit one. While the federal plan will apply to Texas (and other states lacking their own plan), once promulgated, there is no set time for compliance with the federal plan at this time.

State of New York v. EPA, No. 19-1019 (D.C. Cir. filed Jan. 30, 2019).

In 2018, the EPA issued a "close-out" rule that would allow 20 states subject to the Cross-State Air Pollution Rule ("CSAPR") to avoid stricter controls on emissions sources that would affect attainment with the National Ambient Air Quality Standards in downwind states. The CSAPR is a cap-and-trade program that includes limits on ozone-forming nitrogen oxides (NOx). In January 2019, six states (New York, New Jersey, Connecticut, Delaware, Maryland, and Massachusetts) filed suit against the EPA in the U.S. Court of Appeals D.C. Circuit, urging the court to vacate the "close-out" rule and force EPA to promulgate a replacement rule mandating pollution cuts before 2020.

Utility Cases

Time Warner Cable Texas LLC v. CPS Energy, 17-0840, 2019 WL 2147257 (Tex. May 17, 2019).

In 2009, CPS Energy ("CPS"), the municipally-owned electric utility owned by the City of San Antonio, filed a petition at the Public Utility Commission ("PUC") complaining of AT&T and Time Warner Cable regarding pole attachments made by the companies to CPS-owned poles (PUC Docket No. 36633). CPS complained that AT&T and Time Warner were both refusing to pay CPS's invoiced fee for their attachments to poles owned by CPS. Time Warner and AT&T both had pole attachment agreements with CPS dating from the 1980's, whereby they both agreed to pay a rate of \$3.75 per attachment. Time Warner's agreement had an escalator clause allowing annual rate increases, but AT&T's agreement did not. Over time, Time Warner's rate had escalated to \$15.63, while AT&T continued to pay the lower amount. Upset that CPS did not try to collect the higher fees from

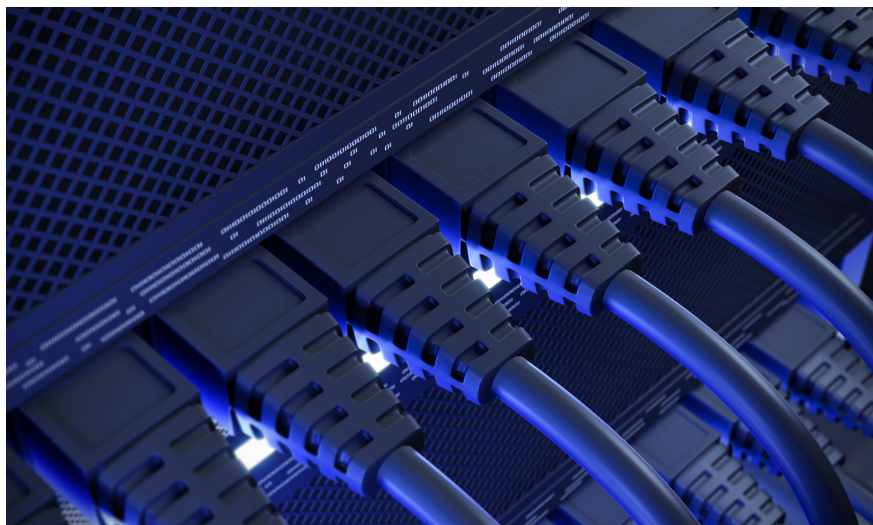
AT&T, Time Warner sued CPS in 2008. Time Warner alleged that CPS violated Public Utility Regulatory Act ("PURA") § 54.204(c) which, since September 1, 2006, has required utilities like CPS to charge all telecommunications providers "a single, uniform pole attachment...rate," and § 54.204(b), which prohibits utilities from discriminating between providers regarding pole attachment rates or terms. By agreement of the parties, the lawsuit was abated pending completion of the PUC complaint proceeding. In its PUC complaint, CPS argued that it had tried to collect the higher fee from AT&T, but to no avail, and sought the PUC's help in enforcing the non-discrimination provisions of PURA and ordering AT&T to pay the higher rate. The matter was litigated at the PUC until the Order on Rehearing was issued on February 1, 2013 (after over 4 years and more than 900 filings by the parties). Early on, the PUC dismissed CPS's request that the Commission order AT&T and Time Warner to pay overdue fees. Then, in its Order on Rehearing, the PUC found that CPS had violated § 54.204(c) for the period in which it made no meaningful effort to collect a uniform rate, and ordered CPS to comply with the statutory provisions going forward. The PUC also recalculated

the maximum allowable pole attachment rate to be charged by CPS. On appeal from the PUC Order, the district court affirmed the PUC's conclusions. The Court of Appeals reversed, however, reasoning that PURA § 54.204(c) only requires that a utility charge uniform rates, not that it also collect them. The Court of Appeals concluded that the PUC exceeded its authority in requiring CPS to use meaningful and serious efforts to collect its rates. On May 27, 2019, the Supreme Court of Texas overturned the Court of Appeals decision, noting that "CPS Energy failed to make any serious or meaningful effort to collect from AT&T before it initiated the enforcement proceeding, and

it collected far more from Time Warner than from AT&T." The Supreme Court, therefore, determined that "CPS Energy discriminated in collecting rates from these telecommunications providers," and that "the PUC could reasonably have concluded, as it did, that CPS Energy violated the plain terms of PURA Section 54.204(b)."

City of Alvin v. Comcast of Houston LLC, No. 4:19-CV-00458 (S.D. Tex. May 22, 2019).

Numerous cities served by Comcast of Houston, LLC ("Comcast") have brought suit against Comcast, disputing the accuracy and completeness of Comcast's franchise fee payments. In February 2019, the case was removed to U.S. District Court for the Southern District of Texas. On April 5, Comcast filed a Partial Motion



to Dismiss, alleging that the Cable Act and Chapter 66 of the Texas Utilities Code both bar the cities' claims for franchise fees on what Comcast deems to be non-cable service revenues. Comcast also claimed in its motion that the cities had not asserted a viable declaratory judgment claim, and that the request for accounting claim was invalid. At the end of May, the court issued its Memorandum and Order. The results from the decision are mixed, but ultimately it remains positive for cities' ability to continue to pursue their statutory claim for underpayment. The court dismissed without prejudice the cities' request for accounting, finding that the issue is premature. However, the Order did not

speak to the issue that fees have gone unpaid, or whether Comcast improperly itemized deductions, which are both issues at the heart of the case. The court stated that "the true issue is whether Comcast's method for determining what constitutes 'gross' revenue from cable services is flawed or invalid under the terms of the Agreement or the Act and regulation." This means that this claim remains to be adjudicated. Because the cities' claims have not all been dismissed, the court will continue to resolve the primary dispute.

Atmos Pipeline - Texas v. Railroad Commission of Texas, No. D-1-GN-17-005869 (353rd. Dist. Ct. Travis County, Tex.).

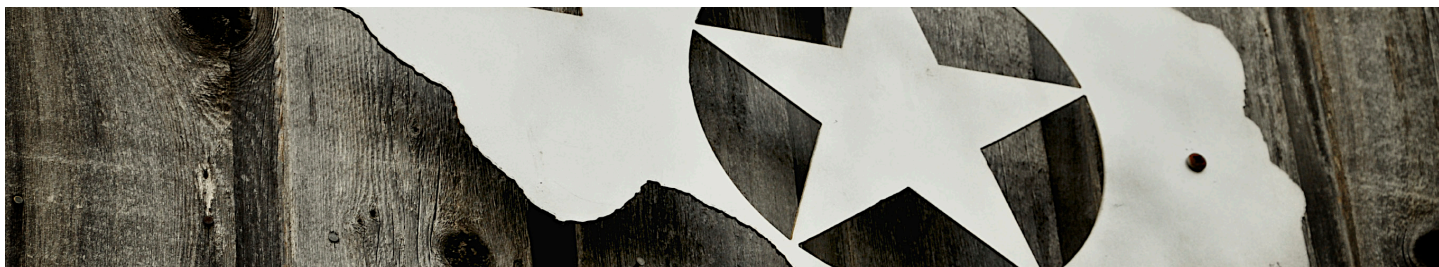
The appeal filed by Atmos Pipeline-Texas ("APT") from the Texas Railroad Commission's decision in APT's last rate case (GUD No. 10580) is scheduled for oral argument in the Travis County District Court on July 31, 2019. The issues on which APT appealed are the capital structure methodology used by the Commission, the return on equity (11.5%) ordered by the Commission, the exclusion of certain incentive compensation amounts, and limitations on the results of the cost allocation methodology. ACSC, the Commission, the City of Dallas, the

ATM coalition, and Texas Industrial Energy Consumers intervened in APT's appeal in support of the agency order. Arguments will be heard by Judge Scott Jenkins of the 353rd District Court.

In the Courts is prepared by the Firm's Water and Compliance and Enforcement Practice Groups, Emily Linn in the Firm's Employment Law and Litigation Practice Groups, and Samuel Ballard in the Firm's Air and Waste Practice Group. If you would like additional information, please contact Emily at 512.322.5889 or elinn@lglawfirm.com, or Sam at 512.322.5825 or sballard@lglawfirm.com.



AGENCY HIGHLIGHTS



United States Environmental Protection Agency (“EPA”)

An EPA Interpretive Statement issued on April 15, 2019 clarifies the Clean Water Act’s (“CWA”) applicability to groundwater.

This Interpretive Statement sets forth the EPA’s position on the inapplicability of the CWA’s National Pollutant Discharge Elimination System (“NPDES”) permitting program to releases of pollutants from a point source to groundwater that subsequently migrates or is conveyed by groundwater to jurisdictional waters of the U.S. Simply put, regardless of whether or not there is a hydrologic connection between groundwater and a jurisdictional surface water, EPA views releases of pollutants to groundwater as categorically excluded from the CWA’s NPDES permitting requirements.

To be clear, EPA did not conclude that the CWA applies only to direct releases to navigable waters. Rather, the Interpretive Statement leaves open the possibility of CWA liability when pollutants are conveyed to a navigable water through a mechanism other than groundwater. This is because EPA views groundwater as an intervening cause, which breaks the chain of connection between the discharge and the jurisdictional water for NPDES purposes. The Interpretive Statement does not, however, address whether and/or what potential mechanisms of conveyance through other mediums would break the causal chain. Accordingly, the determination of whether an NPDES permit is required for indirect discharges to waters of the U.S. will continue to be made on a fact-specific, case-by-case basis.

The position taken in this Interpretive Statement is based on EPA’s conclusion that Congress explicitly left regulation of discharges to groundwater to the states and to the EPA under other statutory authorities. According to EPA, a holistic reading of the CWA and its legislative history indicates groundwater was specifically intended to be excluded from the NPDES permitting program. EPA points to the passive references made to groundwater in the supportive provisions of the CWA (e.g., those concerning providing information, guidance, and funding to states), and to the categorical exclusion of groundwater from the operative sections of the CWA. According to the Interpretive Statement, Congress chose to leave groundwater regulation to the states with the intent of striking a jurisdictional balance between federal and state responsibility.

While the Interpretive Statement does inform future permitting

decisions, it neither alters legal rights or obligations, nor changes or creates law. Nonetheless, EPA’s stated position differs from the theories on groundwater-related NPDES liability currently arising out of the federal circuit courts. The Fifth, Sixth, and Seventh Circuits have read the statutory language as only applying where a pollutant has been directly added to navigable waters via a point source, and not another mechanism, like groundwater. The Fourth and Ninth Circuits, on the other hand, have interpreted Section 402 of the CWA as applying to “fairly traceable” discharges from a point source to “sufficiently connected” navigable waters where the pollutant has travelled over or through any other medium, including groundwater. On February 19, 2019, the U.S. Supreme Court even granted *certiorari* in the Ninth Circuit case (*Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d. 737 (9th Cir. 2018); see also April 2019 *The Lone Star Current*). As such, EPA recognizes that its Interpretive Statement should only guide states and EPA regional offices outside of the Fourth and Ninth Circuits.

EPA issues new guidance for implementation of CWA Section 401 water quality certifications.

CWA Section 401 is intended to give states and authorized tribes a direct role in protecting water quality within their jurisdictions. Under Section 401, states and tribes are authorized to certify that a discharge to waters of the U.S. that may result from a proposed activity will comply with applicable provisions of certain enumerated sections of the CWA. Recently-issued Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth,” however, takes the position that outdated federal guidance and regulations regarding Section 401 are causing confusion and uncertainty, and are hindering the development of energy infrastructure. As such, it directed EPA to issue new guidance to clarify water quality certification requirements under Section 401.

Such guidance, titled “Clean Water Act Section 401 Certification Guidance for Federal Agencies, States, and Authorized Tribes,” was issued by the EPA on June 7, 2019, and replaces the prior interim guidance from 2010. The new guidance makes clear that Section 401 also places limitations on how the role of states and tribes may be implemented to maintain an efficient permitting process within the system of cooperative federalism established by the CWA.

With regard to statutory and regulatory timelines, the guidance makes clear that (1) federal permitting agencies have the authority and discretion to establish certification timelines so

long as they are reasonable and do not exceed one year; (2) the timeline for review begins upon receipt of a written request for certification; and (3) although the CWA does not provide any procedure by which a project proponent may negotiate or agree to provide the state or tribe with additional time to consider the request, the CWA also does not prohibit a federal permitting agency from modifying an established reasonable timeline, as long as it remains reasonable and does not exceed one year from receipt of the request.

As required by Executive Order 13868, the new guidance also addresses the appropriate scope of Section 401 review and conditions. EPA recommends that the scope of a Section 401 certification review, and the decision to issue or deny a Section 401 certification, be limited to an evaluation of potential impacts to water quality. Accordingly, EPA concludes that conditions in a Section 401 certification should be limited to ensuring compliance with the appropriate provisions of CWA Sections 301, 302, 306 and 307. The guidance document also recommends that if a state or tribe issues a Section 401 certification with conditions beyond the permissible scope of Section 401, i.e., conditions not related to water quality, or has denied a water quality certification for reasons beyond the scope of Section 401, federal permitting agencies may determine whether a permit or license should be issued with those conditions or if the state or tribe has waived the certification requirement.

The new Section 401 guidance also clarifies the scope of information relevant to a state or tribe's Section 401 certification review, indicating it should be limited to the application materials submitted for the federal permit or license. EPA also recommends that states or tribes not delay action on a certification request until a National Environmental Policy Act ("NEPA") review is complete because the environmental review required by NEPA has a broader scope than that required by Section 401. Further, according to the new guidance, any effort by a state or tribe to delay action past the reasonable timeline due to insufficient information may be inconsistent with the CWA and specifically with Section 401.

EPA issues rule exempting air emissions from manure at farms from federal reporting requirements. In June 2019, the EPA issued a final rule exempting air emissions from animal waste at farms from Emergency Planning and Community Right-to-Know Act ("EPCRA") reporting requirements. Under the prior rule, air emissions from animal waste at farms were reportable under EPCRA because such releases are generally not federally permitted and may exceed the applicable reportable quantity. However, under the new rule, such releases would be exempt. The exemption is limited to air emissions from animal waste at farms, and would not apply to releases of substances from animal waste into water.

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units. In April 2019, EPA

issued a final rule amending several provisions of the 2016 New Source Performance Standards and Emission Guidelines for Commercial and Industrial Solid Waste Incineration ("CISWI"). The rule provides regulated facilities additional time to complete initial compliance demonstrations; allows facilities to comply with production-based emission limits in lieu of the concentration-based limits in the 2016 CISWI rule; extends the timeline for performance evaluation tests from 60 days to 180 days; and allows facilities to use a continuous emissions monitoring system for demonstrating initial compliance, which is aimed at lowering compliance testing costs.

EPA Proposes to Approve Texas' Affirmative Defense in Air Emission Enforcement Actions. In April 2019, EPA issued a proposal to approve affirmative defense provisions in Texas's state implementation plan ("SIP") that would shield large stationary sources from civil penalties for excess air emissions resulting from upset events and unplanned maintenance, startup, or shutdown activities. An affirmative defense in this context means a defense advanced by a defendant in an enforcement proceeding that specifies particular criteria that, if met, prevent imposing penalties for violations of SIP requirements. While the proposal approves affirmative defenses in Texas's SIP, it still prohibits affirmative defenses within EPA's hazardous air pollutant rules. The comment period for the proposal closed on June 28, 2019, but there is no indication on when it will be final.

EPA Issues Draft Interim Recommendations to Address PFAS in Groundwater. In April 2010, the EPA released its draft Interim Recommendations for Addressing Groundwater Contaminated with Perfluorooctanoic Acid ("PFOA") and/or Perfluorooctane Sulfonate ("PFOS"), which are two of the primary substances that fall under the larger category of per- and polyfluoroalkyl substances ("PFAS"). The EPA indicated earlier this year that it intends on rolling out a comprehensive regulatory scheme to address PFAS, as discussed in the April 2019 edition of *The Lone Star Current*. The Interim Recommendations set 70 parts per trillion as the preliminary remediation goal for groundwater for PFOA and PFOS combined. EPA intends for the recommendations, when finalized, to provide "a starting point for making site-specific cleanup decisions" as well as "clear and consistent guidance for federal cleanup programs, including the Comprehensive Environmental Response, Compensation, and Liability Act."

The EPA received over 370 comments on the recommendations before the comment period closed on June 10, 2019. Several state agencies, including the Texas Commission on Environmental Quality ("TCEQ"), provided comments. TCEQ commented that while the agency agrees with the recommendations, it does not believe that they are broad enough, as the guidance does not indicate how other PFAS components will be addressed. In addition, TCEQ questioned how EPA intends to implement the recommendations, without a federally-promulgated standard, in situations where other state risk-based information supports cleanup at a different level. EPA will make any revisions it deems necessary to the recommendations upon reviewing

these comments before providing the guidance to the Office of Management and Budget for final review.

Texas Commission on Environmental Quality (“TCEQ”)

TCEQ is seeking public comment on a proposed rulemaking regarding the beneficial reuse of treated wastewater. The rulemaking proposed in Docket No. 2019-0399-RUL would amend TCEQ’s rules to give an applicant for a Texas Land Application Permit (“TLAP”) the option to obtain a “beneficial reuse credit” in order to reduce the acreage required for land application of treated domestic wastewater. Such a credit would be based on firm reclaimed water demand demonstrated by water use data from the applicant’s reclaimed water users. Under the proposed rule, an applicant could also use a beneficial reuse credit to increase permitted flows without changing the disposal acreage or to change both the disposal acreage and the permitted flow, but the proposed rules would not allow the effluent storage size required by Chapter 222 to be reduced by the beneficial reuse credit. TCEQ also proposes to prohibit reducing the disposal site area by more than 50% of the area required based on permitted flow.

The proposed rulemaking is the result of a petition filed by the City of Austin in response to increasing demands on water supplies and decreasing availability of land areas large enough for domestic wastewater disposal under TCEQ’s current rules. TLAP applicants seeking a beneficial reuse credit would be required to submit five years of consecutive data from the period immediately preceding the application filing date, if available, to demonstrate firm reclaimed water demand. The executive director determined that if such data is not available, at least two years of water data is necessary to support a user’s demand as firm. Accordingly, potential applicants must be existing entities with historical water use data, and prospective or speculative water use data would be prohibited. For users with less than five years of water use data, the credit would be calculated as 80% of the lowest single month of total outdoor water use. Otherwise, the credit would be 80% of the average of the lowest three months of total outdoor water use or 100% of the average of the lowest three months of total water use data.

The public comment period began June 28, 2019, and ends July 30, 2019. Until that time, written comments may be submitted electronically at <https://www6.tceq.texas.gov/rules/ecomments/>, or mailed to Ms. Kris Hogan, MC 205, Office of Legal Services, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. All comments should reference Rule Project Number 2016-042-309-OW. Additionally, a public meeting is scheduled for 10 a.m. on July 25, 2019, at TCEQ, 12100 Park 35 Circle, Building E, Room 201-S, Austin, Texas 78753.

Texas Legislature

The Senate Committee on Agriculture, Water, and Rural Affairs (“Senate Ag. & Water”) has submitted its interim report, including findings and recommendations for consideration by

the 86th Legislature, to Lieutenant Governor Dan Patrick. The year and a half between legislative sessions in Texas is known as the “interim” period. Committees of the House of Representatives (the “House”) and Senate use this period to conduct hearings and hold public meetings to study certain issues, or charges, assigned to them by the Speaker of the House or the Lieutenant Governor, the presiding officers of their respective chambers. At the close of the 85th Legislative Session, the Lieutenant Governor’s interim charges to Senate Ag. & Water directed it, among other things, to study and evaluate water right permit issuance, the regulatory framework for groundwater conservation districts (“GCDs”) and river authorities, and prioritization in the Regional Water Plan. Having done so, Senate Ag. & Water recently published its interim report. Noteworthy findings in the interim report include a recommendation that the length of time it takes the TCEQ to process surface water permits be improved upon, and the conclusion that Texas landowners and producers would be better served by a GCD regulatory process that was similar across neighboring GCDs. The TCEQ also produces a biennial report for the state’s lawmakers before every regular legislative session. That report was delivered to the state Capitol on December 7, 2018, and, perhaps prophetically, contained an appendix addressing “Permit Time-Frame Reduction and Tracking.” A full copy of the interim report prepared by Senate Ag. & Water of the 85th Legislative Session is available here: <https://senate.texas.gov/cmtes/85/c505/c505.InterimReport2018.pdf>, and the TCEQ’s biennial report can be accessed at: <https://www.tceq.texas.gov/publications/sfr/tceq-biennial-report/biennial-report-to-the-86th-legislature-fy2017-fy2018/biennial-report-to-the-86th-legislature-fy2017-fy2018>.

Texas Water Conservation Association (“TWCA”)

January 2020 will bring new leadership to TWCA. With current General Manager Dean Robbins planning his retirement from TWCA effective December 31, 2019, the Board of Directors voted at its recent Mid-Year Conference to name Stacey Allison Steinbach, current Assistant General Manager, as the incoming General Manager upon Dean’s retirement. Ms. Steinbach has worked at TWCA for the past four years, but her water-related collaboration with Mr. Robbins began 15 years ago at the beginning of Ms. Steinbach’s career as a water attorney in Austin. In addition to her time at TWCA, Ms. Steinbach has served as executive director of the Texas Alliance of Groundwater Districts and as an attorney at the Texas General Land Office. Prior to that, Ms. Steinbach worked in the Water Practice Group at Lloyd Gosselink. Ms. Steinbach holds a Bachelor of Science in biology and ecology from Baylor University, a Master of Science in wildlife and fisheries sciences from Texas A&M University, and a juris doctor, with honors, from the University of Montana School of Law.

Public Utility Commission of Texas (“PUC”)

On March 22, 2019, Governor Abbott appointed Lori Cobos as Public Counsel for the PUC’s Office of Public Utility Counsel (“OPUC”) with a term set to expire on February 1, 2021. OPUC

represents small commercial and residential consumers in the electric, telecommunications, and water and wastewater utility industries in utility matters before state and federal regulatory agencies and courts. Leading OPUC's representation of consumers, the Public Counsel oversees OPUC's overall operations.

Prior to her appointment, Ms. Cobos worked in private practice as the principal owner of Cobos Law Firm. Her practice focused on the representation and counseling of clients regarding legal, regulatory, public policy, legislative, and business development matters in the Texas energy industry. Ms. Cobos also has more than fifteen years of experience in the Texas electric power industry, having served in several senior-level positions at the PUC and as in-house counsel for the Electric Reliability Council of Texas prior to her appointment. Specifically, Ms. Cobos served as an advisor for two PUC Commissioners, assistant counsel to the PUC Executive Director, and senior policy analyst in the PUC's policy development division. Ms. Cobos' interest in the Texas electric power industry dates back to law school, during which time she worked as a law clerk at Lloyd Gosselink. Ms. Cobos' appointment has not yet been confirmed by the Texas Senate.

Utilities File EECRFs. Pursuant to the PUC's energy efficiency rules, electric utilities made their annual Energy Efficiency Cost Recovery Factor ("EECRF") filings at the end of May to adjust their rates during the following year to reflect changes in program costs and performance bonuses. The filings also true-up any prior energy efficiency costs over- or under-collected pursuant to PURA and PUC rules. Because EECRF proceedings are limited in scope and review, they proceed on an expedited schedule.

AEP Texas Inc. ("AEP Texas") is seeking to adjust its EECRF to collect \$11,244,298 (\$9,027,616 for the Central Division and \$2,216,682 for the North Division) in 2020. CenterPoint Energy Houston, LLC ("CenterPoint") is seeking to collect \$37,820,991, Texas-New Mexico Power Company is seeking to collect \$5,854,754, and Oncor Electric Delivery Company, LLC ("Oncor") is seeking to collect a 2020 EECRF of \$56,446,846.

In each EECRF proceeding, the PUC has issued its Preliminary Order, setting the list of issues to be addressed at the State Office of Administrative Hearings.

Cities Request Dismissal of TGS Harvey Cost Recovery Request. On April 16, 2019, Texas Gas Service ("TGS"), a division of ONE Gas, Inc., filed its Statement of Intent to Increase Rates to Recover Hurricane Harvey Response Costs Within the Gulf Coast Service Area with the Railroad Commission of Texas ("RRC"). In its filing, TGS requested a total increase in revenue of \$714,389 over a two-year period. This amounts to an annual increase of 1.22% (including gas costs) or 1.98% (excluding gas costs).

In June 2019, the Cities of Groves, Nederland, Port Arthur, Port Neches, and Galveston (the "Cities") filed a Joint Motion to Dismiss TGS's docket. The Cities argued that the application, if approved, would result in piecemeal ratemaking, alleging that

the expenses should have been presented with a comprehensive base rate case in order to be eligible for recovery. The Cities also requested the proceedings be abated in order to give the parties the opportunity to reach a settlement. The parties have reached a settlement in principle that resolves this procedural issue. Under the terms of the settlement, these costs will be preserved for a future rate case.

RRC Issues Order on Atmos RRM Denial Appeal. Atmos Energy Corp., Mid-Tex Division ("Atmos"), appealed certain cities' denial of Atmos' Rate Review Mechanism ("RRM") case. Atmos and the cities filed a partial settlement agreement in February 2019, resolving all issues except whether short-term debt should be used in calculating Atmos' capital structure.

A hearing on the merits was held on March 7, 2019, and the Administrative Law Judges issued their Proposal for Decision ("PFD") on April 24, 2019. On May 21, 2019, the Commission issued its Final Order, agreeing with the PFD and approving the parties' partial settlement, and also deciding that short-term debt should be excluded from Atmos' rate base.

The issue as to whether short-term debt should be treated the same way as long-term debt in determining the utility's capital structure is currently in litigation in the pending appeal in district court from the Commission's decision in the last Atmos Pipeline rate case (Gas Utilities Docket No. 10580), scheduled for oral argument on July 31, 2019. In that case, the Commission determined it was reasonable to include short-term debt in the Company's capital structure. Atmos Pipeline is arguing in the appeal that the Commission acted against precedent in its decision.

Oncor Hits Speedbump in Sale of South Texas Assets to AEP Texas. As previously reported, on March 29, 2019, in Docket No. 49402, Oncor and AEP Texas filed a joint report and application for the PUC to approve the transfer of Oncor's McAllen and Mission area distribution assets, service areas, and associated retail electric delivery customers to AEP Texas. The assets being sold are the same assets that were sold to Oncor from Sharyland Utilities, L.P. and Sharyland Distribution and Transmission Services, L.L.C. in PUC Docket No. 47469.

On May 30, 2019, the Steering Committee of Cities Served by Oncor ("Cities"), the Office of Public Utility Counsel, and Texas Industrial Energy Consumers filed a Joint Request for Hearing. Those intervenors, along with the Alliance for Retail Markets, are concerned about how the approval of Oncor and AEP Texas' Application will affect customer rates and the confusion it will cause with AEP Texas' rate case pending at the same time. Parties are currently discussing possible settlement or abatement of the schedule to correspond with the timing of the AEP Texas rate case.

Oncor DCRF Settled, Awaiting PUC Approval. As previously reported, Oncor filed an application with the PUC on April 8, 2019, to amend its Distribution Cost Recovery Factor ("DCRF").

The parties have settled and have filed the settlement documents with the PUC for approval.

Oncor is seeking to update its current DCRF Rider and Wholesale DCRF (“WDCRF”) Rider to include additional distribution of invested capital placed in service from January 1, 2017, through December 31, 2018. This is Oncor’s second DCRF filing since its last full base rate case in PUC Docket No. 46957.

Oncor’s application states that it invested \$838,823,298 in net distribution system invested capital booked during the period of January 1, 2017, through December 31, 2018. The Company’s total

PUC Reaches Decisions on SPCOA Revocations. The PUC has finally entered orders in several of Staff’s requests for Service Provider Certificate of Operating Authority (“SPCOA”) revocations. The PUC staff has filed over a dozen requests to revoke SPCOAs that are unused, or whose holders have not met their obligations under the certificates.

In June, the PUC granted nine default orders, revoking SPCOAs from Broadband Fiber, LLC; BroadLinkOne; iNetworks Group, Inc.; Magnum Networks, LLC; Public Wireless; Safetel, LLC; Sara Telecom, LLC; T2 Communications, LLC; and Usmani Enterprises, Inc.



The PUC also denied several of Staff’s motions for default order in its revocation proceedings for various reasons, including incorrect addresses for notices, and finding good cause for the companies’ untimely hearing requests (Vitcom and Phonoscope). PUC Staff has withdrawn petitions to revoke SPCOAs from Cbeyond Communications LLC and Crown Castle NG Central LLC for various reasons, as have been previously reported. In addition, on June 12, 2019, Staff withdrew its petition to revoke ExteNet Systems, Inc.’s SPCOA. This case had been abated at the parties’ request to allow for settlement negotiations. However, the Staff has now requested the ALJ to close the docket; the case was dismissed on June 17. Staff

distribution revenue requirement associated with allowed return, depreciation, income and other taxes on its net distribution invested capital during that period is \$84,746,424. Adjusted for load growth, the total distribution revenue requirement is \$44,633,617. Compared to the revenue requirement of \$15,199,813 agreed to, and approved, in Oncor’s last DCRF in Docket No. 48231, this filing seeks to increase the Company’s total distribution revenue requirement by approximately \$29,433,804.

The PUC referred the case to the State Office of Administrative Hearings (“SOAH”) on April 9, 2019, requesting the assignment of an Administrative Law Judge (“ALJ”) to conduct a hearing and issue a proposal for decision, if necessary. On June 10, based on the settlement stipulation submitted by the parties, the SOAH ALJ remanded the case to the PUC and subsequently dismissed the SOAH docket. The settlement requires PUC approval at an open meeting of the Commissioners.

withdrew its revocation application without prejudice to refile, stating that it will request a new docket if it becomes necessary to revoke ExteNet’s SPCOA in the future.

The petition to revoke Telenational Communication Inc.’s SPCOA is the only case that has not had any movement since the filing of the petition on April 30, 2019.

CenterPoint and AEP Texas Rate Case Updates. The PUC and interested parties continue to review the recent rate case filings by CenterPoint and AEP Texas.

On April 5, CenterPoint filed its application to increase system-wide transmission and distribution rates by \$161 million per year. In its filing in PUC Docket No. 49421, CenterPoint asserts that it is entitled to an increase of \$154 million in retail transmission and distribution rates (an increase of about 7.4%) and \$6.8 million

in wholesale transmission rates (an increase of about 1.8%). According to CenterPoint, the impact on an average residential customer would be an increase of about \$2.38 per month.

The parties in the CenterPoint case just wrapped up a hearing on the merits that took place on June 24-27, 2019.

Similarly, on May 1, AEP Texas filed its application to increase system-wide transmission and distribution rates. AEP Texas seeks to consolidate the rates of its Texas Central Company ("TCC") and Texas North Company ("TNC") divisions into a single rate under the business name "AEP Texas," reflecting the PUC's approval to merge the management and operation of the divisions in Docket No. 46050. In its filing in PUC Docket No. 49494, AEP Texas asserts that it is entitled to an increase of \$38.3 million in retail distribution rates (an increase of about 4.2%) and a decrease of \$3.16 million in wholesale transmission rates (a decrease of about 0.7%). According to AEP Texas, the impact on an average residential customer in the AEP TCC division would be an increase of about \$4.75 or 9.8% per month. The impact on an average residential customer in the AEP TNC division would be an increase of about \$5.01 or 10.6% per month.

The parties in the AEP Texas case are currently undertaking discovery and reviewing AEP Texas' direct testimony. Intervenor's direct testimony is due on July 25, 2019, and the hearing on the merits is scheduled for August 20-23, 2019.

PUC Approves Settlement of Oncor and Sharyland Merger. As we have previously reported, Oncor Electric Energy Delivery Company LLC ("Oncor"), Sharyland Distribution & Transmission Services, L.L.C. ("SDTS"), Sharyland Utilities, L.P. ("Sharyland"), and Sempra Energy ("Sempra") (collectively, "Applicants") filed a Joint Report and Application for Regulatory Approvals ("STM Application") at the PUC in Docket No. 48929. On April 5, 2019, the parties agreed upon a stipulation that seeks a settlement of the STM Application.

The STM Application seeks approval for several transactions: (1) the exchange of transmission assets between SDTS and Sharyland and the respective CCN amendments required; (2) the acquisition of InfraREIT, Inc. by Oncor; and (3) the acquisition of a 50% indirect interest in Sharyland by Oncor and Sempra.

The Steering Committee of Cities Served by Oncor intervened in this proceeding, along with Texas Industrial Electric Consumers, Office of Public Utility Counsel, and several other intervenor groups. After lengthy settlement discussions throughout March and April 2019, the Applicants agreed to accept terms offered by the opposition.

At its May 9, 2019 open meeting, the PUC Commissioners adopted a final order, specifying several terms that the parties must adhere to after the closing. The major terms of settlement include: (1) elimination of a Future Development Agreement between Sharyland and Oncor, which all intervenors found to be not in the public interest; (2) Oncor providing merger savings

rate credits to customers of \$5 million in 2019, \$5 million in 2020, and \$2 million in 2021; (3) Oncor and Sharyland providing 90% of interest savings of each utility resulting from improved credit after the merger; (4) Oncor agreeing to not seek transaction costs from ratepayers and holding its customers harmless from any de-REITing liabilities; and (5) the South Texas Sharyland utility will be ring fenced in a manner similar to Oncor, with the exception that it will not be required to have an independent board of directors. There are several additional settlement terms relating to treatment of taxes and regulatory assets.

Atmos Mid-Tex Files its 2019 Annual RRM. On April 1, 2019, Atmos Mid-Tex ("Atmos Mid-Tex") made its annual filing under the Rate Review Mechanism ("RRM") Tariff. The RRM is an annual expedited review rate proceeding used by Atmos in its Mid-Tex and West Texas service areas. The RRM Tariff was created as a substitute for Gas Reliability Infrastructure Program ("GRIP") filings as a part of Atmos Mid-Tex's 2007 system-wide rate case.

The RRM Tariff process allows cities to evaluate all aspects of the utility's business, similar to a full rate case but in a shortened timeframe, and using certain assumptions from the last fully-litigated rate case. Cities can then negotiate the proposed increase with Atmos Mid-Tex. In contrast, GRIP filings are not subject to substantive review by cities, and only address recovery of the utility's capital investment.

In its 2019 RRM filing, Atmos Mid-Tex claims to have a \$70 million revenue deficiency on a system-wide basis. Atmos Mid-Tex also reports that from 2011 through 2017, it replaced 1,154 miles of distribution pipe and over 171,000 steel service lines. Further, during 2018, Atmos Mid-Tex claims to have replaced 290 miles of distribution pipe and 16,000 steel service lines. Under the provisions of the RRM Tariff, October 1 is the effective date for new rates. Cities will be requested to take action on this matter in September.

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