Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 24, NO. 4 OCTOBER 2019

THE LONE STAR CURRENT

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

BUGS, BUNNIES, AND THE BLANKET RULE: A BRIEF OVERVIEW OF KEY ENDANGERED SPECIES ACT RULE REVISIONS

by Lauren C. Thomas

The Endangered Species Act ("ESA"), the United States' leading federal legislation for the protection of endangered and threatened species, underwent three major rule revisions over the past few months. These revisions stand to alter the way in which species are listed, delisted, and reclassified, and how affected entities can advocate for or against certain federal decisions on species classification. This article explores these three critical ESA changes: (i) the repeal of the so-called "blanket rule," (ii) the added provisions for species-specific rules, and (iii) the removal of the "economic impact" language.

The ESA affects federal, state, and local governments, as well as private parties, such as individual property owners and developers. In Texas, there are over 100 species classified as threatened or endangered under the ESA, as administered primarily by the U.S. Fish & Wildlife Service ("FWS"). *See* Federally Listed, State Listed, and Candidate Species in Texas Datasheet https://tpwd.texas.gov/huntwild/wild/wildlife_diversity/nongame/listed-species/.

The first rule revision is the repeal of the "blanket rule." Under the ESA, when a species is listed as endangered, parties are prohibited from taking certain actions, such as causing harm, killing, or stressing species in ways that might affect them or their habitat. Historically, however, the FWS automatically extended the prohibitions available to species listed as "endangered" to species that were classified as "threatened," but the National Marine Fisheries Service ("NMFS") would not. Because the FWS has jurisdiction over terrestrial and freshwater organisms, and the NMFS has jurisdiction over marine organisms, there are differences between the levels of regulatory protection available to the species at issue. 16 U.S.C.A. 1533(d). Now, because the FWS will no longer apply a blanket rule to threatened species, both the FWS and the NMFS will implement the prohibitions in the same way. However, this revision will only apply to species that are listed as threatened after September 26, 2019. Thus, species designated as "threatened" before September 26, 2019 will retain their blanket rule protections.

With the repeal of the blanket rule, the second major rule revision becomes significant; instead of the blanket rule, the FWS and NMFS may opt to implement species-specific rules. Species-specific rules, also known as § 4(d) rules, are special regulatory rules that FWS and NMFS are allowed to implement for endangered species. If the FWS and NMFS promulgate a species-specific rule, then the species-specific rule controls. 16 U.S.C.A. 1536(a); Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. at 44,760. Notably, this revision impacts future threatened species listings and downlistings of species from endangered to threatened status.

Species-specific rules are not new. As of May 2016, 49% of threatened animal species listed by FWS have species-specific rules, and 61% of threatened animal species listed by NMFS have species-specific rules. Defenders of Wildlife ESA Policy White Paper Series, *Section 4(D) Rules: The Peril and the Promise*, 5 (Jan. 2019). Notable species with species-

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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.

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

FIRM NEWS

Reid Barnes has joined the Firm's Energy and Utility Practice Group as an Associate. Reid assists clients in water, electric, and natural gas-related matters. Reid recieved his doctor of jurisprudence from the University of Texas School of Law and his Bachelor of Science in Public Relations from the University of Texas in Austin.

Maris Chambers will be presenting "It's Over, Now What? Water-Related Outcomes and Impacts of the 86th Texas Legislature" at the North Central Texas Chapter of Texas AWWA's 18th Annual Robert F. Pence Drinking Water Seminar on October 25 in Fort Worth.

Thomas Brocato will be discussing "General Fund Transfers and Other Allocations in the Current Regulatory and Legislative Environment/Update on Data Foundry vs. Austin Energy Litigation" at the Texas Public Power Association Legal Seminar on October 31 in San Antonio.

Cody Faulk will be presenting "Regulatory Archeology: Service Area Disputes Arising from 1975 Certification Proceedings" and "The Transmission Line Siting Process for Cities & MOUs Update" at the Texas Public Power Association Legal Seminar on November 1 in San Antonio.

Georgia Crump will be moderating "Municipal Challenges to State Actions - Update on Challenges to SB 1004 and SB 1152" and "State Legislative Update for the 2019 Session" at the Annual Conference of the Texas Association of Telecommunications Officers and Advisors on November 7 in Corpus Christi.

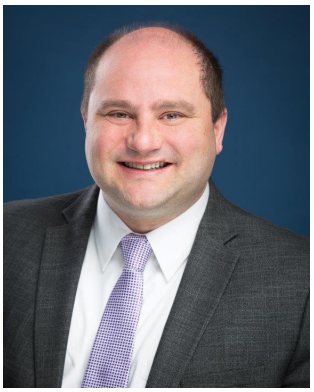
Sheila Gladstone will be presenting "Workplace Law & Legal Liabilities" at the Correctional Management Institute of Texas New Chiefs Development Program on November 14 in Huntsville.

Nathan Vassar will be discussing "Top Clean Water Act Enforcement and Permitting Developments of the Year" at the NACWA National Clean Water Law Seminar on November 20 in Austin.

Congratulations to Lambeth Townsend, Geoffrey Gay, and **Thomas Brocato**, all principals in the Firm's Energy and Utility Practice Group, who have been selected as 2019 Texas Super Lawyers. *Super Lawyers* selects outstanding lawyers who have attained a high degree of peer recognition and professional achievement. The selection process includes independent research, peer nominations, and peer evaluations. Each year only 5% of all attorneys in Texas make the list, so this is quite an honor for these attorneys and our Firm.

Congratulations to our *Best Lawyers*: Six of our Principals have been included in the 2020 Edition of *The Best Lawyers in America*. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing. **Lambeth Townsend, Georgia Crump, and Geoffrey Gay** are named in Energy Law; **Thomas Brocato** is named in Energy Regulatory Law; **Mike Gershon** is named in Water Law; and **Sheila Gladstone** is named in Litigation - Labor and Employment.

THE LONE STAR CURRENT INTERVIEW



Arthur D'Andrea, Commissioner

Public Utility Commission

Governor Greg Abbott appointed Arthur D'Andrea to serve as a Commissioner for the Public Utility Commission of Texas on November 14, 2017, for a term set to expire on September 1, 2023. Before his appointment, Commissioner D'Andrea served as Assistant General Counsel to Governor Abbott. His career has been primarily focused on the law, including his role as Assistant Solicitor General in the Texas Attorney General's office, where he served as lead appellate counsel in matters including constitutional challenges to state statutes, public-utilities regulation, antitrust, tax disputes, insurance regulation, regulatory takings, and petitions for writ of habeas corpus. There he argued thirteen cases in the Second and Fifth Circuits, the Texas Supreme Court, and in the intermediate state courts of appeals. Prior to joining the Attorney General's team, Commissioner D'Andrea worked in the Supreme Court and Appellate Litigation Practice Group for a private law firm where he represented clients before the United States Supreme Court and in federal and state courts of appeals nationwide in matters including white-collar criminal prosecutions, international-trade disputes, patent infringement, trademark disputes, bankruptcy, international arbitration, and securities litigation. After earning a Bachelor of Science degree in Chemical Engineering from the University of Texas, Commissioner D'Andrea worked as a Management Consultant for Price Waterhouse Coopers before earning a Juris Doctor from the University Of Texas School Of Law. He and his wife, Erin, are raising their children in Austin, Texas.

The Lone Star Current recently had the opportunity to interview Arthur D'Andrea, who graciously responded to our questions. We appreciate his willingness to take the time to share his unique perspective with our readers.

Lone Star Current: What do you believe are the most important aspects of your position as Commissioner of the PUC?

D'Andrea: My job is ensuring that utilities provide value to ratepayers. Ratepayers want reliable service at low rates and with fair conditions, and utilities need an incentive to invest their capital in the State's critical infrastructure to keep the water, electricity and telecommunications services running twenty-four hours a day. It's also important to keep an eye out for cross subsidies, making sure that everyone pays their share. Fortunately, nearly everyone who appears before the Commission understands and shares these goals.

LSC: What do you view as the biggest challenges facing the PUC over the next few years?

D'Andrea: The State's small water utilities are in particular need of attention from our agency. There are hundreds of tiny water utilities serving Texans, and many of these are mom-and-pop operations, without the resources to hire lawyers, accountants, and other experts. To complicate matters, many of these systems were installed by developers decades ago, and now the infrastructure is reaching the end of its useful life. The Commission has been busy reaching out to help these small utilities navigate state regulations so they may focus on the business of supplying clean and reliable water service. But in some cases, we need to come up with alternative solutions to keep clean water flowing in the communities these systems serve.

LSC: What issues have been the most interesting that you have dealt with during your time at the PUC?

D'Andrea: Some of the most interesting issues we face at the Commission involve regulatory interventions in the ERCOT market. I am a huge fan of Texas's restructured electric market, where investors bear the risks and consumers share the benefits, but there remain some issues to be worked out. One of these is how to price reliability. Consumers pay extra in utility bills for power plants that remain idle for most of the year, so consumers can have electricity on peak demand days. That "extra" is essentially an amount set by the Commission through administrative pricing. This means that I have to predict how much extra the public wants to pay for reliability and how much more reliability they want. For example, how much would a typical consumer be willing to pay to guarantee no more than 15 minutes of outages every ten years? Ten percent more? Twenty percent more? And does the additional reliability that those extra power plants provide really impact the customer's life when squirrels and birds cause scores

of minutes of outages every year? We have to answer these questions on behalf of consumers because there is no market mechanism for them to express a preference for reliability.

LSC: What facet of your job as Commissioner do you most enjoy?

D'Andrea: I enjoy the wide variety of people that come through my office and the wide variety of subject matters they want to discuss. This job has demanded that I learn about law, accounting, engineering, human resources, and many other subjects besides. And the industry is full of interesting and brilliant characters: I've learned energy markets from a theater producer, and I've learned legislative procedure from a chicken farmer. Every day brings someone and something new.

LSC: Tell us something most people would be surprised to know about you.

D'Andrea: I was a bad student in high school and my first year of college. Eventually I grew up, but in the meantime I had lots of fun.

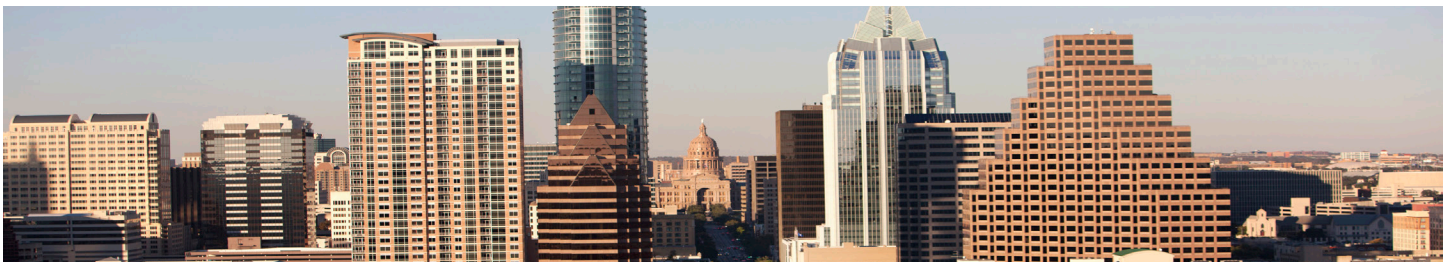
LSC: What is the last great book you read, and why did you like it?

D'Andrea: I recently read a novel that is a couple decades old called *Mariette in Ecstasy* by Ron Hansen. It was published my sophomore year of high school, so naturally (see above), I'd never heard of it. I am a fan of Graham Greene (despite his relentless anti-Americanism) and an even bigger fan of T.S. Elliot (despite his toxic anti-Semitism) but Hansen's novel is, for me, in the running for the best work of Catholic literature of the 20th Century. It poetically captures the wonder and sometimes strangeness of faith, ritual, and the religious experience. I highly recommend it to readers of any faith or no faith at all.

LSC: If you weren't serving in your current position, and it was possible to pursue any trade or profession, what would it be, and why?

D'Andrea: I would teach high school History and Chemistry and coach whatever team would have me.

MUNICIPAL CORNER



Maintaining two governmental positions often requires an analysis of the constitutional dual-office prohibition, along with the common-law doctrines of self-appointment incompatibility, self-employment incompatibility, and conflicting-loyalties incompatibility. Tex. Att'y Gen. Op. No. KP-0265 (2019).

The City of Ranger (the "City") sought an opinion by the Attorney General ("AG") to determine whether the city manager may simultaneously serve as the police chief.

The most well-known prohibition implicated by the City's question is the dual-office prohibition under the Texas Constitution. The Constitution prohibits a single individual from simultaneously holding "more than one civil office of emolument." TEX. CONST. art. XVI, § 40(a). The prohibition applies if both positions are civil offices entitled to an emolument. In other words, the first question becomes whether both positions are compensated. If only one position is compensated, then the Constitutional prohibition will not apply.

If both positions are compensated, then the second question becomes whether both positions qualify as "offices" under the Constitution. Whether a position qualifies as an office under the Constitution depends on "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *Aldine Indep. Sch. Dist. V. Standley*, 280 S.W.2d 578, 583 (Tex. 1955).

In the City's case, the second position is the police chief. Because a municipal chief of police serves at the pleasure of the governing body, he or she does not exercise his or her authority "largely independent of the control of others." Thus, the police chief qualifies as an employee rather than an officer of the municipality.

So though the positions of city manager and police chief are both compensated, the City need not worry about the Constitutional dual-office prohibition because one of those positions, the position of chief of police, does not qualify as an office. Consequently, the city manager may maintain both positions without running afoul of the Constitution.

But what about other prohibitions that arise outside the Constitution?

The common-law doctrine of incompatibility prohibits dual public service that comes in three different flavors: (1) self-appointment incompatibility, (2) self-employment incompatibility, and (3) conflicting-loyalties compatibility.

Self-appointment incompatibility prevents one person from holding two offices, one of which appoints the other. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928) ("[C]ourts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint."). Similarly, self-employment incompatibility prohibits one person from holding an office and an employment that the office supervises. *See id*.; Tex. Att'y Gen. Op. No. GA-0766 (2010) at 1. And finally, conflicting-loyalties incompatibility "prohibits an individual from simultaneously holding two positions that would prevent him or her from exercising independent and disinterested judgment in either or both positions." Tex. Att'y Gen. Op. No. GA-0169 (2004) at 2.

The first and third types of incompatibilities—self appointment and conflicting loyalties—only apply in instances when both positions qualify as offices. As referenced above, the police chief does not qualify as an office under the Constitution. Consequently, the AG refrained from providing an in-depth analysis of whether those incompatibilities apply.

On the other hand, the AG found self-employment incompatibility does exist in this case. The City Charter provides that the city manager appoints and removes all officers or employees of the City. This language suggests that the city manager supervises the chief of police, and to the extent that this is the case, self-employment incompatibility prohibits the city manager's occupation of both positions.

Despite the finding of self-employment incompatibility, the AG provided a surprising final assessment given a saving provision in the City Charter, which provides that the city commission has the authority to combine the roles of city manager and chief of police. If the city commission exercises this authority, two positions will not exist to analyze. Thus, the AG decided that the city manager may take on both roles despite the applicability of the self-employment incompatibility, as long as the two positions were consolidated under the city commission's authority.

The protections against excessive fines are applicable in Texas under both the United States Constitution and the Texas Constitution. Tex. Att'y Gen. Op. KP-0267 (2019).

The Chair of the Committee on Corrections (the "Chair") posed several questions to the AG regarding the applicability and meaning of various Constitutional prohibitions against excessive fines.

The federal Constitution provides protection against excessive fines under the Eighth Amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Whether this guarantee is applicable to the states is not automatic, however.

The Bill of Rights was conceived as a limitation on the powers of the federal government, and initially, courts determined that the first Eight Amendments did not apply to the states. *See McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010). But the Due Process Clause of the Fourteenth Amendment, adopted after the Civil War, incorporates certain of the guarantees set out in the Bill of Rights, rendering them applicable to both the States and the federal government. *Id*. at 764-65.

Rather than conclude that the Due Process Clause incorporates the entire Bill of Rights, however, the U.S. Supreme Court determined, "that the only rights protected against state infringement by the Due Process Clause were those rights of such a nature that they are included in the conception of due process of law." *Id*. at 759. Thus, the Court has examined the Bill of Rights guarantee-by-guarantee over the years to determine which are incorporated rights applicable to the States—a process known as selective incorporation. Id. at 763-65.

This year in the U.S. Supreme Court case, *Timbs v. Indiana* 139 S. Ct. 682, the Court held that the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Due Process Clause of the Fourteenth Amendment. 139 S. Ct. 682, 686-87 (2019). Its protection against excessive fines, like its proscription of excessive bail and cruel and unusual punishment, "guards against abuses of government's punitive or criminal-law-enforcement authority." *Id*. at 686.

The Texas Constitution also contains a prohibition on excessive fines. The first sentence of article I, section 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." TEX. CONST. art. I, § 13. Thus, Texans are protected from excessive fines under both the federal and Texas Constitutions.

The obvious corollary is how a court might determine whether a fine is indeed unconstitutionally excessive, along with what circumstances or factors a court may consider when making that determination. While the U.S. Supreme Court in *Timbs* held that the Fourteenth Amendment incorporates the Eighth Amendment protection against fines, it did not determine whether the specific fine in question was excessive. *See Timbs*, 139 S. Ct. at 690-91. Instead, it remanded the case for the lower court to make that determination, and as a result, no guidance will exist until a decision comes out of the lower court.

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.*

Endangered Species Act continued from page 1

specific rules include the polar bear, the Preble mouse, and the San Marcos salamander. To create a species-specific rule, the FWS and NMFS must go through the rulemaking notice and comment process pursuant to the federal Administrative Procedure Act. 15 U.S.C. § 553. Species-specific rules have not followed a consistent pattern or framework, which is why the latest agency comments to the 2019 revisions states that guidance is forthcoming with regard to species specific rules for threatened species. *See* Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. at 44,757. A prudent stakeholder would be prepared to comment on upcoming species-specific rule related proposed regulations.

The third major revision is the removal of the "economic impact" language. Before the current rule revisions, the ESA required the FWS and NMFS (the "Services") to make decisions regarding whether a species will be listed or reclassified based solely on the best available scientific and commercial information and "without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b) (current through September 25, 2019). Now, economic impact information regarding the proposed action may be presented to the Services when the Services are making listing decisions, although the information is not supposed to influence the Services' listing determination.

In addition to the three significant changes discussed above, the recent ESA revisions address an array of other topics. The implications for political subdivisions and businesses alike may be substantial, particularly with regard to various water and other infrastructure projects that impact real property in areas where certain species are present, or where such species' habitat is located. Although the rules listed above will be subject to ongoing litigation and regulatory follow up, planning ahead can help position entities to address ESA issues directly.

Lauren C. Thomas is a to-be-licensed Associate in the Firm's Water Practice Group. If you would like additional information about this article or other matters, please contact Lauren at 512.322.5856 or lthomas@lglawfirm.com.

THE UNTIMELY SEP DEATH IN FEDERAL ENFORCEMENT CASES

by Nathan E. Vassar

The use of Supplemental Environmental Projects ("SEPs") in the enforcement context has been a widely accepted practice for many years for defendants wishing to fund projects in lieu of a full civil penalty in enforcement actions. At both the state level and federal level, SEPs have been useful tools in pursuing environmental benefit without having to write a check (or a more sizable check) to the state/federal treasury. Both TCEQ and EPA have endorsed the use of SEPs over time, including for municipal and public utilities whose ratepayer funds can be better tailored to improvement projects with a SEP, than to funnel to the treasury coffers in Austin or Washington, D.C. On August 21, 2019, however, the federal policy changed, as the U.S. Department of Justice ("DOJ") released a memorandum prohibiting the use of SEPs in settlements with state/local governments. Citing the rationale of an earlier DOJ memo from 2018, DOJ is now taking the position that because SEPs go beyond the four corners of applicable environmental laws (by their very name and nature, SEPs are ***supplemental*** to existing requirements), they cannot be used in settlements.

The consequences of the position shift are far-reaching, as it both increases the amounts of civil penalties that would otherwise be reduced by the pursuit of a SEP project, and limits a community's ability to fund projects that can yield important results for infrastructure, receiving streams, and public health and safety. Although the DOJ memo does not impact cases that are state-only (i.e., where TCEQ brings an enforcement action), it does impact settlements on Clean Water Act issues that implicate both the federal government and the State of Texas as Plaintiffs.

Utilities wishing to implement SEPs may still be able to pursue such projects in other contexts, whether that be state enforcement by TCEQ, or outside the confines of an enforcement matter. The Texas policy includes three types of SEP approaches, including Compliance SEPs, where past expenditures can count toward a penalty amount if one can show a nexus between the investment and permit compliance. Others include pre-approved SEPs for projects the State has already identified, as well as custom SEPs that are tailored to a community's particular project focus.

The recent federal position will have an impact on POTWs facing federal enforcement, and the removal of a tool that some utilities have found critical to support compliance and limit financial exposure to penalties. As the implementation process now begins, utilities should consider how this may impact planning and negotiation positions on current and future enforcement matters.

Nathan Vassar is a Principal in the Firm's Water, Compliance and Enforcement, and Litigation Practice Groups. Nathan assists communities and utilities with environmental permitting and enforcement matters with both state and federal regulators, with a focus on water quality. His involvement includes negotiating settlement terms and counseling clients with respect to compliance strategies. If you would like additional information about this article or other matters, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com.

TELECOM AND CABLE TV ENTITIES POISED TO TAKE ADVANTAGE OF SB 1152

by Georgia N. Crump

While cities are still coming to terms with Senate Bill ("SB") 1004 from the 85th Texas Legislative Session, drastically reducing 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, effective on September 1, 2019, 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.

Also known as the "Pay Me Once" statute, SB 1152 allows entities that are members of an "affiliated group" to avoid paying cities either a cable franchise fee or access line fees. An "affiliated group" is defined in § 171.0001(1) of the Texas Tax Code as: "a group of one or more entities in which a controlling interest is owned by a common owner or owners, either corporate or non-corporate, or by one or more of the member entities." A "controlling interest" is defined generally as ownership of more than 50% of the stock or interest in the entity. Texas Tax Code § 171.0001(8). As a result of SB 1152, cities stand to lose either access line fees or cable franchise fees from these companies.

As cities look ahead to their budgets and possible reduction in franchise fee and access line fee revenues, they may not know whether the provider of cable services in their city might also be the holder of a Service Provider Certificate of Operating Authority ("SPCOA") and provide telecommunications services in other parts of the state, and vice versa. The Public Utility Commission maintains market directories identifying those entities that hold a State-Issued Certificate of Franchise Authority ("SICFA") for the provision of cable television services and an SPCOA for the provision of local telephone services. The following is a list of the entities who appear to be members of affiliated groups whose members hold SICFAs and SPCOAs, and are thus likely to qualify under the provisions of SB 1152:

AT&T	Comcast	Grande
Spectrum	Suddenlink	Frontier
En-Touch	Phonoscope	Windstream
XIT	Consolidated Communications Enterprises	GVEC
Hill Country Telephone Cooperative	Mid-Plains Communications	Nortex
NTS	Westex	Plateau

As noted above, the law went into effect on September 1, 2019, and will apply to payments made on or after January 1, 2020, based on the amounts actually paid between July 1, 2018, and June 30, 2019. Qualifying entities have already calculated the amounts they paid state-wide for this period, and are currently providing notices to cities as to which revenue stream the cities will do without in 2020.

Georgia Crump is the Chair of the Firm's Energy and Utility Practice Group. Georgia assists cities with developing and implementing right-of-way management practices relating to telecommunications, gas, and electricity. If you would like additional information, please contact Georgia at 512.322.5832 or gcrump@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We have an employee who is medically certified to take intermittent leave under the Family and Medical Leave Act (FMLA) for severe shoulder pain when he has a "flare-up." His job requires repetitive shoulder movements with his arms outstretched in front of him. We have noticed that he always takes his FMLA days in conjunction with a weekend or holiday, or before a planned vacation. After seeing the pattern, we hired an investigator who videotaped the employee playing golf both times he was surveilled. His golf swing looked pretty good! It seems to us that if he can golf unimpaired, then he can work. When confronted, the employee responded that his pain is always there, so it helps him to rest it for long weekends. He also says that golf puts lesser strain on his shoulders than his job. Can we fire him?

Signed,
Suspicious

Dear Suspicious,

In a recent case out of the Sixth Circuit Court of Appeals (*LaBelle v. Cleveland Cliffs* [6th Cir. 2019]) the Court addressed a similar issue. After being fired under these facts, the employee sued the employer for interference with his FMLA rights and retaliation for taking FMLA. The Court held for the employer, and found that the employee was fired for the legitimate, non-discriminatory reasons of fraud and abuse (not use) of FMLA leave. Of importance to the Court was that the terms of the FMLA intermittent leave required either medical appointments or specific flare-ups of increased pain, and were not for periodic resting of his shoulder when the pain level hadn't changed. In other words, his absences must be medically necessary, and the days off to extend time off and play golf were inconsistent with a claimed inability to work.

Before going ahead with this termination, be sure you have your facts in order. First, make sure that the way he is using his leave does indeed violate the terms of the intermittent leave. For example, if the certification allows for resting the shoulder monthly without the need for a flare-up or inability to work, then taking the leave when it is convenient for the employee may not be a violation by itself. If the activities performed while on leave are not inconsistent with the need for leave, then they might not be abusive of the terms of the leave. When an employee is unable to work, there still might be other activities he can do. In your case, however, it does seem that swinging a golf club is inconsistent with leave for shoulder pain. You should have a conversation (documented) with the employee before making your final decision.

In *LaBelle*, the employer approved the FMLA request based on 1) attending medical appointments and 2) taking time off approximately monthly for "flare-ups." The Court stated, "if LaBelle had constant pain that required occasional long weekends to mitigate, he should have requested FMLA leave for the purpose."

Also, be aware of whether there are any internal communications showing management hostility to the employee using FMLA. Intermittent leave can be frustrating to managers, and internal emails and other communications, although private, will be revealed in litigation, unless the communications were with an attorney. In *LaBelle*, although the employer won, internal communications made that win a bit more bumpy, based on management emails talking about "getting rid of the slackers."

So, bottom line, you can likely terminate this employee for leave abuse and fraud, so long as you are confident his leave is in violation of the terms of his intermittent FMLA, his activities on leave are inconsistent with his need to be off work, and there are no "smoking gun" statements floating around that would make the employer appear to be retaliatory or hostile to FMLA leave.

"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

Dyer v. TCEQ, 2019 WL 2206177 (5/22/2019).

The Texas Court of Appeals in Austin affirmed the dismissal of a challenge to TexCom Gulf Disposal, LLC's approved permit for construction and operation of underground injection control wells for disposal of non-hazardous industrial waste. The general purpose of the Injection Well Act ("Act") is to maintain the quality of fresh water for the public and existing industries, while considering the state's economic development, and specifically to prevent underground injection that may pollute fresh water. Under the Act, a business seeking to operate an injection well must apply for a permit from the Texas Commission on Environmental Quality ("TCEQ"), and submit a letter from the Railroad Commission of Texas ("RRC") asserting that the injection well will not harm an oil or gas reservoir.

The RRC first issued a no-harm letter in 2005. After the TCEQ closed the administrative record, the RRC rescinded its 2005 no-harm letter when a nearby mineral rights owner argued that the wells might harm the reservoir.

The Court of Appeals construed the Texas Administrative Procedure Act, which generally provides the minimum standards of uniform practice and procedure for state agency proceedings, to allow parties to rely on the finality of agency decisions. And therefore, the Court of Appeals held that the rescinded RRC letter did not have any impact on the administrative proceedings before the TCEQ, which were conducted years before the challenge.

Corpus Christi v. Trevino, 2019 WL 2381455 (6/6/2019).

The Texas Court of Appeals in Corpus Christi clarified the application of governmental immunity to political subdivisions from tort actions. In May 2016, the City of Corpus Christi ("City") issued a water boil advisory. Trevino sued the City in 2018 alleging that she was out of water for two weeks and that she had to pay for a service she did not receive. Among her allegations were negligence and breach of contract.

Trevino alleged that she drank un-boiled water and that as a result she suffered illness. Trevino relied on the Texas Tort Claims Act ("TTCA") to assert that governmental immunity is waived for all claims from a city's performance of governmental function. Under the TTCA, immunity is waived when the injury is caused by a condition of tangible property. Because potable water is a condition, Trevino alleged a viable negligence claim under the TTCA. Nevertheless, the Court of Appeals held that Trevino's negligence claim failed on the TTCA's notice requirement, which requires that the claim is filed no later than six months after the incident.

For the breach of contract claims, governmental entities waive immunity from liability, but not from suit. A narrow exception under Chapter 271 of the Local Government Code waives immunity when a local governmental entity enters into an agreement for providing goods or services to the local governmental entity. Trevino argued that the agreement was not subject to immunity because the City was performing a proprietary function. The court dismissed Trevino's argument, because water service is one of the enumerated government functions in the TTCA.

League of United Latin American Citizens v. Edwards Aquifer Authority, 2019 WL 4050469 (8/28/2019).

The League of United Latin American Citizens ("LULAC") sued the Edwards Aquifer Authority ("EAA"), claiming that its electoral scheme violated the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Claiming to be a special-purpose unit of government, the EAA countered that it was exempt from the one "person, one vote" rule.

The EAA's jurisdiction covers eight counties representing three districts regions: (1) the western agricultural counties of Atascosa, Medina, and Uvalde, where approximately 117,000 persons live; (2) the eastern spring-flow counties of Caldwell, Comal, Guadalupe, and Hays, where roughly 435,000 people live, and (3) the urban county of Bexar, which has over 1.7 million residents. Under the current voting scheme, the "agricultural" and "spring-flow" counties (herein, "rural counties," together representing a constituency of roughly 552,000 people) elect a total of 8 voting members on the EAA Board of Directors, while the more densely populated Bexar County (representing a constituency of roughly 1.7 million) only elects 7 members of the EAA Board of Directors. Under this scheme, all eligible voters are enfranchised (i.e., if you live in the EAA's jurisdiction and are eligible to vote, you have a right to

vote for representation of your particular district; no other stipulations restrict one's eligibility to vote).

In its opinion, the court leaned heavily on two particular cases where certain voting schemes were upheld as Constitutional, despite not complying strictly with the "one person, one vote" principle (see *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, and *Ball v. James*). To qualify for the *Salyer-Ball* exception, the governmental entity in question (and its electoral scheme) must (1) serve a special limited purpose; and (2) disproportionately impact voters, such that the voters with the most at stake have more voting power than those with less at stake.

In applying the *Salyer-Ball* test, the court found that the EAA serves a special limited purpose as opposed to having general governmental powers and duties. Some facts the court considered were that the EAA cannot levy *ad valorem* property or sales taxes or oversee such public functions as schools, housing, zoning, transportation, roads, or health and welfare services. Rather, the EAA's powers are expressly tailored to protecting the quantity and quality of groundwater in the Edwards Aquifer. The court also found that the EAA's activities disproportionately impact the western agricultural and eastern spring-flow counties, whose residents are most empowered by its elections.

Because the court found that (1) the EAA was a limited special purpose district and (2) its operations disproportionately impacted the citizens of the rural counties of its jurisdiction more than the citizens of Bexar County, it held that the EAA falls within the exception to the "one man, one vote" principle carved out in *Salyer* and *Ball*. Therefore, the Court of Appeals affirmed the district court's ruling that the EAA's current scheme is not in violation of the "one man, one vote" Constitutional rule.

Knight v. U.S. Army Corps of Engineers, 2019 WL 3413423 (7/29/2019).

A federal District Court rejected a Motion to Complete the Administrative Record brought under the federal Administrative Procedure Act ("APA"). The landowner-plaintiffs' claim would have required the U.S. Army Corps of Engineers ("Corps") to compile an administrative record for the Court of certain allegations relating to a permit it granted to the North Texas Municipal Water District (the "District").

In early 2018, the Corps issued a permit to construct the Lower Bois d'Arc Creek Reservoir. Landowners near the proposed site of the Reservoir challenged the permit, arguing that (1) the Reservoir would cause "significant degradation of waters," and citing the lack of a plan to mitigate adverse impacts to the water, and (2) the Corps's failure to conduct an analysis that would ensure that the "least environmentally damaging practicable alternative was selected."

The court found that judicial review of an APA claim is limited to the documents and materials directly or indirectly contemplated by an agency in making decisions—that is the administrative record. Absent evidence of the contrary, the court presumes that the agency properly designated the record. That notwithstanding, a party may supplement the record if it demonstrates there is a reasonable basis to believe that some materials considered in the decision-making process are not included in the administrative record.

The court denied the landowners' motion to include the 2016 Region C Water Plan, five documents discussed and cited in public comments, and a log of information deemed privileged. The request to add the 2016 Region C Water Plan was found moot because the Plan had already been added to the administrative record.

Regarding the public comment documents, the court held that landowner plaintiffs provided little evidence that would permit the court to find that the Corps constructively considered the documents beyond their mere reference in public comment letters that were already part of the administrative record. Plaintiffs should have shown that the record lacks necessary information to evaluate the claims or documents that are adverse to the Corps' decision.

Regarding the privilege log, the court accepted the Corps' statement that documents were partially redacted or withheld entirely due to privilege, and that the Corps provided brief explanations of the basis for such redactions and withholdings.

Taylor v. San Jacinto River Authority, 2019 WL 3720099 (8/8/2019).

The Texas Court of Appeals in Beaumont upheld a trial court's judgement in a case where the appellant unsuccessfully sued the San Jacinto River Authority ("SJRA"), seeking damages for injuries and wrongful death. The appellant asserted that a boat, on which he was a passenger, collided with a landmass bulkhead along the shoreline of a lake. The executor alleged SJRA was negligent in a number of assertions. SJRA's plea to the jurisdiction was granted by the trial court on the basis of governmental immunity.

The Court of Appeals reasoned that while governmental units are typically immune from suit, the Texas Torts Claims Act ("TTCA") provides a limited waiver of such immunity to certain tort claims. Generally, under the TTCA, "a governmental unit is liable for personal injury and death caused by the condition of real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." However, the TTCA is restricted by the recreational use statute, which provides that, "if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser." Thus, SJRA only waives its governmental immunity if it acted willfully, wantonly, or through gross negligence.

Since the plaintiff did not plead facts that SJRA acted in a grossly negligent manner, which caused the injuries and wrongful death at issue, the court rejected the appeal and upheld the trial court's judgment that the court

lacked jurisdiction because SJRA enjoyed governmental immunity.

Revelant General Litigation Cases

With the U.S. Supreme Court and the Texas Supreme Court just coming back from their summer vacations, we thought it might be worth looking at the U.S. Supreme Court's upcoming term, and also revisiting a case from the Texas Supreme Court's last term.

US Supreme Court 2019-2020 Preview

With the Supreme Court resuming hearing cases October 7th, here are a few cases we are watching this term.

Allen v. Cooper

The Court will decide whether the Copyright Remedy Clarification Act validly abrogates state sovereign immunity allowing authors of original expression to sue states who infringe their (federal) copyrights.

Atlantic Richfield Co. v. Christian, et al.

The Court will take up three related EPA questions: (1) whether a common-law claim for restoration seeking cleanup remedies that conflict with remedies ordered by the Environmental Protection Agency is a jurisdictionally barred "challenge" to the EPA's cleanup under CERCLA; (2) whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA approval under CERCLA before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and (3) whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

County of Maui v. Hawaii Wildlife Fund

The Court will decide whether the Clean Water Act requires a permit for pollutants that originate from a point source but are conveyed to navigable waters by a nonpoint source (such as groundwater).

Kelly v. United States

The Court will answer does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision?

PHI, Inc. v. Texas Juvenile Justice Dep't., ---S.W.3d ----, 2019 WL 1873431 (Tex. Apr. 26, 2019).

On April 26, 2019, the Texas Supreme Court issued its Opinion in PHI, holding that a close temporal proximity between an employee's negligent parking of a motor vehicle and the subsequent collision satisfies the "active operation of a vehicle at time of incident" inquiry under the Texas Tort Claims Act to waive sovereign immunity for property damage.

This case began dramatically, when an unoccupied cargo van owned by the Texas Juvenile Justice Department rolled backwards down an incline and into PHI's grounded medical helicopter. The court's decision does not clarify whether there was a Hollywood-style explosion, or whether the collision resulted in an anticlimactic and unsatisfying thud.

Evidence showed the employee properly parked and exited the van, but did not set the emergency brake. A post-accident inspection found the van's gear-shift mechanism was worn in a way that prevented the vehicle from going fully into park. Hours before the accident, a different Department employee complained to the vehicle-control officer that the van was "running rough" and a work order for a tune-up was submitted but no follow-up had yet taken place.

PHI sued the Department. The Department asserted PHI's claims were barred by sovereign immunity. But, of course, the Texas Tort Claims Act waives sovereign immunity for property damage arising from the operation or use of a motor vehicle. The principle dispute was whether the damage to the helicopter arose from the "operation or use" of the van. The Department claimed that the damage to the helicopter occurred when the van was explicitly not being used.

The trial court denied the Department's plea to the jurisdiction and motion for summary judgment. The Department then took an interlocutory appeal.

In a divided opinion, the court of appeals reversed and rendered a take-nothing judgment. The court of appeals reasoned the waiver of sovereign immunity did not apply because the provision applies only if the vehicle was in "active" operation or use "at the time of the incident" based on the use of this language in a previous case, *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015). In *PHI*, the court of appeals found that the van was not "active" when it was parked, turned off, and the employee had walked away. However a dissenting justice reasoned that "operation" of a vehicle in the statute included safely securing the vehicle at the end of a trip.

The Texas Supreme Court agreed with the dissenting justice and reversed the lower courts' decisions, holding that the language of the statute provided the governing rule of decision and an essential part of "operation" included making sure the vehicle does not roll away after it is parked. The Supreme Court emphasized that whether a vehicle was in "active" operation "at the time of the incident" is an important consideration but not itself the rule of decision. The language of the statute provides the governing rule of decision and that the statute requires the accident arise from the "operation" of a vehicle. The Court stated *Ryder's* emphasis on "active" operation was meant to distinguish the facts from other cases but was not intended to add new elements to the statute. Therefore, the language of the statute provided the governing rule of decision and the Court concluded an essential part of "operation" included making sure the vehicle does not roll away after it is parked.

PHI provides a set of unusual facts of an injury arising from the operation or use of a vehicle even though the driver was not behind the wheel when the accident

happened. Although facts such as these are unlikely to occur often, in this case the Court clarifies that the Texas Tort Claims Act—waiving sovereign immunity for property damage arising from the use or operation of a vehicle—does not require the driver to be inside the vehicle at the time of the collision. And it also raises the question: what other actions are ancillary to the "operation and use" of motor-driven equipment?

Air and Waste Cases

California Communities Against Toxics v. EPA, No. 18-1163 (D.C. Cir. 2019).

On July 2, 2019, the D.C. Circuit Court of Appeals held that EPA lacked jurisdiction over legitimate recycling of a hazardous secondary material, even when the entity that generated the material being recycled paid a third party to recycle it. The court found that a generator's paying a reclaimer to accept a material for recycling does not automatically mean the material is discarded. According to the D.C. Circuit decision, the primary inquiry in deciding whether hazardous materials are discarded, and therefore subject to EPA regulation, is whether those materials have become part of the "waste disposal problem." The court reasoned that the materials were not contributing to the waste disposal problem because EPA had reasonably concluded the materials were adequate for safe transfer and legitimate recycling.

State of Wisconsin v. EPA, No. 16-1406 (D.C. Cir. 2019); State of New York v. EPA, No. 19-1010 (D.C. Cir. filed March 12, 2018).

On September 17, 2019, the D.C. Circuit Court of Appeals ruled that the EPA must "ensure that upwind states reduce significant amounts of power plant pollution so their downwind neighbors can meet federal ozone limits." In a related case, *State of New York v. EPA*, the D.C. Circuit Court of Appeals indefinitely delayed oral arguments challenging EPA's regulation, or lack thereof, of cross-state pollution while the Agency decides how to proceed in the *Wisconsin* case. The EPA has until October 29, 2019 to decide whether to rewrite the 2018 update of the cross-air pollution rule in the New York case.

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA and the Department of the Army Repeal the 2015 "Waters of the United States" Rule. On September 12, 2019, the EPA and the Department of the Army (collectively, the "Agencies") repealed the 2015 Clean Water Act ("CWA") rule defining the "Waters of the United States" ("WOTUS"), fulfilling the first of several directives ordered by President Donald Trump in Executive Order ("EO") No. 13778. In that EO, the President directed the Agencies to repeal the 2015 WOTUS rule, recodify the regulations to include the rule that existed prior to the 2015 WOTUS rule, and promulgate a new definition of WOTUS.

The EPA released a pre-publication document detailing four primary reasons for the decision to repeal the 2015 WOTUS rule. First, the 2015 rule did not implement the legal limits on the Agencies' authority that were intended by Congress and reflected in Supreme Court rulings. Second, in enacting the 2015 rule, the Agencies failed to give proper weight to the policy that Congress represented in the CWA. Third, the Agencies reasoned that some of the interpretations of the CWA "push the envelope" of their Constitutional and legislatively granted authority, and repealing the 2015 rule avoids these encroachments. Fourth, the Agencies found that the rule's "distance-based limitations" were burdened by procedural errors.

The next step of this process requires the Agencies to implement a new definition of WOTUS. In December of 2018, the Agencies proposed a new definition of WOTUS, and the public comment period for this new definition closed in April 2019. At this point, the next step in the rulemaking process will be for the Agencies to promulgate a final definition for this critical defined term.

EPA Approves the 2016 Texas Integrated Report of Surface Water Quality. On August 6, 2019, the EPA approved Texas Commission on Environmental Quality's ("TCEQ") 2016 Texas

Integrated Report of Surface Water Quality. Pursuant to § 303(d) of the CWA, the TCEQ submits this report to the EPA every two years, and it includes a list of Texas' impaired surface waters. A copy of the report may be found here: https://www.tceq.texas.gov/waterquality/assessment/16twqi/16txir/.

In addition to identifying impaired waters, TCEQ sets water quality standards with the goal of bringing those impaired waters back to levels that are healthy and safe for the public, aquatic species, and other wildlife. TCEQ is in the process of developing a schedule to identify Total Maximum Daily Loads ("TMDLs") for impaired waterbodies. TMDLs are levels of the maximum amount of a pollutant that is allowed to enter a waterbody, and are used to restore water quality in waterbodies. The TMDL schedule will be initiated over the next two years.

The report includes an index identifying waterbodies that have one or more impairments. The waterbodies themselves are divided into two categories. The first category, category 4, includes waterbodies burdened with impairments that are not suitable for the development of a TMDL and waterbodies with impairments that already have a TMDL. The second category, category 5, includes waterbodies that are burdened with impairments that are suitable for a TMDL.

According to the 2016 report, 547 waterbodies in Texas are classified as category 5 impairments, which constitute a 15-waterbody reduction from the 562 category 5 waterbodies reported in 2014.

EPA Promulgates Three Final Endangered Species Act Rules. On August 12, 2019, the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") announced three final revisions to the Endangered Species Act that became effective as final rules on August 26, 2019.

The first revision, *Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants*, removes the "blanket rule," among other changes. The blanket rule is a rule that automatically extends the protections granted to endangered species to threatened species. Historically, the FWS and NMFS jointly administer the ESA, but they implement the blanket rule differently, with FWS opting to implement the blanket rule, and NMFS opting not to implement the blanket rule. The revisions repeal the blanket rule and instead encourage the use of species specific rules. To view the revision in the Federal Register, click here: https://www.federalregister.gov/documents/2019/08/27/2019-17519/endangered-and-threatened-wildlife-and-plants-regulations-for-prohibitions-to-threatened-wildlife.

The second revision, *Revision of the Regulations for Listing Species and Designating Critical Habitat*, includes altering the designation of critical habitat to align with the Supreme Court's holding in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361, revising the definition of "physical or biological features," and removing the "economic impact" language. Prior to the revision, this section included language forbidding the services from considering economic impact when making listing decisions.

Because of the removal of this language, the Services may consider the projected economic impact of listing actions, although the economic impact of the proposed listing cannot ultimately influence the Services' determination. To view the revision in the Federal Register, click here: https://www.federalregister.gov/documents/2019/08/27/2019-17518/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-species-and-designating.

The third revision, *Revisions of Regulations for Interagency Cooperation*, addresses alternative consultation mechanisms, revises portions of the formal and information consultation processes, and makes several other changes designed to streamline the consultation process. To view the revision in the Federal Register, click here: https://www.federalregister.gov/documents/2019/08/27/2019-17517/endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation.

EPA Issues Revised Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Landowner Defense Guidance. On July 29, 2019, the EPA released new guidance entitled, "Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners." This is the first update to the CERCLA landowner defenses to be published since March of 2003. CERCLA imposes liability on certain parties in relation to contaminated property. The 2003 EPA guidance is intended to address uncertainty surrounding these defenses and CERCLA liability in general.

Specifically, EPA's new guidance attempts to clarify the "continuing obligations" required for maintaining a statutory defense. The guidance discusses what qualifies as "disposal" of hazardous substances under CERCLA, clarifies what an owner must do to satisfy the standard of "all appropriate inquiries," requires that the owner show that no hazardous substances were disposed on the property after the owner acquired the property, and confirms that the owner should ensure that any institutional controls that are implemented remain effective.

EPA Seeking to Revise Texas Air Designations. On August 22, 2019, the EPA published a draft rule which would change the categorization of certain east Texas counties from "nonattainment" to "unclassifiable" with regard to sulfur dioxide emissions. These counties include Freestone, Anderson, Rusk, Panola, and Titus Counties. EPA issued the draft rule in order to "correct an error" in designating the identified counties; specifically, the Agency explained that it erred in not giving greater weight to Texas' preference to characterize air quality through monitoring, and steps undertaken by Texas to begin monitoring in these areas. The comment period expired in September 2019 and it is unclear when EPA will revisit the designation of these counties, as the revised designation only indicates that the agency could not

determine "based on available information at the time" whether the identified counties were in compliance with sulfur dioxide emissions standards.

EPA Proposes Revisions to Clarify New Source Review Permitting Process. In August 2019, EPA proposed changes to the New Source Review ("NSR") applicability regulations, originally proposed in March 2018. The changes would clarify that both increases and decreases in emissions from an existing source should be considered in the first step of the NSR test. This step, originally referred to as "project netting," will now be known as "project emissions accounting." This change is intended to remove an obstacle that "regularly discouraged" companies from implementing new energy efficient technology. The proposed rulemaking was published in the Federal Register on August 9, 2019 and the comment period closed on October 8, 2019.

EPA Proposes Removing Oil and Gas Entities from GHG and VOC Standards. In August 2019, EPA proposed excluding certain entities from air emissions standards governing greenhouse gases ("GHGs") and volatile organic compounds ("VOCs"), including natural gas and oil storage and transmission facilities. The proposed rule change would also remove certain methane emission standard requirements applicable to production and processing of natural gas and oil. In addition, the proposed change would remove VOC standards only for storage and transmission facilities. However, production and processing facilities would still be bound by the existing standards. EPA has also proposed an alternative rule change that would remove methane requirements for oil and natural gas, but would not affect the existing VOC regulation. With regard to this alternative, EPA is requesting comment on its statutory authority to regulate these pollutants. This request may be aimed at challenging the 2016 EPA rule that determined the Agency was not required to make a GHG endangerment finding. The proposed rulemaking was published in the Federal Register on September 24, 2019 and the comment period closes on November 25, 2019.

Update on EPA Landfill Emissions Rule. The court-mandated deadline for states to submit compliance plans for the 2016 Emissions Guidelines ("EG") landfill rule passed on August 29, 2019. EPA has received plans from six states: Arizona, California, Delaware, New Mexico, West Virginia, and Oregon.

As previously reported in the July edition of *The Lone Star Current*, the EPA is required to promulgate a federal plan for states that have not submitted their own plans by November 6, 2019, per a California federal court's order. However, the EPA issued a final rule in August 2019, delaying the deadlines for both states and EPA by more than two years, until August 30, 2021.

In addition, the EPA filed a motion in August 2019 to vacate the court's existing order that obligates the Agency to promulgate regulations for the federal plan by the November deadline, arguing that the EPA has until August 2021 to issue the federal plan.

EPA funds university research on PFAS in waste streams. In September 2019, the EPA announced plans to fund $1.3 million in research to be conducted by Texas A&M AgriLife and Texas Tech University over the environmental risks posed by per- and poly-fluoroalkyl substances ("PFAS") in waste streams. The Universities will also work to identify approaches to manage potential impacts of PFAS in the environment.

EPA announced plans this past spring to implement a PFAS Action Plan to address PFAS, which may classify PFAS as "hazardous waste" under CERCLA. A number of states have already begun implementing their own plans to address PFAS, but Texas has not.

Texas A&M AgriLife plans to investigate the feasibility of electron beam technology for the destruction of PFAS compounds while Texas Tech University plans to identify and quantify the occurrence of PFAS in landfill leachate, investigate the fate of PFAS passing through typical landfill liner systems, and test the ability to break down PFAS in landfill leachate using soundwaves. Please refer to the April and July editions of *The Lone Star Current* for further information about PFAS.

Texas Commission on Environmental Quality ("TCEQ")

Bobby Janecka Appointed TCEQ Commissioner. On Monday, September 16, 2019, Governor Greg Abbott selected Robert "Bobby" Janecka to fill the vacant Commissioner seat at the TCEQ. Janecka, along with Chairman Jon Niermann and Commissioner Emily Lindley, will serve as the leaders of the TCEQ. Janecka will serve a six-year term.

Janecka, who has served as a policy advisor for Governor Greg Abbott since 2018, brings nuclear and radioactive materials experience, as well as significant policy experience, to the position. During his time with the Governor, Janecka served as the State's liaison to the Nuclear Regulatory Commission, an agency of the federal government tasked with protecting public health and safety related to nuclear energy.

Janecka worked for the TCEQ in the past, most recently as a section manager in the Commission's Radioactive Materials Division. Prior to his work with the Governor and the TCEQ, Janecka worked as a legislative aide for two state representatives, Geanie Morrison and Tryon Lewis.

Read the press release here: https://www.tceq.texas.gov/news/releases/bobby-janecka-appointed-as-new-commissioner.

In Response to HB 2771, TCEQ Hosts First Oil and Gas Wastewater Stakeholder Group Meeting. Governor Greg Abbott signed House Bill ("HB") 2771 on June 14, 2019, and this new law went into effect on September 1, 2019. HB 2771 is a delegation bill, meaning that it requires the TCEQ to seek authority from the EPA to issue discharge permits for produced water, hydrostatic test water, and gas plant effluent. Over the next two years,

the TCEQ will apply for delegation authority to issue discharge permits through the Texas Pollutant Discharge Elimination System ("TPDES").

On September 17, 2019, the TCEQ held a stakeholder meeting to explain HB 2771's implications, upcoming challenges, and next steps. In the meeting, TCEQ officials discussed the various steps that TCEQ must take before individuals can begin submitting applications for permits to the TCEQ, as well as the initial challenges TCEQ and EPA will have to overcome in order for the TCEQ to begin issuing discharge permits. Additionally, the TCEQ discussed what will be required of individual applicants when they apply for a discharge permit. The TCEQ will likely require the same information the EPA required when it was the issuing body for these permits, which includes site information, applicant information, discharge location, notice information, and affected landowner information. Applicants will also likely be required to submit a technical report, which will likely include the type of wastewater in question, the treatment process, and a pollutant analysis.

A full video of this meeting may be found on TCEQ's YouTube page: https://www.youtube.com/user/TCEQNews.

In the Matter of the Application of MedCare Environmental Solution for a New Medical Waste Registration No. 40294, TCEQ Docket No. 2019-0202-MSW. On August 28, 2019, the TCEQ denied MedCare Environmental Solution's ("MedCare") application for a registration to operate a medical waste facility in El Paso, Texas, based on a discrepancy between the number of residences in a one-mile radius of the site and the number listed in the application. In June 2019, the TCEQ approved the application, which would have allowed MedCare to process 100,000 pounds of medical waste per day. However, hundreds of protestants filed Motions to Overturn ("MTOs") at the TCEQ, arguing the Commission should change its decision and deny the application. Many of these MTOs alleged that the application contained false information and misrepresented the number of residences within a one-mile radius of the facility. The TCEQ overturned the previous decision and denied the application based on incompatible land-use.

In the Matter of the Application of Altair Disposal Service, LLC for New Hazardous Waste Permit No. 50407, SOAH Docket No. 582-18-1960. On September 27, 2019, the TCEQ denied Altair Disposal Service's ("Altair") application for a new hazardous waste permit for a noncommercial, hazardous waste landfill in Colorado County. The proposed landfill would take waste from an incineration facility near Houston to Colorado County.

The Administrative Law Judge recommended denial of the application on several bases, including one finding that the application failed to demonstrate that the soils were protective of groundwater. However, TCEQ denied the application based solely on the geology issue, finding that the soil was not dense enough to protect the underlying aquifers below the site.

Public Utility Commission of Texas ("PUC")

Proposal for Decision Issued in CenterPoint Rate Case. On April 5, 2019, CenterPoint Energy Houston Electric, LLC ("CenterPoint") filed its application to increase system-wide transmission and distribution rates by $161 million per year. Later, CenterPoint amended that total to $154.6 million, consisting of (1) a net annual increase in retail rates of about $149.2 million over adjusted test-year revenues and (2) an annual increase of about $5.4 million for wholesale transmission service.

Following the hearing on the merits in June and briefing by parties in July, the hearings examiners issued their Proposal for Decision ("PFD") on September 16, 2019. The Administrative Law Judges ("ALJ") recommend an overall revenue increase of $2,644,193, or 0.11%, over CenterPoint's present base revenues. Additionally, the ALJs recommend a 9.42% return on equity, substantially lower than the 10.4% return on equity proposed by CenterPoint.

The PUC will soon determine whether to adopt the ALJs' PFD at an open meeting.

Parties Await SOAH Decision in AEP Rate Case. The PUC and interested parties have completed their review of AEP Texas Inc.'s ("AEP Texas") recent rate case filing. Parties submitted their Reply Briefs last week as they await the State Office of Administrative Hearings ("SOAH") ALJ's PFD.

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 and Texas North Company 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 Central Division would be an increase of about $4.75 or 9.8% per month. The impact on an average residential customer in the North Division would be an increase of about $5.01 or 10.6% per month.

Once the SOAH ALJs review all of the information submitted by the parties and issue their PFD, the PUC Commissioners will determine whether to adopt the PFD at an open meeting.

SPS Files Rate Case. On August 8, 2019, Southwestern Public Service Company ("SPS"), a non-ERCOT utility, filed an application with the PUC for authority to change rates. On August 8, 2019, the PUC issued an order referring this docket to the State Office of Administrative Hearings ("SOAH").

SPS is seeking approval of a total retail base rate revenue requirement of $695,083,391 and a base rate increase of

$141,284,640. SPS also requests that the final rates set in this case be effective for consumption occurring on and after September 12, 2019. The SOAH ALJ granted SPS's request for temporary rates beginning on September 12, 2019, and there will be a refund or surcharge applicable for usage during the temporary rate period.

The parties are currently conducting discovery in anticipation of filing testimony in February 2020. A hearing on the merits is currently scheduled to take place from March 30-April 8, 2020.

PUC's Cleanup of SPCOAs Continues. The PUC's quest to clean up its Service Provider Certificate of Operating Authority ("SPCOA") files continues. A petition filed in August 2018 by the PUC Staff against Vitcom, LLC, has been finally resolved. The PUC's order in Docket No. 48643 was approved on September 2, 2019. The revocation was based on an alleged pattern of not responding to Commission inquiries, failing to comply with reporting requirements, and failing to actively provide telecommunications services. The stated basis for the order was a failure to provide telecommunications services.

Other pending revocations have been finalized. The Commission approved Mitel Cloud Services' application to relinquish its SPCOA on September 30, 2019, and Sunesys' application on October 11, 2019. The Commission has ordered both Legacy Long Distance and Talk America Services to provide additional notice of their relinquishment applications to the Commission on State Emergency Communications ("CSEC") and the Office of Public Utility Counsel ("OPUC"). Legacy Long Distance has since provided proof of notice to OPUC, but not to CSEC. Talk America Services, however, has provided proof of notice to both OPUC and CSEC.

A new round of SPCOA terminations have been filed at the Commission. Local Access, ThinQ, USA Fiber, Cbeyond, and Local Access have all filed applications to discontinue service or terminate their SPCOAs. ThinQ (Docket No. 50044), and USA Fiber (Docket No. 50045) submitted applications to relinquish their certificates. Cbeyond has filed an application to amend its SPCOA to discontinue service, but retain its SPCOA. Local Access originally filed a simple letter to relinquish its SPCOA (Docket No. 50035), but when ordered by the Commission to use the Commission's forms, Local Access reapplied (filed in both Docket No. 50035 and new Docket No. 50093), indicating that it will discontinue service, without relinquishing its certificate. The PUC has yet to review these applications.

PUC Reviews, Readopts, and Revises its Telecommunications Rules. Late last year, the PUC instituted a review of its Chapter 26 rules related to telecommunications service providers. The Administrative Procedures Act, Tex. Gov't Code § 2001.039, requires that each state agency review its rules every four years and readopt, readopt with amendments, or repeal the rules. These reviews must include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rules continues to exist. A few associations representing telecommunications providers, 9-1-1 providers, and telephone cooperatives filed comments recommending that the rules be readopted. There were some requests for the PUC to open new rulemaking proceedings to address various issues, but generally, amending the rules to catch up with technology. In its Order adopted on September 12, 2019 (Project No. 48979), the PUC found that the reasons for adopting the rules in the first place continue to exist, and it thus readopted Chapter 26. The PUC also acknowledged that some of the suggestions have merit, and the agency will consider amending the rules "as resources permit."

Also on September 12, in Project No. 47668 the PUC adopted a new rule, Section 26.409, establishing the criteria and process for determining whether Texas Universal Service Fund ("TUSF") support should be eliminated. The new rule captures some statutory changes from 2017, and it requires the PUC to review the per-line TUSF support under the statutory criteria, such as total number of access lines served by eligible telecommunications providers in the exchange, number of competitors in the exchange, and whether the continuation of TUSF support is in the public interest.

PUC Commissioner Botkin Reappointed. Governor Greg Abbott has reappointed Shelly Botkin to the PUC for a term set to expire on September 1, 2025. Botkin has served as a Commissioner at the PUC since June 2018. She was previously the Director of Corporate Communications and Government Relations for the Electric Reliability Council of Texas, where she served for eight years. Botkin received a Bachelor of Arts in anthropology from Washington University in St. Louis.

Railroad Commission of Texas ("RRC")

TGS Harvey Update. 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 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. Cities argued that the application, if approved, would result in piecemeal ratemaking; the expenses should have been presented with a comprehensive base rate case in order to be eligible for recovery.

The parties reached a settlement where TGS agreed to withdraw the filing but may ask for the expenses in a future rate case; and the parties will be free to object at that time. On October 1, the RRC approved the settlement.

CenterPoint Gas Refund. Last year, CenterPoint Gas made a filing to take into account the reduction in federal taxes they pay due to the Tax Cut and Jobs Act of 2017. On August 1, 2019, CenterPoint Gas made a filing for their Houston and Texas Coast divisions to take into account additional impacts associated with the legislation. Then, on August 16, CenterPoint Gas amended its filing. As part of this filing, CenterPoint Gas addressed Hurricane Harvey costs as well. Under the law, CenterPoint Gas is not allowed to combine Hurricane Harvey costs into the refund case.

On September 27, CenterPoint agreed to refile its application and remove costs associated with Hurricane Harvey system restoration. CenterPoint's removal of the Hurricane Harvey system restoration costs does not prohibit the Company from requesting those costs in a future Statement of Intent proceeding; nor does the removal of the Hurricane Harvey costs prohibit any party from taking any position on the appropriate amount of, prudence of, or recoverability of those costs in that future proceeding.

On October 11, 2019, CenterPoint filed its 2nd Supplemental Filing to remove Hurricane Harvey related costs. The result of removing such costs is to increase the refund from $16,556,357 to $17,763,968. The refund will be effective on bills rendered on or after January 1, 2020 and will last for 36 months.

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