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ATTORNEYS AT LAW

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THE LONE STAR CURRENT

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

PARDON OUR DUST AS WE PREPARE FOR THE NEXT DECADE AT LLOYD GOSSELINK

by Lauren J. Kalisek

Some of our clients and colleagues may have noticed a bit of construction work going on in our offices over the past few weeks. This work will become even more intense in the last quarter of 2018 as we complete renovations that implement some long-term planning decisions we've made earlier this year. We are excited to report that we've negotiated an extension of our lease in our current office space at 816 Congress Avenue and we will continue to call this address home for at least the next decade. Maintaining a downtown Austin presence was important to us to support our clients and our clients' access to the Capitol, the Travis County Courthouse, and many of the various state agencies that are the focus of our practice. As anyone who has visited downtown Austin recently has observed, it has experienced explosive growth that, while great for the community, has led to challenging rental rates. In order to mitigate and offset this expense and keep the cost of our services as reasonable as possible for our clients, we are making more efficient use of our office space and giving back some unneeded space to the building. This move to greater efficiency has led to the need for the construction work that will convert the first floor of our offices into a multi-tenant floor on 19. We will retain the entire top floor of the building on 20. We expect this construction to be completed by the start of 2019. At the same time, we continue to seek out and bring on new talent with two new attorney hires in 2017, four in 2018 and possibly more to come in 2019. So although things may be dusty for a bit here, we are excited about the bright future ahead and appreciative of the opportunity to continue to serve our clients for many years to come.

Lauren Kalisek is the Firm's Managing Principal and Chair of the Districts Practice Group. If you have questions about this update or other matters, please contact Lauren at 512.322.5847 or lkalisek@lglawfirm.com.

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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

Sarah Collins has joined the Firm's Water and Compliance and Enforcement Practice Groups as an Associate. Sarah assists clients with matters involving water resource management and development, water quality permitting, regulatory compliance, enforcement, and endangered species. Prior to joining the Firm, Sarah worked for a national law firm in Washington D.C. and Austin. Sarah received her doctor of jurisprudence from The University of Texas School of Law and her Bachelor of Science, *summa cum laude*, from the College of William and Mary.

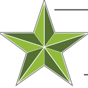
Patrick Dinnin has joined the Firm's Energy and Utility, Water, and Compliance and Enforement Practice Groups as an Associate. Patrick assists clients with matters involving electric, gas, and water utility services before the Public Utility Commission, Railroad Commission, and the State Office of Administrative Hearings regarding ERCOT matters, license applications, rate proceedings, rulemakings, complaints, enforcement, and government relations. Prior to joining the Firm, Patrick worked at the Public Utility Commission, Oversight and Enforcement Division. Patrick received his doctor of jurisprudence from the University of Houston Law Center and his Bachelor of Arts from the University of Texas at Austin.

Bettye Lynn has joined the Firm's Employment Practice Group as Of Counsel. Bettye practices exclusively in the management side of labor and employment law, representing employers in both the public and private sectors. Bettye received her doctor of jurisprudence from DePaul College of Law, her Master's in Public Administration from the University of Kansas, and her Bachelor of Arts from American University.

New Practice Areas

Appellate Practice Group arises from the solid foundation of the Firm's core subject matter practices and its strong and diverse court litigation and agency-advocacy practice. Our appellate attorneys have experience not only with a wide array of subject matter, including water law, environmental law and litigation, governmental immunity,

Firm News continued on 17



MUNICIPAL CORNER

A contractual assessment imposed under the Property Assessed Clean Energy Act is a special assessment by the local government, and despite not being an ad valorem tax, it is treated in a manner similar to taxes on real property. Tex. Att'y Gen. Op. KP-0210 (2018).

The Property Assessed Clean Energy ("PACE") Act authorizes cities and counties to establish a program to finance permanent improvements on certain privately owned commercial or industrial properties to decrease water and energy consumption. *See generally* Tex. Loc. Gov't Code §§ 399.001-.019.

If the local government deems it "convenient and advantageous," it can establish a program under which either a third party or the local government itself will provide financing for "qualified improvements." *Id.* at § 399.006. Qualified improvements may include permanent fixtures in the form of devices on the customer's side of the meter that can generate electricity, provide thermal energy, or regulate temperature. *Id.* at § 399.002.

The entity that finances the qualified improvements, whether it be a third party or the local government, will be repaid by means of an assessment on the real property where the qualified improvements are located. *Id.* at § 399.004. The assessment covers things like cost of labor and materials, permitting fees, lender's fees, and program application and administrative fees. *Id.* at § 399.006.

Before a PACE assessment can be imposed, each project must have a review of baseline energy or water use conditions by an independent third-party expert and a projection of the energy or water savings expected. *Id. at* § 399.011. The local government must receive verification that the improvements were properly completed and that they operate as intended. *Id.*

When notice of a PACE assessment is filed in the real property records of the county, the assessment becomes a first lien against the property that "has the same priority status as a lien for any other ad valorem tax." *Id.* at § 399.014. The lien runs with the land and does not accelerate in the event of a default, but transfers to any new owner. *Id.*

Further, "[t]he assessment lien may be enforced by the local government in the same manner that a property tax lien against real property may be enforced by the local government to the extent the enforcement is consistent with Section 50, Article XVI, Texas Constitution." *Id.* at § 399.014(c). The high statutory priority can make PACE assessments attractive to private lenders, who are then willing to finance such projects at lower interest rates and for longer periods of time than they would with conventional financing.

Here, a Texas nonprofit company developed a model toolkit for local PACE programs to facilitate an "orderly, consistent, statewide approach to PACE design and implementation." *See* Keeping Pace in Texas, Pace in a Box, https://www.keepingpaceintexas.org/pace-in-a-box. The nonprofit company asked the Attorney General ("AG") whether the assessments could be considered "special assessments" and whether they could be treated in a similar manner as *ad valorem* taxes.

The impetus for the inquiry came from correspondence from the U.S. Department of Housing and Urban Development ("HUD"), which provides administrative guidance for multifamily residential properties participating in PACE programs throughout the country. Before HUD will consent to participation in a PACE program by multifamily residential properties assisted by HUD and on which HUD holds or guaranteed the mortgage, it requires confirmation from the state's attorney general that the obligations under the PACE program are special assessments and treated in a similar manner as the real estate taxes.

The Texas Supreme Court has defined a special assessment as, "charges imposed for purposes which do not necessarily require that they be imposed annually, or with reference to the time; nor are they usually based upon a percentage of the value of the taxable property . . . but upon the . . . benefit resulting from the improvement . . . ." *City of Wichita Falls v. Williams*, 119 Tex. 163, 26 S.W.2d 910, 912 (1930).

The AG reasoned that the PACE assessments were indeed special assessments because (a) the local government does not impose the assessment on all property within the designated region as a general revenue source; (b) the assessment is intended to cover the cost of the improvement and is tied to the useful life of the improvement; and (c) the benefit accrues to only the property subject to the assessment and not to the general public of the local government offering the funding mechanism under the Act.

Finally, the AG determined while a special assessment is not an *ad valorem* tax, it is treated similarly nonetheless. The AG cited several sections of the Texas Local Government Code to support this conclusion. One of the cited provisions states that delinquent installments of the assessments incur interest and penalties in the same manner as delinquent property taxes, for example. Tex. Loc. Gov't Code § 399.014(d).

The AG resolved that this and other provisions sufficiently illuminated the Legislature's intent to treat the assessment in a manner similar to real property taxes—particularly with respect to lien priority status, enforcement, and delinquencies.

The Texas Constitution prohibits school district employees, other than schoolteachers, from receiving a salary for service on the city council. Tex. Att'y Gen. Op. KP-0211 (2018).

With certain exceptions, the Texas Constitution prohibits an individual from holding at the same time more than one "civil office of emolument." TEX. CONST. art. XVI, § 40(a). "An 'emolument' is compensation paid to the officer and does not include reimbursement for actual expenses." Tex. Att'y Gen. Op. GA-0214 (2004) at 2. Thus, an individual serving as trustee of an independent school district may also serve as a trustee on a county hospital district board because both offices are ones in which a person serves without compensation. Tex. Att'y Gen. Op. KP-0023 (2015) at 1.

The AG was asked whether employees of an independent school district were eligible to receive compensation for their service on the city council, given the dual-office prohibition. The AG pointed to the express prohibition of current school district employees receiving a salary for serving on the city council unless the individual is considered a schoolteacher under the Texas Constitution. TEX. CONST. art. XVI, § 40(b)(1).

A previous AG opinion explained that "[w]hether a particular individual who receives compensation from the State . . . is a schoolteacher for purposes of article XVI, section 40 . . . depends upon whether the individual is employed to instruct students in a school setting . . . as a result of which participants may receive credit toward fulfilling their curriculum requirements." Tex. Att'y Gen. Op. GA-0530 (2007) at 5.

Using the above guidance, the AG concluded in this opinion that most assistant principals and special education coordinators would not count as schoolteachers. Their lack of direct student instruction likely precludes them from receiving compensation for their service on the city council.

In contrast, a school counselor may be considered a schoolteacher depending on his or her job description. The Texas Education Code requires a school counselor to plan and implement a developmental guidance and counseling program, which includes "a guidance curriculum to help students develop their full educational potential." Tex. Educ. Code § 33.005(1). To implement the developmental guidance curriculum, § 33.006 provides that the school counselor may either, "deliver classroom guidance activities or serve as a consultant to teachers conducting lessons based on the school's guidance curriculum." Id. § 33.006(b)(6). The AG cited these responsibilities for support of the theory that a school counselor could qualify as a schoolteacher and, consequently, could receive a salary for city council service.

Though each role requires a fact-specific analysis for whether the dual-office prohibition applies, the AG's framework sheds some light on what one can expect to come from similar inquiries in a variety of roles and occupations.

Municipal Corner *is prepared by Jacqueline Perrin. Jacqueline is a to-be-licensed 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.*

FEDERAL COMMUNICATIONS COMMISSION PREEMPTS LOCAL CONTROL

by Georgia N. Crump

The Federal Communications Commission ("FCC") has recently taken action to preempt local control over the deployment of fifth generation ("5G") wireless infrastructure. Small cell deployments (also known as "network nodes") are the means to support the exploding demand for wireless broadband services. Citing regulatory obstacles to the investment needed to advance the ubiquitous availability of 5G services, the FCC pointed the accusatory finger at state and local governments. The national headlines say it all: "FCC Passes Order Limiting Cities' Review of 5G Deployment"; "Ajit Pai Slams Cities and Towns as FCC Erases $2 Billion in Local Fees"; and "FCC Oks Plan for 5G Deployment by Overriding Some Local Rules."

The action by the FCC that's behind these headlines took place on September 26, 2018, when the FCC adopted a Declaratory Ruling and Third Report and Order entitled, "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment." This extraordinary ruling imposes limitations on the right-of-way use fees that cities can impose on wireless facilities, establishes shot clock deadlines for city review of applications, and preempts multiple provisions of state law that the federal agency determined "materially inhibit" the deployment of advanced wireless services throughout the country.

The FCC has justified its action under provisions of the Telecommunications Act of 1996, specifically, 47 U.S.C. §§ 253 and 332. Section 253(a) provides that "[n]o State or local statute or regulation,

or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 332(c)(7) provides that state and local regulations on the placement of personal wireless services cannot be discriminatory or have the effect of prohibiting the provision of such services. Additionally, this section provides that local governments must act on applications to place wireless facilities within a reasonable period of time.

Texas cities are familiar with these provisions, as such provisions formed the basis for the enactment of S.B. 1004 in 2017, now found in Chapter 284 of the Texas Local Government Code. However, the FCC's recent order goes further in removing the ability of local governments to receive reasonable and adequate compensation for the use of public property by business interests and to protect the community interests inherent in local legislation. And, although the FCC cited municipal permitting and fee requirements as the primary barrier standing in the way of rural or low income areas having access to high-speed broadband, the FCC imposed no requirements on providers to invest in such areas, relying instead on market forces to incent such investment.

The Order will take precedence over state and local legislation in several material respects, and will require Texas municipalities to adjust their processes and regulatory provisions affecting the installation of wireless facilities in public rights-of-way that have been in effect for only one year. Among the provisions of Chapter 284 that have been preempted or called into question by the federal order are: antenna and pole height restrictions, protections for residential areas and parks, deference to private deed restrictions, protections for historic districts and design areas, aesthetic requirements, undergrounding requirements, and minimum spacing requirements.

The time periods in which cities must act on permit applications are similar under Chapter 284 and the FCC's order, but are implemented slightly differently. Chapter 284 requires cities to grant or deny applications for new network nodes no later than 60 days after receipt of a complete application; the FCC order also applies a 60-day action requirement. Under Texas law, a city has 30 days to determine whether an application is complete, and the 60-day period doesn't start to run until it is complete. The FCC order, as revised, allows only a 10-day period to determine completeness of the application, and resets the shot clock when supplemental information to remedy the incompleteness is received. The resetting of the shot clock only happens once. If the city subsequently determines that the supplemental information did not cure the deficiency (a determination that must be made within 10 days of receipt), then the shot clock is simply tolled from that date and not reset. A city may not limit the number of applications submitted at one time, and no extensions of the shot clock are allowed to accommodate the review time needed for multiple applications.

Applications for the installation of new node support poles in the right-of-way must be reviewed and approved or denied within 150 days under Texas law; and the FCC order shortens this period to 90 days, again with no ability of a city to place restrictions on the number of applications submitted at one time. This period applies not only to right-of-way permits but also to all other approvals that a city must issue under applicable laws prior to the deployment of the facilities, including: agreements for attachments to city-owned street lights, traffic lights, directional signs; presumably to pole attachment agreements for city-owned utility poles; building permits; road closure permits; electrical permits; and excavation permits.

The FCC's order requires all fees charged by cities be set in amounts to recover a reasonable approximation of the government's actual and reasonable costs of maintaining the right-of-way, maintaining a structure within the right-of-way, or processing an application or permit, with no consideration of the value of the use of the rights-of-way. The FCC identified presumptively reasonable fees of $500 for a single up-front application that includes up to five wireless facilities, with an additional $100 for each facility beyond five, and $270 per facility, per year, for all recurring fees, including right-of-way access fees and fees for attachments to municipally-owned structures in the right-of-way. Chapter 284 also allows for a $500 application fee for up to five network nodes, but allows an additional application fee of $250 for each facility beyond five. Under Chapter 284, cities may charge up to $1,000 for each node support pole application; thus, this fee will be preempted under the FCC's order.

The FCC order will be effective 90 days after its publication in the Federal Register; the period for filing petitions for reconsideration or petitions for judicial review also start on the date that a summary of the declaratory ruling is published in the Federal Register. Numerous local government interests have already stated their intent to challenge what FCC Commissioner Rosenworcel has described as "extraordinary federal overreach."

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 have any questions related to these areas or would like additional information, please contact Georgia at 512.322.5832 or gcrump@lglawfirm.com.

WATER SUPPLY PLANNING: 404 PERMITTING*

by Nathan E. Vassar

The federal overlay to water rights permitting and planning can be substantial, as many water suppliers can attest. As we have described in recent articles, when federally jurisdictional waters are implicated in a project, authorization from the U.S. Army Corps of Engineers ("USACE") is required. Today's focus highlights factors that water suppliers should consider when there is a likelihood that section 404 of the Clean Water Act may be triggered.

Section 404 permitting can take the form of either a nationwide permit for certain activities or a more searching process for an individual permit. USACE is the federal agency charged with reviewing applications and issuing 404 permits. When certain projects require a nationwide permit, the authorization process is relatively straightforward, as a permittee must demonstrate that the project in question meets the provisions of that particular nationwide permit. Such nationwide permits cover a variety of activities, including maintenance of certain flood control facilities, bank stabilization, and work on outfall structures.

When an individual 404 permit is required, an applicant should be prepared for a number of regulatory hurdles and should prepare accordingly. First of all, the timeframe for an individual permit can extend for multiple years, driven by extensive evaluations, including USACE coordination with its sister agencies in the federal government, and its consideration of input from state agencies as well. The time component is also directly impacted by important environmental laws and technical analysis, such as the National Environmental Policy Act ("NEPA") process.

There are a number of critical constituencies involved in an individual 404 application effort. In addition to the state/federal agency involvement mentioned above, there are ongoing public interactions as well, as well as coordination discussions with recognized tribal interests. Although some of these interactions are driven by the specific content of public and agency comments offered during comment periods, existing state and federal statutory and regulatory structures mandate a thorough review that includes a variety of stakeholders and analysis. Accordingly, the 404 application process looks to provisions outside of the Clean Water Act itself to analyze impacts from a proposed project. Such laws include, among others, the Endangered Species Act, NEPA (as provided above), National Historic Preservation Act, and state antiquities codes and other applicable state statutory/ regulatory structures.

Water supply planners looking to undertake significant water supply projects requiring a 404 permit should always evaluate alternatives. Even independent of a NEPA-driven alternatives analysis, a prudent approach to water supply planning includes consideration of a suite of options to extend supplies and provide for supplemental water. Our series to date has highlighted a number of those alternative options, including the important analysis of reuse and conservation efforts.

If it is believed that an individual 404 application is warranted, developing the groundwork for the application is important. Such effort includes appropriate resources analysis, projected needs over a planning horizon time period, and a fatal flaws analysis, identifying potential hurdles or road blocks that may arise down the road. Although a 404 application effort is never without surprises and contingencies, successful applicants are typically those who have undertaken significant front-end work so that they are better prepared when such issues emerge during the permitting process. That planning effort includes both a legal and technical component, and may involve a variety of tasks from an analysis of existing water supply contracts to a comparison of modeling results under the USACE's preferred model, RiverWare.

As our series continues, we will highlight certain aspects of the ancillary laws beyond CWA Section 404 that can come into focus during water rights applications, or even under state-funding programs that voluntarily include the involvement of species/cultural-protection laws. Such articles will highlight the importance of remaining abreast of policy developments in order to affect influence even before a project triggers such regulatory/policy-driven application.

Nathan Vassar is a Principal in the Firm's Water Practice Group. Nathan's practice focuses on representing clients in regulatory compliance, water resources development, and water quality matters. Nathan regularly appears before state and federal administrative agencies with respect to such matters. For questions related to water supply issues, federal requirements, or the use of water supply planning tools, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com.

**This article is the eleventh in an ongoing series of water supply planning and implementation articles to be published in* The Lone Star Current *that address simple, smart ideas for consideration and use by water suppliers in their comprehensive water supply planning efforts.*

THIRD COURT OF APPEALS PROVIDES CLARITY IN CHAPTER 1205 BONDS VALIDATION LAWSUITS

by José de la Fuente

An unusual and sometimes mysterious creature of Texas law – Chapter 1205 of the Texas Government Code, which allows for expedited declaratory judgment actions to validate public bonds – has recently become less mysterious, after the Texas Third Court of Appeals issued its recent opinion in *Cities of Conroe, Magnolia, and Splendora v. Paxton*, 03-16-00785-CV, 2018 WL 4190803 (Tex.App.—Austin Aug. 31, 2018, no pet. h.). The bond validation process of Chapter 1205 has been utilized with some regularity in cases involving contracts, including cases in which other public entities are on the other side, raising questions as to the nature of disputes that could be considered in a Chapter 1205 case and the implication of the governmental immunity of public entity parties that may oppose the relief requested.

In this case, the San Jacinto River Authority ("SJRA") filed a Chapter 1205 suit in Travis County, a permissible venue under the statute, seeking to resolve numerous issues related to its issuance of bonds, including ongoing contractual disputes that it had with certain cities regarding its wholesale water rate. Several opposing parties, including several cities that were contract customers of SJRA, appeared and asserted pleas to the jurisdiction generally claiming that 1) SJRA's requested relief went beyond the permissible bounds of 1205, and 2) the cities were immune to such a suit. The trial court judge denied their pleas, and the Third Court considered the parties' arguments on an interlocutory appeal of that denial.

Justice Pemberton's opinion is long and detailed, and contains some very helpful analysis on multiple points of Chapter 1205 law; but in summary, the Court held that:

<u>Breach-of-contract claims do not belong</u>: SJRA's attempt to obtain a Chapter 1205 adjudication that the City of Conroe had breached its contract with SJRA was beyond the scope of matters that can be adjudicated under Chapter 1205, and thus that claim was non-jurisdictional (that is, the question of whether Conroe breached its contract does not belong in a Chapter 1205 suit, and must be litigated by another mechanism, such as an ordinary breach-of-contract suit). Thus, the Court of Appeals reversed the denial of the plea to the jurisdiction in that respect;

<u>Claims to validate a contractual "rate" are permissible</u>: SJRA's remaining requested relief, including "that the SJRA issued its fiscal year 2017 Rate Order, including the setting of its fiscal year 2017 rate, in accordance with the procedures set forth in the GRP Contracts," and "that the SJRA's fiscal year 2017 rate, Rate Order, and the GRP Contracts, including the Contract with Conroe, are legal and valid," is within the scope of Chapter 1205, and thus the denial of the plea to the jurisdiction on that basis was proper. Importantly, a declaration as to the legality and validity of a contract – even one for which there is a dispute about whether the issuer properly followed it – is within the scope of Chapter 1205, and is proper subject-matter for a Chapter 1205 case. The Court even went on to say that "to the extent the Cities are maintaining that adjudication affecting personal or particularized rights rather than public rights is inherently incompatible with an in rem action, they are similarly mistaken"; and

<u>Chapter 1205 claims are an exception to governmental immunity</u>: The cities' claim that governmental immunity rendered them immune from such adjudication was rejected. The court specifically held that (particularly in light of its striking of the claim for breach of contract, discussed above) cities are not immune from being parties to and being bound by a Chapter 1205 suit, observing that the claims are

> within a recognized 'exception' holding that immunity is not implicated by claims that would enforce an underlying statutory or constitutional requirement "that government contracts be made or performed in a certain way, leaving no room for discretion." Such requirements or duties in this case would be formed by SJRA's enabling statute and the statutes deeming "incontestable" the GRP bonds (including bond covenants) and the GRP Contracts.

The Court went on to hold that if a party "asserts that the GRP Contracts are statutorily beyond legal challenge," the claim also would not implicate governmental immunity.

The opinion also made findings on numerous smaller issues that, while less controversial, were not entirely settled before this case: e.g., a Chapter 1205 suit can be brought both before and well after the securities are issued, and the defined term "public security authorizations" in the statute includes contracts like SJRA's.

The opinion also suggests that, if a party to a contract believes that Chapter 1205 does not provide the requisite due-process protections (because of its broad and general notice provisions), the proper mechanism is a constitutional challenge to the statute's enforcement. However, as the constitutionality of Chapter 1205 has been the subject of appellate opinions in the past, this path does not seem to be a particularly viable one.

While the SJRA case is now on remand to the trial court, it is likely to return to the Third Court of Appeals once final judgment is issued, and we may receive even more guidance as to the interpretation of Chapter 1205 at that time. In any

case, we now know that public entities with governmental immunity may nonetheless be parties to and may be bound by a Chapter 1205 suit filed by a third party, and in such cases, the legality and validity both of their contracts and the issuer's performance thereunder with respect to setting rates can be decided. Governmental entities, and any entity that is a party to a contract with a government entity that may issue bonds, should be cognizant of this better-defined playing field, and realize that whether they would like to be or not, they are players in the game when a Chapter 1205 suit is filed.

José de la Fuente is the Chair of the Firm's Litigation and Appellate Practice Groups. If you have questions about this article or other matters, please contact Joe at 512.322.5849 or jdelafuente@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We seem to have an office full of employees with allergies, respiratory problems, and anxiety, and they are all asking for workplace accommodations. We have no problem reasonably accommodating our employees so that they will be comfortable and healthy at work, but now we have complaints that what helps one employee hurts another. For example, one employee says she needs an air diffuser in her office for her asthma, and another employee says she is allergic to the diffuser. In yet another example, when an employee brings in her service dog to alleviate her anxiety, other employees state that they are allergic to the dog or have a fear of dogs in general. All these employees have brought in doctors' notes diagnosing their health conditions and confirming the need for accommodation. HELP!!

Signed,
Can't Make Everyone Happy

Dear Can't Make Everyone Happy:

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations to allow disabled employees to work. An accommodation is not reasonable if it causes an undue hardship to the employer, and preventing other employees from working could be considered an undue hardship.

Does that mean you deny the accommodation because of another employee's disability? Not so fast. The law also requires you to discuss the issues with the employees claiming health issues, to engage in an "interactive process" to determine possible alternatives, and to make compromises that can result in the best possible resolution, even if everyone is not happy. The requirement to reasonably accommodate does not mean you have to

go with the employee's preferred choice of accommodation, so long as you work toward resolving the problem.

In your situation, you should look at alternatives such as office relocation, increased ventilation, and shift changes. You could have the dog and the diffuser on one side of the building, and designate the other side as an allergen-free area. Be careful not to make unsubstantiated judgments about the sincerity or seriousness of each disability. You may want to ask the health care providers for additional information as to how serious each allergy is – sometimes a potential deadly reaction will take precedence over an itchy nose. If no compromise can truly be reached, and your documentation shows all your efforts to resolve the matter, then you must make a reasoned and documented decision.

A few years ago, a similar charge was filed against the City of Indianapolis with the EEOC; an employee has a potentially fatal allergy to powdered chili, such as paprika, and uses a trained service dog to alert her if it smells paprika in the area. The employer allowed the dog, but on the first day, a coworker had an asthma attack because of a dog allergy. The City promptly banned the dog, and placed the employee on indefinite leave. The City ended up settling the case three years later for cash and a commitment to train managers on handling accommodation requests. What did the City do wrong? It made a snap decision without considering alternatives, talking to the employees involved (and documenting those discussions), and demonstrating that there existed no other reasonable alternatives to the decision to ban the dog. The employer did ban paprika-containing foods in the workplace, but the employee did not find that policy enough assurance in the face of a potentially deadly reaction. There was also evidence that a blind employee was allowed a service dog, but the paprika-allergic employee was not.

"Ask Sheila" *is prepared by Sheila Gladstone, the 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

South Carolina Coastal Conservation League, et al. v. Pruitt, No. 2:18-cv-00330 (D.S.C. Aug. 16, 2018).

A coalition of conservation groups brought suit on February 6, 2018 to challenge the validity of the Trump Administration's February 2018 rule ("Suspension Rule") that suspended the "applicability date" of the 2015 clean water rule ("WOTUS Rule") until 2020. See Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018). Following briefing on a cross-motion for summary judgment, the court granted plaintiffs' motion and issued a nationwide injunction of the Suspension Rule, holding that the Environmental Protection Agency ("EPA") did not comply with the Administrative Procedure Act in promulgating the rule because the EPA did not provide a meaningful opportunity for public comment on the rulemaking, which opportunity should have included both the WOTUS Rule and the prior jurisdictional rule. Instead, EPA so narrowed the scope of its request for public comment as to exclude the requisite opportunity to comment on the substance or merits of either rule, limiting the focus to whether it was "desirable and appropriate to add an applicability date" to the WOTUS Rule. Further, EPA failed to "supply a reasoned analysis" for its changed course in promulgation of the Suspension Rule. The court determined that a nationwide injunction of the Suspension Rule was appropriate, as its effects are felt nationwide. Functionally, the court's invalidation of the Suspension Rule resulted in the reinstatement of the WOTUS Rule in those states that were not otherwise subject to prior court orders blocking implementation of the 2015 rule within those states. As a result, this ruling of the U.S. District Court for the District of South Carolina revived the WOTUS rule in 26 states, including Texas. The U.S. Department of Justice ("DOJ") has appealed the district court's decision in *South Carolina Coastal Conservation League* to the Fourth Circuit, and subsequent developments in other cases have altered the number of states in which the WOTUS Rule is in effect since this ruling.

State of Texas, et al. v. U.S. Envtl. Prot. Agency, et al., No. 3:15-cv-00162 (S.D. Tex. Sept. 12, 2018).

In this case filed June 29, 2018, the Attorneys General of the States of Texas, Louisiana, and Mississippi sought and were granted a preliminary injunction of the WOTUS Rule within each of their respective states. Interestingly, the Attorneys General and DOJ both argued in favor of a preliminary injunction of the WOTUS Rule, which demonstrates a reversal of DOJ's prior position against a stay of the WOTUS Rule- a position that had been based upon the Administration's order instituting a 2-year delay of the Rule's implementation date. However, with that 2-year delay now struck down nationwide on August 16, the DOJ argued in support of an injunction in this case. However, DOJ continued to oppose a nationwide injunction of the WOTUS Rule. In its ruling granting the motion for preliminary injunction, the court concluded that granting the preliminary injunction was in the public's interest, as a stay of the application of the WOTUS Rule "provides much needed governmental, administrative, and economic stability" until a permanent decision on the Rule's constitutionality can be made. On September 21, the Court ordered the consolidation of this case with two similar cases filed in the U.S. District Court for the Southern District of Texas by the American Farm Bureau Federation and the Association of American Railroads, along with other industry co-plaintiffs. At this point, the WOTUS Rule is currently in effect in only 22 states, the District of Columbia, and the U.S. territories.

Sierra Club v. Virginia Electric & Power Co., No. 2:15-cv-00112, 2018 WL 4343513 (4th Cir. 2018).

This case is one of the latest in a series of recent suits across the country that have the potential to expand the National Pollutant Discharge Elimination ("NPDES") permit program to encompass a discharge to groundwater that is hydrologically connected to jurisdictional waters and where pollutants are fairly traceable to the discharge. Earlier in 2018, the U.S. Circuit Court of Appeals for the Ninth Circuit ruled in *Hawai'i Wildlife Fund v. County of Maui* that the County violated the Clean Water Act ("CWA") by indirectly discharging treated effluent into the Pacific Ocean through groundwater as a result of its state-permitted disposal wells. See April 2018 *The Lone Star Current*. On August 27, 2018, the County of Maui filed a petition for *writ of certiorari* with the U.S. Supreme Court. *Hawaii Wildlife Fund v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018), *petition for cert. filed* (U.S. Aug. 27, 2018) (No. 18-260). Similarly, a Fourth Circuit decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, held that discharges from a broken pipe to hydrologically-connected groundwater can give rise to liability under the CWA, and Kinder Morgan filed its own

petition for *writ of certiorari* with the U.S. Supreme Court on August 28, 2018. *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, 877 F.3d 677 (4th Cir. 2018), *petition for cert. filed* (U.S. Sept. 4, 2018) (No. 18-268).

Here, *Sierra Club v. Virginia Electric & Power Co.* similarly involves a citizen suit allegation of a CWA violation based upon discharge of arsenic from coal ash piles on a plant site into surrounding surface waters via leaching by rainwater and migration of pollutants through groundwater into navigable waters. The Fourth Circuit followed its precedent set in *Upstate Forever*, holding that landfill and settling ponds were not a "point source" within the meaning of the CWA, and so the defendant power utility was not liable under the CWA for pollutants reaching navigable waters. However, the court also pointed out that the Resource Conservation and Recovery Act ("RCRA") continues to govern the treatment, storage, and disposal of hazardous waste and solid waste such as coal ash. The U.S. Court of Appeals corrected the district court for "blurr[ing] two distinct forms of discharges that are separately regulated by Congress—diffuse discharges from solid waste and discharges from a point source." While this case appears to have somewhat combined the Fourth Circuit's earlier holding in *Upstate Forever*, this issue of whether discharges to groundwater that result in pollutants migrating into hydrologically connected jurisdictional waters is thought to be one in which the Supreme Court may take interest during the term that begins October 1, as a split among the federal circuit courts persists on this question.

Kentucky Waterways Alliance v. Kentucky Utilities Co., 2018 WL 4559315, No. 18-5115 (6th Cir. Sept. 24, 2018) and Tennessee Clean Water Network v. Tenn. Valley Auth., 2018 WL 4559103, No. 17-6155 (6th Cir. Sept. 24, 2018).

The most recent decisions on the question of whether an unpermitted discharge to groundwater hydrologically connected to jurisdictional waters, where pollutants are fairly traceable to the discharge, violates the CWA came from the U.S. Court of Appeals for the Sixth Circuit; and these holdings further entrench the ongoing circuit split. Unlike the Fourth and Ninth Circuits, the Sixth Circuit rejected the plaintiffs' theory that pollutants that reach navigable waters after passing through groundwater constitute discharges required to be authorized under the NPDES permitting program. Both Sixth Circuit cases dealt with environmental groups' claims that power plants violated the CWA by failing to obtain NPDES permits for releases of pollutants from coal ash ponds into groundwater that subsequently migrated into surface waters. In *Kentucky Waterways*, the court rejected the idea that groundwater itself is a "point source" that discharges into navigable waters, within the meaning of the CWA. Further, the court concluded that the release of water is not a "discharge" requiring an NPDES permit. The court in *Tennessee Valley Authority* applied the reasoning of *Kentucky Waterways* on the same day, resulting in a holding that the coal ash ponds' releases to groundwater did not qualify as discharges that required NPDES permits. Again, these two decisions from the Sixth Circuit solidify the split among circuit courts, and they may increase the likelihood that the U.S. Supreme Court will grant a petition for certiorari to resolve this question regarding "indirect" discharges once and for all.

End Op, L.P and Lost Pines Groundwater Conservation District v. Meyer, et al., No. 03-18-00049-cv, 2018 WL 4102013 (Tex. App.—Austin [3rd Dist.] Aug. 29, 2018, no pet.).

This case involved a dispute over whether an environmental nonprofit and group of landowners had standing to contest a certain groundwater permit application. Appellees End Op, L.P. and Lost Pines Groundwater Conservation District ("GCD") in 2007 applied for operating and transport permits, and the nonprofit and landowners ("Appellants") sought to participate in the contested case hearing regarding the permit application that was already proceeding at the State Office of Administrative Hearings ("SOAH"). On SOAH's recommendation, the GCD denied the landowners' request for party status and allowed only one entity (a competitor of End Op) to contest the application. The GCD granted End Op's application in 2016, and the landowners then sued the GCD, seeking judicial review of both the GCD's order denying party status and the GCD's final order granting the permit application. While the district court had ruled in favor of the plaintiffs, the appellate court overturned that decision, holding that the court lacked jurisdiction over the challenged GCD orders. First, the landowners failed to file a timely petition for review of the GCD's order regarding party status in the hearing, because they filed for judicial review prior to the GCD's decision on their motion for rehearing and so had not yet exhausted their administrative remedies. Because the suit for review of the administrative action was prematurely filed, the courts lacked jurisdiction. Second, the appellate court held that the district court lacked jurisdiction over the landowners' challenge to the final order granting the disputed permit application because under Texas Water Code § 36.251, only the GCD, applicant, and other parties to a contested case hearing have the right to seek judicial review of the final order. Finally, the appellate court rejected Appellants' assertion that they planned to raise constitutional challenges to the GCD's order denying them party status such that they could establish jurisdiction under the Uniform Declaratory Judgments Act ("UDJA"), as the planned approach would be barred by the doctrine of redundant remedies. Because the landowners' hypothetical constitutional claim was redundant of the claim they could have timely brought, the district court had no jurisdiction to entertain such a claim.

Litigation Cases

Village of Tiki Island v. Premier Tierra Holdings, Inc., --- S.W.3d ---, 2018 WL 3352235 (Tex. App.—Houston [14th Dist.] Aug. 14, 2018, no pet. hist.).

In this case, the court held that a vested rights claim lays the foundation for a takings claim when a city rejects a plat application based on zoning restrictions promulgated after the developer first filed the application.

Here, the lawsuit arose after Premier sought to develop its property into a residential condo building with up to

250 dry-stacked, enclosed boat slips. In furtherance of that plan, Premier submitted a plat application to the Village in April 2010, before the Village had developed any land-use regulations. Five days later, the Village approved a new zoning ordinance that, among other things, prohibited dry boat storage and apartment properties, limited the heights of new structures, and required minimum parking.

Over the next several years, the Village rejected various revised plat applications based on the Village's claimed preexisting "general plan as reflected in its existing streets and bridges." Premier filed suit under Chapter 245 of the Texas Local Government Code ("TLGC"), alleging that its vested rights had been violated and seeking mandamus. Premier also alleged that the Village's denial of its applications constituted a compensable taking. The Village countered that Premier failed to state a claim and that its claims, to the extent there were any, were not ripe.

Broadly, Chapter 245 of the TLGC establishes a rule that municipal regulatory agencies must consider a permit application under the terms of the ordinances, rules, or other regulations in effect at the time the application is filed. Chapter 245 contains an express waiver of governmental immunity.

Evaluating Premier's Chapter 245 claim, the court rejected the Village's claim that it was relying on a preexisting "general plan" to deny Premier's plat application. The Village did not present any evidence that such a "general plan" existed, nor was there evidence that the Village relied on such a "general plan." Accordingly, the court found that Premier stated a claim under Chapter 245 on the basis of Premier's allegation that the plat applications were really rejected as a result of a *post hoc* application of the zoning ordinance. The court further concluded that Premier's suit seeking declaratory judgment to confirm the existence and extent of its vested rights to develop the project was ripe.

In addition, the court concluded that "Premier has adequately pleaded a viable takings claim by alleging that at the time it acquired the Property, it had a reasonable investment-backed expectation to develop or market the Property as a marina with elevated dry boat storage, and that the [Village] interfered with Premier's investment-backed expectations by repeatedly denying Premier's vested rights to its projected based on items irrelevant to plat applications or ordinances adopted after Premier's rights vested." Long story short—a vested rights claim can lay the foundation of a takings claim.

Triple BB, LLC v. Village of Briarcliff, --- S.W.3d ---, 2018 WL 3863252 (Tex. App.—Austin Aug. 15, 2018, no pet. hist.).

In *Triple BB*, the court held that the Local Government Contract Claims Act does not apply to waive immunity for breach of a contract conveying an interest in real property—in this case, an easement—because it is not a contract providing goods or services to the local governmental entity.

Thirty years ago, the Briarcliff Marina erected a billboard on Village property attached to a cliff overlooking Lake Travis. In 2002, the Village contracted with the Marina's owners to acquire an easement on the Marina's property for a new raw water line in consideration for a license to display the billboard on the Village's property.

But when the Village sold the property, the deed to the new owners did not mention the billboard license. The marina's owners sued the Village for breach of contract and a compensable taking.

Reviewing the district court's decision to grant the Village's plea to the jurisdiction on the basis of immunity, the court of appeals concluded as a threshold issue that the Village was acting in its governmental function in dealing with the property. The court observed that the Texas Tort Claims Act specifically defines the provision of water and sewer service as a governmental function, and the acquisition of the easement to construct a new raw water line fell within that function.

The court further observed that the Texas Local Contract Claims Act did not waive immunity to the marina owner's suit because the contract was not for the provision of goods or services to the Village. The contract conveyed an easement to the Village; it did not require the Marina to take any action. Accordingly, the real-property conveyance effected by the contract did not constitute a good or service to the Village, and the contract was therefore outside the scope of the Contract Claims Act.

City of Westworth Village v. City of White Settlement, --- S.W.3d ---, 2018 WL 3763908 (Tex. App.—Fort Worth Aug. 9, 2018, pet. filed).

Here, the court held that a city's economic-development agreement to split tax revenue arose from a proprietary function, and thus governmental immunity does not shield the city from suit for breach of the contract.

The City of Westworth Village entered into an economic development agreement with its neighbor, the City of White Settlement, whereby the two would cooperate to obtain development of a parcel of land that was split by the two cities. Under the resulting agreement between the two cities and the developer, a Sam's Club and a Wal-Mart would be constructed on the parcel inside Westworth Village, with the stores' parking lot lying in White Settlement's city limits. The cities agreed to split the sales tax revenue from the stores, even though the stores themselves lay entirely within Westworth Village.

Twelve years into the agreement, Westworth Village terminated the contract, arguing that the stores required a disproportionate amount of the city's emergency services. When Westworth Village withheld the tax revenue due White Settlement under the contract, White Settlement sued. Westworth Village asserted governmental immunity.

The court rejected Westworth Village's assertion.

Westworth Village argued that it contracted with White Settlement as part of its governmental functions. To evaluate whether the agreement was a governmental function, the court applied

the criteria set forth in *Wasson Interests, Ltd. v. City of Jacksonville*, No. 17-0198, 2018 WL 2449184 (Tex. June 1, 2018)—whether (1) the act was mandatory or discretionary, (2) whether the act was primarily intended to benefit the general public or Westworth Village's residents, (3) whether Westworth Village acted on the state's behalf or its own behalf in contracting, and (4) whether the act was sufficiently related to a governmental function to render the act governmental even if it would have otherwise been proprietary.

Evaluating these factors, the court concluded that the agreement was a discretionary act intended to benefit primarily Westworth Village's residents. The court further observed that, although economic development is broadly a state function, Westworth Village's contract was for its own purposes and on its own behalf. And without no close nexus with a governmental function, the court concluded that the contract was the result of a proprietary function, and thus immunity did not apply.

Air and Waste Cases

Sierra Club v. Wheeler, No. 16-2461 TJK, 2018 WL 4387564 (D.C.C. Sept. 14, 2018).

On September 14, 2018, the United States District Court for the District of Columbia ordered the EPA to complete review and revisions of air pollution limits for new and existing solid waste incinerator units that the agency set in 2005. These rules required solid waste incinerators to limit toxic air emissions of volatile compounds as a result of thermal treatment during processing and disposal. The Sierra Club sued the EPA in December 2016 for failing to review and revise these standards. The district court's decision dismissed the EPA's claim that it lacked time and resources to complete the review and revisions. The decision also requires EPA to publish notice of a proposed rulemaking by August 31, 2020 and promulgate a final rule by May 31, 2021.

Texas v. EPA, No. 18-1263 (5th Cir. filed Sept. 24, 2018).

Texas Governor Greg Abbott and Attorney General Ken Paxton filed a petition for review by the United States Court of Appeals for the Fifth Circuit of the EPA's designation of Bexar County as a nonattainment area under the 2015 national ambient air quality standards ("NAAQS"). Entities that are affected by this final rule include state, local, and tribal governments; air pollution control agencies responsible for the attainment of ozone standards; and owners and operators of regulated sources of volatile organic compound ("VOC") and nitrogen oxide ("NOx") emissions. The current ozone NAAQS standard is 70 parts per billion ("ppb")—down 5 ppbs from the 1997 standards laid out by the Bush Administration. The two Texas leaders characterize the designation as an overreaching regulation by the EPA, and argue that, if allowed to remain, the designation would impose a financial burden on the Texas economy with minimal benefit to public health.

Whole Women's Health v. Smith, No. A-16-CV-01300 DAE, 2018 WL 4225048 (W.D. Tex. Sept. 5, 2018).

On September 5, 2018, the United States District Court for the Western District of Texas, Austin Division found that laws promulgated by the State of Texas to limit waste disposal options for embryonic and fetal tissue remains violated both the Equal Protection and Due Process Clauses of the United States Constitution. Plaintiffs, women's healthcare providers in Texas, brought suit against Defendant Charles Smith, in his official capacity as the Executive Commissioner of the Texas Health and Human Services Commission, challenging the constitutionality of the laws limiting waste disposal options for embryonic and fetal tissue remains. The court held that the challenged laws did not pass the rational-basis test, because the laws distinguished between pre-implantation and post-implantation embryos and the facilities that handle them, imposing disparate treatment against health care facilities and IVF clinics without being rationally related to a legitimate government interest. The court also held that the laws placed substantial obstacles in the path of women seeking pregnancy-related medical care, while offering minimal benefits. The court entered a permanent injunction prohibiting the commissioner of the Texas Health and Human Services Commission from enforcing the laws under THSC Chapter 697 and Title 25 of the Texas Administrative Code related to limited disposal of embryonic and fetal tissue remains. The petitioner has filed an appeal, which is pending in the Fifth Circuit.

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA recently announced record-breaking interest in Water Infrastructure Finance and Innovation Act ("WIFIA") loans. EPA's WIFIA program is a relatively new federal loan and guarantee program intended to accelerate investment in water infrastructure by providing long-term, low-cost financial assistance for regionally and nationally significant water projects. EPA issued a Notice of Funding Availability ("NOFA") under the WIFIA program in April 2018, thereby announcing the availability of as much as $5.5 billion in loans. Prospective borrowers responding to the NOFA were required to submit letters of interest ("LOI") to the EPA by July 31, 2018. Thereafter, the EPA announced that it had received a record 62 LOIs, collectively requesting $9.1 billion in loans. The LOIs were sent by prospective borrowers from 24 states, the District of Columbia, and Guam, and concern a wide variety of projects, including wastewater, drinking water, water recycling, desalination, and stormwater management. EPA is now evaluating the LOIs for project eligibility, credit worthiness, engineering feasibility, and alignment with WIFIA's statutory and regulatory criteria. Following this review process, the EPA will select projects it intends to finance and invite them to submit a formal application this fall.

EPA published proposed rule revisions to refrigerant management program's extension to substitutes, 83 Fed. Reg. 49332 (October 1, 2018). On October 1, 2018, the EPA published a proposal to rescind a 2016 rule that instituted refrigerant leak repair and maintenance requirements. Under the proposed revisions, appliances with 50 or more pounds of substitute refrigerants would not be required, among other things, to conduct leak rate calculations; repair an appliance that leaks above a threshold leak rate; or conduct verification tests on repairs. The EPA will be hosting a public hearing on the proposed rule on October 16, 2018 from 2:00 PM to 5:00 PM at 1201 Constitution Ave. N.W. Washington, D.C. 20460. Registration for the event must be completed via email to spdcomment@epa.gov by October 14, 2018, and must indicate whether the individual would like to reserve time to speak.

EPA has added a Grand Prairie, Texas site to the Superfund National Priorities List ("NPL"), 83 Fed. Reg. 46408. On September 13, 2018 the EPA published a final rule designating the Delfasco Forge Site in Grand Prairie, Texas as a federal hazardous waste site, and adding it to the Superfund National Priorities List. Superfund is the informal name given to the Comprehensive Environmental Response, Compensation, and Liability Act that the United States Congress established in 1980 to help fund the cleanup of contaminated sites across the country. The Delfasco Forge Site is home to a plant that manufactured bombs for Navy and Air Force pilots. Testing there revealed that trichloroethylene—a volatile organic compound used as a solvent degreaser—had migrated off the site into nearby homes and businesses. The Superfund removal program has installed vapor mitigation systems at the site and provided additional mitigations systems to homes in the area. Post-mitigation testing and cleanup is ongoing.

Texas Commission on Environmental Quality ("TCEQ")

A string of recent leadership changes at the TCEQ has resulted in a vacancy on the Commission. On August 20, 2018, then-Chairman Bryan Shaw announced the appointment of Commissioner Toby Baker as Executive Director ("ED"), effective that day. Baker replaces Richard Hyde, who retired at the end of March. His Deputy Executive Director ("DED") is Stephanie Bergeron Perdue, who, like Baker, is not new to the TCEQ. Perdue previously served as DED under Mr. Hyde from January 2014 until his retirement in March, at which point the Commissioners appointed her to act as Interim ED.

Also on August 20, 2018, Governor Greg Abbott announced his appointment of new Commissioner Emily Lindley. Lindley most recently served as Chief of Staff for the Region 6 office of the U.S. EPA in Dallas. Prior to that, she worked for more than ten years at the TCEQ—most recently as special assistant to DED Perdue. Lindley has chosen Martha Landwehr, former General Counsel for the Texas Chemical Council, to serve as her Executive Assistant/Counsel.

Less than two weeks later, on August 31, 2018, Bryan Shaw announced his retirement from the TCEQ, thereby concluding more than ten years at the agency. Governor Abbott designated Commissioner Jon Niermann as Shaw's replacement effective that same day. These numerous appointments and departures have resulted in a vacant seat on the three-person Commission.

Updates to the TCEQ's rules in 30 TAC, Chapters 80, 288, 295, and 297 took effect on August 16, 2018. These updates implement changes necessitated by a number of bills passed by the 83rd Texas Legislature in 2013 and the 85th Texas Legislature in 2017. With regard to the bills passed in 2013, this rulemaking amends 30 Texas Administrative Code ("TAC") § 80.4 to reflect the transfer of jurisdiction from the TCEQ to the PUC in 2014. House Bill 1648, passed in 2017, necessitated the changes made to 30 TAC §§ 288.1 and 288.30, which were amended to comport with requirements in the Texas Water Code ("TWC") for retail public utilities providing potable water to 3,300 or more connections.

The remaining changes impact the TCEQ's procedural and substantive rules regarding water rights. Most notably, the TCEQ (1) repealed 30 TAC §§ 295.121-295.126 and adopted new §§ 295.121 and 295.122, which replace specific map requirements with a more general requirement; (2) amended § 297.46 to clarify that for purposes of public welfare findings, the Commission may only consider factors that are within its jurisdiction and expertise as established in TWC, Chapter 11; (3) added § 295.151(b)(9) to require notice of a water right application to identify any proposed alternative source of water, other than state water, identified by the applicant; (4) added § 295.152(b) to require published notice of a hearing in a newspaper of general circulation in each county in which a groundwater conservation district ("GCD") is located for applications to use an exempt reservoir to convey groundwater under the jurisdiction of a GCD; (5) added § 295.153(b)(3) and (c)(2) to require that the Commission provide mailed notice of an application to any GCD with jurisdiction over groundwater production in an area from which the applicant proposes to use groundwater as an alternative source; (6) added § 295.73, which provides certain applications with an expedited process (prioritized technical review) to change the diversion point for existing non-saline surface water rights when the applicant begins using desalinated seawater; and (7) amended § 80.252 to require the Commission to set a deadline of no more than 270 days for contested case hearings on the § 295.73 expedited amendment applications.

The TCEQ is currently working to renew General Permit TXR040000 for Phase II Municipal Separate Storm Sewer Systems ("MS4s"), which expires on December 13, 2018. In order to discharge stormwater to surface water in the state, Phase II (i.e., small) MS4s must obtain authorization under this permit, which is known as the "MS4 General Permit." The TCEQ issued a draft permit and fact sheet on August 24, 2018, both of which are available at: https://www.tceq.texas.gov/permitting/stormwater/ms4/WQ_ms4_small_TXRO4.html. The public comment period for the proposed permit began that day and closed following a public meeting on September 24, 2018. The ED must now consider all timely filed comments to determine whether any changes to the proposed permit are required. He must also prepare a written Response to Comments. Then, as long as the TCEQ does not receive any requests for a hearing, the ED may issue the new MS4 General Permit.

Significant proposed changes to the existing MS4 General Permit include: implementation of the federal MS4 Remand Rule (81 Fed. Reg. 89320 (Dec. 9, 2016) (codified at 40 C.F.R. pt. 122)), which requires permit language to be "clear, specific, and measurable"; requiring applications and reports to be submitted electronically by December 21, 2020; a revised definition of "construction activity" to include stockpiling of fill material and demolition; a requirement that MS4s with websites post their annual reports and Stormwater Management Plans ("SWMP") thereon; the addition of a public notice process for certain Notices of Change; and an increase in the application fee from $100 to $400. Operators of small MS4s that were covered under the previous MS4 General Permit must reapply for coverage by submitting a Notice of Intent and SWMP within 180 days following the effective date of the new MS4 General Permit.

TCEQ to host first annual Autumn Environmental Conference & Expo October 9–11, 2018. This event will combine the TCEQ's former Advanced Air Permitting and Water Quality/Stormwater Seminars, and is intended to provide engineers, environmental managers, consultants, and the regulated community updates on permitting rules, requirements, issues, and regulations. The Conference & Expo will take place at the Palmer Events Center, 900 Barton Springs Rd., Austin, Texas 78704. Attendees may choose to register for: Air Permitting and Wastewater/Stormwater Permitting at a cost of $349; Air Permitting only at a cost of $249; or Wastewater/Stormwater Permitting only at a cost of $199. A one-day Waste Classification Workshop has already sold out. Online registration is available at: http://www.cvent.com/events/2018-autumn-environmental-conference-expo/event-summary-d4b4f2e38a4a4c52b58d010981bc5065.aspx.

TCEQ adopted rule revisions to update definitions in air permit by rule for pathological waste incinerators, 43 Tex. Reg. 4757 (July 13, 2018). Effective July 19, 2018, the TCEQ adopted rule revisions to 25 TAC § 1.132 to align with Senate Bill ("SB") 8 of the 85th Texas Legislature regarding the definition of the term "embryonic and fetal tissue remains." Under Texas Health and Safety Code ("THSC") § 106.494, crematories and non-commercial incinerators which meet the conditions of this section, and which are used to dispose of pathological waste, human remains, and carcasses, are permitted by rule. Under the new rule, "embryonic and fetal tissue remains" are not considered "pathological waste." However, facilities that are authorized under THSC § 106.494 are also authorized to burn any materials meeting the definition of embryonic and fetal tissue. Therefore, a facility permitted under THSC § 106.494 will not be required to re-register in order to continue disposing of embryonic and fetal tissue. In addition, enforcement of this rule has been halted by litigation, and an appeal is pending in the Fifth Circuit.

TCEQ's Municipal Solid Waste ("MSW") Permits Section has developed a new checklist for applications. Effective September 1, 2018, all MSW permit and registration applications must include a completed checklist along with the applicable forms for the project. This new checklist will replace the former MSW application checklists. An electronic version is currently available on the TCEQ's website at https://www.tceq.texas.gov/permitting/

waste_permits/msw_permits/perm_reg_mod.html.

TCEQ adopted rule revisions to implement federal petroleum underground storage tank ("UST") updates, 43 Tex. Reg. 3390 (May 25, 2018). Effective May 31, 2018, the TCEQ adopted rule revisions updating 30 TAC, Chapter 334 to add periodic operation and maintenance requirements for UST systems; requirements to ensure UST system compatibility before storing certain biofuel blends; and revised rules relating to the fee on delivery of petroleum products and the funding of the Petroleum Storage Tank Remediation account. The revisions emphasize proper operation and maintenance of existing UST equipment through additional testing and inspection.

TCEQ has issued a proposed rulemaking regarding compatibility with federal regulations promulgated by the Nuclear Regulatory Commission, 43 Tex. Reg. 3752 (June 8, 2018). On June 28, 2018, the TCEQ held a public hearing on the adoption of rules to adjust the surcharge fees for compact waste disposal, and to remove the annual requirement for rate adjustment for disposal of Low-Level Radioactive Waste to allow flexibility to incorporate rate adjustments on an as-needed basis. The changes are proposed under the Texas Radiation Control Act, THSC § 401.011. A comment period was held from June 8, 2018 to July 10, 2018, and the anticipated adoption date is October 17, 2018.

Sunset Advisory Commission

A Sunset Advisory Commission Staff Report recommends abolishing the Texas Board of Professional Geoscientists and repealing the Texas Geoscience Practice Act. The Texas Sunset Act (the "Sunset Act") sets dates by which certain agencies are abolished unless the Legislature passes a bill to continue them. Pursuant to the Sunset Act, staff of the Sunset Advisory Commission (the "Commission") evaluate agencies and issue recommendations to the Commission. The Commission then considers these recommendations, hears public testimony, and makes recommendations to the full Legislature.

The Board is subject to the Act pursuant to a sunset provision in the Texas Geoscience Practice Act (Tex. Occ. Code Ann. § 1002.003), and it will be abolished as of September 1, 2019 unless the Legislature enacts a law to extend its tenure. As such, the Board is under review by the Commission in preparation for the upcoming 86th Legislative Session. In August, Commission staff issued a report recommending that the Board be abolished based on a historical lack of meaningful enforcement action and measurable impact on public protection. Commission staff also noted that more direct oversight of geoscientists' work is provided by other state agencies, and concluded that this rendered ongoing state regulation of geoscientists unnecessary to protect the public. The Commission will hear public testimony on the Board at a meeting tentatively scheduled for November 14-15, 2018. Public input regarding agencies under review by the Commission may also be submitted here: https://www.sunset.texas.gov/input-form.

Public Utility Commission of Texas ("PUC")

Updated PUC rules related to rates and fees charged by a municipality to certain special districts took effect on August 15, 2018. At an open meeting on July 26, 2018, the Commissioners of the PUC approved an amendment to 16 TAC § 24.45 and adopted a new 16 TAC § 24.46 in order to bring the agency's rules into concert with Texas Water Code §§ 13.044, 13.0441, and 13.088. The amendment to 16 TAC § 24.45 merely changed that rule's title to "Rates Charged by a Municipality to Certain Special Districts" (it previously read "Rates Charged by a Municipality to a District"). Newly added § 24.46 concerns fees charged by a municipality to a public school district. Pursuant thereto, a municipally-owned utility is prohibited from charging a school district, in addition to the utility's regular service charges, a fee based on the number of district students or employees. The new rule also provides a means for school districts to appeal such a fee by filing a petition with the PUC. If a school district initiates an appeal, the municipality charging the fee has the burden of proof to establish that it complies with § 24.46.

Project No. 48226 – *Proceeding to Investigate and Address the Effects of Tax Cuts and Jobs Act of 2017 on the Rates of Texas Investor-Owned Utility Companies*. In January 2018, after the enactment of the Tax Cuts and Jobs Act in late 2017, the PUC opened a project to investigate and address the new law's effects on the rates charged by regulated Texas investor-owned utility companies. The Tax Cuts and Jobs Act changed the corporate federal income tax rate from 35% to 21%. Over the last several months, consistent with the PUC's directive, all investor-owned electric utility companies in Texas have used various types of regulatory filings to reduce the amount of income tax expense included in their authorized rates.

The PUC issued a memo in Project 47945 summarizing the savings realized from the reduction to federal income tax expense. Thus far, the total savings for TDUs, transmission-only, and vertically integrated utilities equals $333 million. This amount only represents the change in income tax rate expense for each company. There are four pending proceedings for Southwest Electric Power Company, Southwestern Public Service Company, Entergy Texas, and Texas-New Mexico Power, so that the $333 million does not include savings realized from those utilities. This number also does not include special treatment of other tax-related adjustments like the amortization of excess accumulated deferred federal income tax, because these treatments vary widely between companies.

Project 48551 - *Review of Summer 2018 ERCOT Market Performance*. With the summer peak season approaching its end, the PUC announced in an Open Meeting in August that it would seek comments from interested parties on a number of questions related to the performance of the ERCOT wholesale market.

In the months leading up to this summer, observers expressed some concern that, during the peak usage season, a number of

announced plant retirements and expected high temperatures could lead to difficulty, up to and including rolling blackouts. As of this writing, thankfully, no such grid emergency developed, and the system appeared to have handled record electricity usage and persistent high temperatures.

Even so, at its August 28 Open Meeting, the PUC stated an intent to review market outcomes in an effort to ensure that the market was working efficiently. The PUC asked parties to comment on a number of big-picture questions in Project No. 48551, such as:

- Was the market's "scarcity pricing" appropriate for the summer?—in other words, were prices high when they should have been, and low during other times?
- Did the summer's experience suggest that the ERCOT projections on the adequacy of supplies is correct or incorrect?
- How did wind production this summer affect wholesale prices?
- How did demand response—or the ability of consumers to adjust their usage in response to market prices—affect the market?

Earlier this year, ERCOT downgraded its projected "reserve margin"—the quantity of installed capacity in excess of expected load—below its targeted level. This has led to some discomfort over whether the market adequately incentivizes a reliable level of generating capacity. While this question will be analyzed further in the coming months as part of Project No. 48551, it appears the market performed adequately under very high demands, with no grid emergencies and with elevated, but not unreasonable, wholesale market prices.

Project No. 48023 - *Rulemaking to Address the Use of Non-Traditional Technologies in Electric Delivery Service*. At the September 14 Open Meeting, the PUC approved a request for comments in Project No. 48023, Rulemaking to Address the Use of Non-Traditional Technologies in Electric Delivery Service. The PUC opened this project after denying AEP's application to approve battery storage as an alternative energy source and receive confirmation that the battery installations comply with Texas law.

The PUC is seeking input from stakeholders on:

- What non-traditional technology could provide a potential cost-effective solution to reliability issues on a utility's transmission or distribution system;
- Whether a transmission and distribution utility can legally own a non-traditional technology device;
- Whether the PUC can grant a CCN for a non-traditional technology;
- Whether PUC's rules should permit or require a TDU to contract with a non-utility service provider for the provision of the non-traditional technology device;
- The potential effects on wholesale market outcomes and price formation within ERCOT; and
- Whether the PUC should condition the use of a non-traditional technology device.

Initial comments are due November 2 and reply comments are due November 16th.

Docket No. 48401 - *Application of Texas-New Mexico Power Company for Authority to Change Rates*. On May 30, 2018, Texas-New Mexico Power Company ("TNMP") filed an Application and Statement of Intent for Authority to Change Rates at the PUC and in affected cities. This is the first rate case TNMP has filed in over eight years. TNMP has a projected cost of service of approximately $331.9 million, which is based on its reasonable and necessary expenses and a return of 8.85% on its rate base of $851.8 million. This cost of service results in a revenue deficiency of $31.3 million on a Texas retail basis, and requires an increase of 13.18% over annualized revenues at current base rates.

TNMP has also completed execution of its Advanced Metering System ("AMS") deployment plan. The PUC previously approved reconciliation of TNMP's AMS costs through August 1, 2015. The current filing includes a reconciliation of AMS costs incurred between September 1, 2015 and March 31, 2018. With those costs reconciled, TNMP proposes to include ongoing AMS costs in base rates, to eliminate the AMS surcharge, and to amortize under-collected AMS costs.

In addition, TNMP seeks to recover the restoration costs that TNMP incurred as a result of Hurricane Harvey's impact to TNMP's Gulf Coast customers. TNMP also requests the PUC to approve Rider AVM that will allow TNMP to move to a cycle-based vegetation management program.

The parties have reached a tentative settlement in this rate case. All of the settlement terms have not been finalized, but the agreed-up revenue requirement will result in a $10 million rate increase for TNMP, including all rate riders.

Railroad Commission of Texas ("RRC")

Atmos Energy Corp., *Mid-Tex Division 2018 Rate Review Mechanism ("RRM")*. Atmos Energy and the Atmos Cities Steering Committee ("ACSC") have reached a settlement in Atmos' Mid-Tex division RRM filing. The RRM is a systematic process collaboratively developed by Atmos and the cities, specifying how rates will be set over a specified period of time. The process benefits ratepayers by avoiding litigation and providing for transparent review of the utility's expenses and investment.

Atmos Mid-Tex requested increased revenues of $41.9 million on a total system basis. ACSC and the Company have reached an agreement to reduce the Company's request by $17 million.

The settlement approves a rate increase of $24.9 million on a system-wide basis, or $17.8 million for the Mid-Tex rate division, exclusive of the City of Dallas. Atmos and Cities are currently finalizing settlement documents. The new rates will go into effect October 1st.

The monthly residential customer charge will be $18.85 and the consumption charge will be $0.148 per Ccf. The average customer will see a 1.94% increase in rates, or about $1.06. The West-Tex division has also reached settlement. The Company initially proposed a $2.9 million increase for the settled cities. The Company has agreed to a $2.6 million increase for settled cities. The parties are still finalizing settlement documents.

"Agency Highlights" *is prepared by Maris Chambers in the Firm's Districts, Compliance and Enforcement, Energy and Utility, and Water Practice Groups; Tricia Jackson in the Firm's Air and Waste Practice Group; and Cody Faulk in the Firm's Energy and Utility, Litigation, and Complicance and Enforcement Practice Groups. If you would like additional information or have questions related to these cases or other matters, please contat Maris at 512.322.5804 or mchambers@lglawfirm.com, Tricia at 512.322.5825 or tjackson@lglawfirm.com, or Cody at 512.322.5817 or cfaulk@lglawfirm.com.*

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utility ratemaking, bond validation suits, and takings law, but also uncommon procedural mechanisms, such as appellate court injunctions and direct appeals to the Texas Supreme Court. The Firm's extensive administrative practice has provided our attorneys with significant experience in the unique arena of administrative appeals of agency actions in the district courts of Travis County, as well as subsequent appeals of those opinions all the way to the Texas Supreme Court. Members of the Appellate Practice Group are admitted to practice in every Texas appellate court and the Texas Supreme Court, as well as the Fifth Circuit Court of Appeals and the United States Supreme Court, equipping them to handle appeals from the entire region.

Governmental Relations Practice Group means using the relationships and skills developed over decades to best position and protect our clients' legal, policy, and regulatory interests. Our team assists clients with their needs at the Texas Legislature as well as working with other state elected officials and state agencies. Attorneys in the Governmental Relations Practice Group have vast amounts of experience in all areas of the legislative environment, including lobbying, consulting, strategic planning, and legislative tracking and monitoring. Our firm represents a number of trade associations, cities, counties, special districts, and private corporations, working extensively and directly with legislators, staff and state agency officials to promote and protect our clients' interests.

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 2018 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*: five lawyers have been included in the 2019 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 undergo an authentication process to make sure they are in current practice and in good standing. Those named are **Lambeth Townsend, Georgia Crump, Geoffrey Gay, and Thomas Brocato** are named in Energy Law and **Mike Gershon** is named in Water Law.

Our firm volunteered for an evening at the Central Texas Food Bank, helping process and sort several thousand pounds of food that will help feed hungry people in the Central Texas area. Lloyd Gosselink is proud of this opportunity to give back to our community, and plan to donate our time to this wonderful organization again!

Sheila Gladstone will present "Hot Topics in Employment Law" at the Austin Bar Association on October 17 in Austin.

Lauren Kalisek will be on the "PUC Rate Case Panel: Emerging Trends" at the Texas Water Conservation Association Fall Conference on October 18 in San Antonio.

Maris Chambers will present a "Legislative Update" at the AWWA North Central Texas Chapter's Robert F. Pence Drinking Water Seminar on October 26 in Fort Worth.

Nathan Vassar will discuss "Water Perspective: The Energies of Rural Development" at the Texas A&M School of Law Rural Development Symposium on October 26 in Fort Worth.

Georgia Crump will be discussing "S.B. 1004 One Year Later: Implementation of Chapter 284 Local Government Code" at the Texas Coalition of Cities for Utility Issues Seminar on November 2 in Houston.

Georgia Crump will moderate "Implementation of S.B. 1004 - One Year Update - and What's Happening with Cable Franchise Fees?" at the Texas Association of Telecommunications Officers and Advisors' Annual Conference on November 7 in Dallas.

Sheila Gladstone will discuss "Workplace Harassment in the #MeToo Era" at the Texas Society of Architects on November 9 in Fort Worth.

Maris Chambers will present a "Legislative Update" at the Industry Council on the Environment November Meeting on November 15 in Austin.

Nathan Vassar will discuss the "Top CWA Enforcement Developments of the Year" at the NACWA National Clean Water Law & Enforcement Seminar on November 15 in San Diego.

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