

## The Lone Star Current

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## Environmental Group Threatens Suit Over Guadalupe River and San Antonio River Water Supplies

*by Martin C. Rochelle and Sara R. Thornton*

On December 7, 2009, The Aransas Project ("TAP"), a Texas Gulf Coast environmental group, filed a notice of intent to sue the State of Texas under Section 9 of the Endangered Species Act ("ESA") for illegal "takes" of whooping cranes at Aransas National Wildlife Refuge, Texas. This notice claims that these takings arise from the impact of surface water permitting by the Texas Commission on Environmental Quality ("TCEQ") in the Guadalupe River and San Antonio River Basins. If TAP subsequently files a federal lawsuit and such lawsuit is successful, the issuance of new surface water permits in both the Guadalupe River and San Antonio River Basins could come to a complete halt in order to protect whooping crane habitat, while communities in those river basins could be deprived of important and necessary supplies of water; these communities will effectively be left out to dry.

By virtue of Section 9 of the ESA, it is illegal to "take" an endangered species. "Take" is defined to include harassing, harming, pursuing, wounding or killing such species. 16 U.S.C. § 1532(19). "Harming" an endangered species includes "significant habitat modification or degradation [that]...injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Section 11 of the ESA sets forth civil and criminal penalties for violations and includes a citizen suit provision that allows any person to file a lawsuit to enforce a takings violation under the ESA. A citizen suit may be filed

to stop any person, including any governmental agency, who is alleged to be in violation of any provision of the ESA. A party seeking to file a citizen suit must first issue a 60-day notice of intent to sue, in order to give the alleged violator time to redress the violation.

In its notice of intent to file suit, TAP alleges that the TCEQ's surface water rights permitting program has effectively reduced freshwater inflows to the San Antonio Bay-Aransas Bay complex, thereby causing "significant habitat modification and/or degradation" to occur. TAP claims that the reduction of freshwater flows, in turn, has increased the salinity of the marsh-estuary habitats of the whooping crane, causing that ecosystem to be less productive and reducing the natural food sources of the whooping crane. TAP alleges that this has resulted in a "taking" of whooping cranes under Section 9 of the ESA by causing harm and harassing the endangered species through habitat modification and degradation, significantly impairing essential behavioral patterns of the whooping crane, such as feeding and watering. TAP hopes that the federal suit, if filed, will result in a court order to require (1) a full accounting of all existing water uses on the Guadalupe River and San Antonio River systems, and (2) the development of a Habitat Conservation Plan to identify the mechanism by which TCEQ will adjust existing permits in these two river systems in order to protect the whooping crane.

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## *The Lone Star Current*

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

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

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



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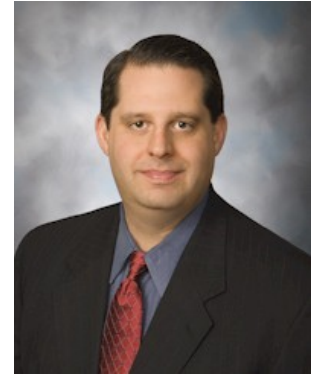
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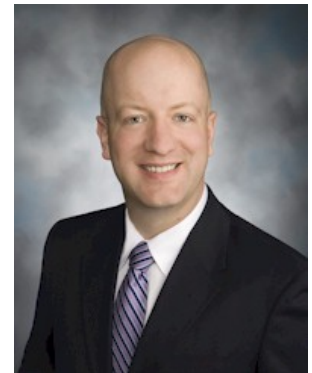
## FIRM NEWS



We are pleased to announce that **Ty H. Embrey** has been elected to the Firm's Board of Directors as a Principal effective January 1, 2010. Ty represents a broad range of clients with environmental law and governmental relations needs. As a member of the Firm's Water and Governmental Relations Practice Groups, Ty has worked with clients to address legal and policy issues involving groundwater, water and sewer utility service, surface water, water resource planning, and other environmental matters. Ty's practice includes representing clients before state agencies, local governmental entities, and the Texas Legislature. Ty joined Lloyd Gosselink after having served as General Counsel for the Texas Senate Natural Resources Committee, the Texas Water Advisory Council and the Joint Senate-House Committee on Water Resources, as well as lead staff member for the Oil-Field Cleanup Fund Advisory Committee. Ty also was the General Counsel for State Senator Buster Brown and a Legislative Aide for State Representative Beverly Wooley. An Austin native, Ty received his B.A. from the University of Texas at Austin and his J.D. from Baylor Law School.



We are pleased to announce that **José E. de la Fuente** has been elected to the Firm's Board of Directors as a Principal effective January 1, 2010. Joe has significant experience both helping clients avoid business disputes through pre-litigation counseling, and when disputes do arise, resolving those disputes through negotiation, mediation, arbitration, trial, and appeals in state and federal courts and before administrative agencies in Texas and nationwide. Joe has represented clients in a wide array of industries, including public and governmental entities, healthcare, oil and gas, construction, insurance, commercial finance, after-market warranties, computer software, private correctional facilities, medical technology, and large retail. He has represented clients nationwide and throughout the State of Texas, and is admitted to practice in Texas and every U.S. District Court in Texas. Joe received his B.A. from the University of Texas and his J.D. from the University of Texas School of Law. A Houston native, Joe has lived in Austin for twenty years, and serves the community as a member of the City of Austin Ethics Review Commission and as a trustee on the board of Mo-Ranch Conference Center, in Hunt, Texas.



We are pleased to announce that **Christopher L. Brewster** has been elected to the Firm's Board of Directors as a

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(In the News continued from page 2)

Principal effective January 1, 2010. Chris is a member of the Firm's Utility Practice Group. His responsibilities include the analysis and evaluation of the emerging nodal market at the Electric Reliability Council of Texas ("ERCOT") and the Public Utility Commission of Texas, and he currently serves on ERCOT's Technical Advisory Committee. Chris also represents cities in proceedings at the PUC involving regulated utilities, including transmission and distribution rate cases and the proceedings related to Competitive Renewable Energy Zones. In addition, Chris has successfully represented a variety of consumers in complaints against their retail electric provider at the PUC. Prior to joining the Firm, Chris served as the Lead Electric Policy Analyst for the Public Utility Commission of Texas where he advised the Commissioners on electric-industry matters, including the Commission's contested caseload and rule-makings, and participated in regular Commission open meetings as well as Commission-held hearings on the merits. Chris received his B.B.A., in accounting, *cum laude* from the University of Houston and his J.D. from the University of Notre Dame Law School, where he graduated *cum laude*.



We are pleased to announce that **Sheila B. Gladstone** has been elected to the Firm's Board of Directors as a Principal effective January 1, 2010. Sheila heads the Firm's Labor and Employment Practice Group and assists public and private sector employers with all aspects of employment law. Her practice focuses on counseling employers on the legal issues involved in personnel decisions, auditing employment practices for legal compliance, assisting with strategic decisions that affect personnel, conducting internal investigations of employee complaints, reviewing policies, conducting management training, defending employers in administrative proceedings, investigating and negotiating demands, and defending employers throughout the litigation process. Sheila also represents her clients before agencies including the EEOC, the NLRB, the OFCCP, the Wage and Hour Board, the Texas Workforce Commission, labor arbitrators, hearing examiners and civil service boards. She is a frequent speaker and published author on employment-related issues. Sheila obtained a B.A. with honors from the University of Arizona, and a J.D. with high honors from the University of Arizona College of Law, where she was an editor for the *Arizona Law Review*.



**Eileen L. McPhee** has joined the Firm's Utility Practice Group. Eileen's experience includes challenging agency rules and regulations, contesting proposed permits, navigating complex regulatory schemes in order to ensure client compliance, and representing clients in environmental and administrative litigation. Eileen received her B.A. with high honors from the University of Texas at Austin. She received her J.D. from the Texas Tech School of Law in 2007, where she graduated *cum laude* and was a published editor of the *Texas Tech Administrative Law Journal*.

**Brian Sledge** will be presenting "Enforcement & Monitoring of Desired Future Conditions" at the Pumping Limits for Texas Aquifers: Desired Future Conditions Process Conference on January 20 in Austin.

**Brian Sledge** will discuss "Current Legislation and Litigation in Texas" at the 10th Annual Rio Grande Conference on March 11 in Santa Fe, New Mexico.

**David Klein** will present "Drafting Wholesale Water Supply Contracts" at the TRWA Conference on March 24 in San Antonio.

**Georgia Crump** will be discussing "Placement and Regulation of Cell Towers: What Are the Limits?" at the University of Texas School of Law Land Use Conference on March 26 in Austin.

**Brad Castleberry** will be speaking on "Water Rights Enforcement" at the Changing Face of Water Rights Conference on April 9 in Austin.





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## The Lone Star Current Interview

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### Carlos Rubinstein, Commissioner Texas Commission on Environmental Quality

Commissioner Carlos Rubinstein was appointed August 31, 2009, by Governor Perry. Commissioner Rubinstein had served as the TCEQ's deputy executive director since June 2008. His responsibilities included assisting the executive director in all major capacities such as directing operations of all employees in 17 statewide offices, administrative oversight of agency budgets, legislative activity, and implementation of agency policies. Commissioner Rubinstein serves on the Governmental Advisory Committee that provides advice to the EPA Administrator on environmental concerns regarding the North American Agreement on Environmental Cooperation ("NAFTA"), and the Commission for Environmental Cooperation. He also serves as a Texas representative in the Border Governors Conference water worktable and as a representative on the Environmental Flows Advisory Group.

Prior to his position as deputy executive director, Commissioner Rubinstein served as the director for the border and South-Central Texas area, and earlier as regional director for the Harlingen and Laredo offices. During this time, Rubinstein also served as the Rio Grande Watermaster, responsible for allocating, monitoring, and controlling the use of surface water in the Rio Grande basin from Fort Quitman to the mouth of the Rio Grande River. He also is a former city manager of Brownsville.

Commissioner Rubinstein has a Bachelor of Science in Biology and Chemistry from The University of Texas–Pan American. He and his wife Judy have three daughters and two granddaughters.

*The Lone Star Current* recently had the opportunity to interview Commissioner Rubinstein who graciously responded to several questions. We appreciate his willingness to share his unique perspective with our readers.

**LSC: In recent years you have spent a lot of time in the Rio Grande Valley and in Austin. Please tell us some more about your background.**

**Rubinstein:** I was born in Mexico City, but grew up and spent most of my life in Brownsville. I served as Brownsville's epidemiologist, EMS and Health Director, as well as City Manager. In many ways, my work as the Health Director involving food service sanitation compares well to our efforts today at the TCEQ in ensuring safe, clean water for our state. Working as the City Manager taught me how best to manage large organizations, keep costs down, focus on the big picture, develop processes to provide greater efficiency, and always enhance delivery of service. Nothing speaks more to public service than being the person responsible to an entire community that you live in for the delivery of high quality, responsive services. Prior to my appointment as Commissioner of the TCEQ, I served as TCEQ's Regional Waste Section Manager, Emergency Response Coordinator, Rio Grande Watermaster, and as Regional Area Direc-

tor for the border and South Texas area, as well as Deputy Executive Director.

**LSC: One of your roles prior to becoming a Commissioner was serving as the Watermaster of the Rio Grande. How did your experiences as the watermaster prepare you for your current role?**

**Rubinstein:** Rarely are we afforded an opportunity to work on issues, such as the international water debt issue, that helps define our efforts in public service. The negotiations and discussions leading to successful repayment of all water owed to the U.S. by Mexico, and, more importantly, the various ways we partnered with water users to best manage our scarce resource during those tough times, will influence the decisions I will have to make regarding active water management on a statewide basis.

**LSC: Can you provide some insight as to your philosophy as Commissioner?**

**Rubinstein:** In pursuit of the TCEQ's mission statement, my decisions will be based on the law, common sense, good science, and fiscal responsibility. I must make sure that *what* we do, as well as *how* we do it, are necessary and efficient. TCEQ must take swift, just, and effective enforcement actions when laws are broken. Open and honest communication with the public and regulated entities must be a cornerstone of the decision-making process. Finally, in accomplishing TCEQ's mission, we must protect our vibrant natural resources and economy, as they are part of this state's backbone, allowing us to prosper and grow.

**LSC: What do you view as the biggest challenges facing the agency and the State over the next six years?**

**Rubinstein:** The Sunset review process, and the subsequent implementation of recommendations, is both a challenge and an opportunity to highlight the great work our staff does every day to protect our human health and our natural resources. Additionally, the TCEQ, in conjunction with the legislature, state agencies, and stakeholders will need to carefully manage one of our most precious resources – water. I am concerned, as droughts often remind us, that most every other problem pales in comparison to running out of water. Air quality will continue to be a hot topic. New air quality standards and ongoing discussions with EPA on our air permitting program present many challenges and opportunities in the future. While air quality has improved, we need to continue this improvement into the future.

As for individual citizens, it is important for me to remember that the biggest challenge depends a lot on where you live. If, for example, you live in Houston, then the quality of the air you and your family breathe ranks as the number one most important environ-

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(Interview continued from page 4)

mental issue. But, for residents in the Rio Grande Valley, water availability and water quality are their major concerns. Water is the key to everything in the Valley. It is the lifeblood of the region, including farming and ranching. You can say the same thing about properly and safely managing waste. The agency will continue to implement policies and rules to enhance the protection of human health and the environment.

### **LSC: What do you like to do with your spare time?**

**Rubinstein:** Nothing is more important to me than family. In particular, being a grandfather to my two grandchildren is what I live for. It is amazing how convincing a three year old can be and how much fun I have playing with my new granddaughter. Aside from that, if you like the Cowboys and the Red Sox, well, then we have much to talk about. If you like the Yankees, well, the conversation might be a short one.



## **MUNICIPAL CORNER**

### **Texas Local Government Code provision regarding rural annexation does not require that a residence be located on each tract of land so long as there are fewer than 100 tracts.**

Texas Local Government Code § 43.052(h)(1) allows a municipality to annex land without a three-year annexation plan if the annexed area contains fewer than 100 tracts of land on which one or more residential dwellings are located on each tract. This exception allows for the quick annexation of predominantly unimproved and rural land. In Opinion GA-0737, the Attorney General was asked whether the exception in § 43.052(h)(1) would apply to an area with fifty-seven lots, where only fifty-six lots contained a residence. The AG opined that, although the statute would benefit from legislative clarification, both statutory construction and legislative history support the conclusion that § 43.052(h)(1) does not require a residence to be located on each tract of land in the area proposed for annexation as long as the area contains fewer than 100 tracts. Additionally, the AG determined that an annexation under § 43.052(h) is not void if a municipality fails to adopt a three-year annexation plan. Tex. Att’y Gen. Op. GA-0737 (2009).

### **A tax appraisal district may conduct tax appraisal less frequently than annually, but may not hold an election to determine the frequency of appraisals.**

In Opinion GA-0740, the Attorney General was asked whether an appraisal district may change the frequency of its appraisals to once every three years rather than annually. The AG opined that the Tax Code does not prohibit appraisals from being conducted less frequently than annually. However, the Tax Code requires that appraisals be conducted at a minimum of every three years. Further, the AG determined that an

appraisal district has no statutory or constitutional authority to hold an election, even if requested by a voter petition. Rather, the frequency of appraisals should be determined by the appraisal district board of directors. The AG was finally asked whether conducting appraisals less frequently than annually would affect the annual study conducted by the Texas Comptroller of Public Accounts regarding school district property values. However, the AG declined to answer this question because fact questions are not appropriate subjects for attorney general opinions, and also because there are pending implementation of legislative changes affecting this issue. Tex. Att’y Gen. Op. GA-0740 (2009).

### **A school district may expend public funds to pay a civil penalty imposed by a municipality if the district is liable for the penalty.**

The Attorney General was asked whether a school district was required to pay a civil penalty imposed by a municipality. In this particular situation, a school district employee driving a school district vehicle in College Station incurred a \$75.00 civil penalty for proceeding through a red light monitored by a red light camera. The municipality’s red light ordinance provides that the owner of the vehicle, in this case the school district, is liable for the civil penalty. The AG opined that, although there is no case law or attorney general opinions addressing a governmental entity’s payment of a civil penalty, the payment of the obligation is not an unconstitutional gift or grant under Article III, Sections 51 and 52(a) of the Texas Constitution. However, the AG qualified this determination, stating that if the school district is not liable for the civil penalty, the payment of such a penalty may violate these constitutional provisions unless the payment accomplishes a “public purpose of the District, with a clear public benefit received in return,” and there must be adequate public controls in place to ensure that the public purpose is accomplished. Tex. Att’y Gen. Op. GA-0747 (2009).

### **The Attorney General declined to provide an opinion regarding the authority of a city to reacquire extraterritorial jurisdiction previously relinquished by the city.**

The Attorney General’s opinion was sought regarding the ability of the City of Prosper to reacquire land it had previously released from its extraterritorial jurisdiction (“ETJ”) in 2002. Prosper sought to reacquire the land at issue and include it in Prosper’s ETJ through an agreement with the City of Celina. Under the agreement, once Celina’s ETJ is eventually expanded to cover the land, Prosper would again release the land from its ETJ so that it could be included in Celina’s ETJ. The two questions presented to the Attorney General were: (1) whether a city could acquire ETJ in a method different than that prescribed in Chapter 42 of the Texas Local Government Code; and (2) whether a city may “hold a particular tract of land within its [ETJ] solely for the purpose of relinquishing it to another city.” The AG determined that the questions could not be resolved by an attorney general opinion because making a determination would involve either the application of law to a specific set of facts, or the resolution of disputed questions of facts or mixed questions of law and fact, neither of which could be investigated or resolved in an attorney general opinion. Tex. Att’y Gen. Op. GA-0750 (2009).

*Municipal Corner is prepared by Stefanie Albright. Stefanie is an Associate in the Firm’s Water and Districts Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Stefanie at (512) 322-5814 or [salbright@lglawfirm.com](mailto:salbright@lglawfirm.com).*

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A similar lawsuit was filed in May 1991 by the Lone Star Chapter of the Sierra Club against the U.S. Fish and Wildlife Service (“USFWS”) to protect threatened and endangered species indigenous to the Edwards Aquifer. In that lawsuit, the Sierra Club alleged that Comal Springs and San Marcos Springs could be completely depleted if unrestricted pumping continued, resulting in a “taking” under the ESA of the threatened and endangered species dependent on the Edwards Aquifer. In January 1993, a federal judge ruled in favor of the Sierra Club and others who had joined it in the suit. In that case, the court held that if unrestricted pumping continued, a “taking” of endangered and threatened species would occur. The court also held that the USFWS had violated the ESA by failing to implement a recovery plan for San Marcos Springs and Comal Springs, thereby causing risk or jeopardy to threatened and endangered species. The court ordered that springflows be maintained even during a record drought, directed the Texas Water Commission to prepare and submit a plan to ensure such springflows, and directed USFWS to determine springflow levels that would result in “take” or “jeopardy” of the species. Following the court’s order in this case, the Legislature passed the Edwards Aquifer Authority Act, which mandated an adjudication of all claims to groundwater in the Edwards Aquifer and a reduction in diversions from the aquifer in order to protect springflow levels in a manner that would not result in a “take” of threatened or endangered species. Rights to pump water from the Edwards Aquifer have been issued by the Edwards Aquifer Authority and alternate supplies of water have been, and are continuing to be, developed in south central Texas in order to supplement these groundwater supplies. Indeed, the Sierra Club’s ESA litigation forever changed the manner in which users of the Edwards Aquifer rely on the aquifer for their existing and future supplies.

If a lawsuit similar to the Sierra Club lawsuit is filed by TAP, the impact to the TCEQ’s surface water permitting program in the Guadalupe River and San Antonio River Basins could come to a screeching halt, crippling not only agricultural and industrial growth, but also communities in the region that depend on water from these two productive river basins. This lawsuit is particularly

troubling in light of the Texas Legislature’s passage in 2007 of Senate Bill 3, which contained significantly increased protections for environmental flows in the TCEQ’s surface water permitting, protections that were broadly embraced at the time by environmental groups across the state. In a press release dated December 14, 2009, State Representative Bill Callegari spoke out against TAP’s potential lawsuit, warning that, if successful, “[t]he economic consequences [of the lawsuit] would certainly be negative.” Instead, Rep. Callegari urged TAP, as an alternative to the lawsuit, “to work with our state agencies and, more critically, the environmental flows advisory process to identify an appropriate solution.”

This “negative” outcome is not difficult to imagine; after a summer of extreme drought conditions in 2009 throughout Texas, some communities and industries, as well as agriculture in the Guadalupe River and San Antonio River Basins, are still reeling from a lack of rainfall. The lawsuit proposed by TAP could effectively allow a federal judge to decide how water in the Guadalupe River and San Antonio River Basins should be managed, including the possibility of a cap on environmental flows that must be maintained in the basins to ensure that whooping crane populations are not harmed, even at the expense of Texans and the communities in which they work and live. Lloyd Gosselink will continue to monitor this potential litigation closely and keep our readers apprised of this important matter.

*Martin C. Rochelle is a Principal with the Firm, where he leads the Water Practice Group. Martin represents a broad array of clients across the state in the areas of water rights and supply, water quality, and water reuse, and he is actively engaged in water policy development before the Texas Legislature. Sara R. Thornton is an Associate with the Firm and a member of the Water Practice Group. Sara assists clients with various permitting, compliance and enforcement issues related to water supply and water quality matters. If you would like additional information or have questions related to this article or other matters, please contact Martin at (512) 322-5810 or [mrochelle@lglawfirm.com](mailto:mrochelle@lglawfirm.com) or Sara at (512) 322-5876 or [sthornton@lglawfirm.com](mailto:sthornton@lglawfirm.com).*

## **Interim Charges Issued for Texas House and Senate Committees**

*by Brian Sledge and Mindy Martinez*

On November 19, 2009, Texas House Speaker Joe Straus (R-San Antonio) released a comprehensive list of interim committees charges for the House of Representatives. Lieutenant Governor David Dewhurst released select interim charges for Senate committees on a piecemeal basis throughout the month of December. Among those, he assigned three water-related interim charges to the Senate Natural Resources Committee. Interim charges are directives to the committees to study and review various issues and make recommendations in preparation for the 2011 Regular Session of the Texas Legislature. The following are selected excerpts from those charges:

### **House Natural Resources Committee:**

1. Evaluate groundwater regulations and permitting processes throughout the state, including the role of state agencies in

groundwater management, the development of desired future conditions, and the adoption of groundwater management plans in relation to regional and state water planning.

2. Monitor the effects of current and proposed federal initiatives that could impact the implementation of the State Water Plan. Evaluate the policies and investments developed by other states dealing with water issues similar to the State of Texas.
3. Monitor ongoing drought conditions and initiatives to promote water conservation through the review of the following: state requirements for the submittal of water conservation plans and annual reporting; the “trigger” for use of drought contingency plans; recommendations by state agencies and the Water Conservation Advisory Council; and progress toward the development of recycled water resources and desalination projects.

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4. Evaluate the regulatory model for investor-owned water and sewer utilities, including rate case process and timing, consultant fee recovery, overall cost reductions, and more effective consumer participation.
5. Monitor the agencies and programs under the committee's jurisdiction.

**House Committee on Energy Resources:**

1. Survey current local ordinances governing surface use of property in oil and gas development. Recommend changes, if any, to the authority of the Railroad Commission to regulate the operation of oil and gas industries in urban areas of the state, particularly the Barnett Shale.
2. Monitor the implementation of recent legislation dealing with carbon capture and storage and make recommendations as to whether further action is required to resolve outstanding issues. Examine proposed legislation from other states and review federal initiatives.
3. Examine the state's portfolio of electric generation resources, including traditional sources, emerging renewable technologies, and energy efficiency. Determine whether the existing state regulatory programs and incentives are adequate to meet the energy needs of the future. Consider factors relating to reliability, requirements for additional transmission, or auxiliary services. (Joint Interim Charge with House Committee on State Affairs)
4. Consider the establishment of uniform statutes and codes relating to liquid petroleum gas permitting and operations as a means to resolve conflicts of interpretation between state and local jurisdictions.
5. Monitor the agencies and programs under the committee's jurisdiction.



**House Committee on Environmental Regulation:**

1. Examine the regulation of air quality in the areas of permitting new and modified sources, public participation, and enforcement. Consider data and proposed federal standards and rules as they relate to the State Implementation Plan.
2. Survey existing recycling programs and suggest needed improvements.
3. Monitor federal legislative and regulatory initiatives as they pertain to climate change. Consider Texas' responses to proposals and make recommendations as to any further preparations.
4. Study the Texas Commission on Environmental Quality's use of supplemental environmental projects in its enforcement process.
5. Monitor the agencies and programs under the committee's jurisdiction.

**House Committee on State Affairs:**

1. Examine state policy on "green" technologies for all state buildings and costs associated with such implementation.
2. Monitor federal legislation and regulatory initiatives pertaining to climate change and its effects on utilities and consumers. Consider Texas' response to proposals and make recommendations as to any further preparations.
3. Examine the state's portfolio of electric generation resources, including traditional sources, emerging renewable technologies, and energy efficiency. Determine whether the existing state regulatory programs and incentives are adequate to meet the energy needs of the future. Consider factors relating to reliability, requirements for additional transmission, or auxiliary services. (Joint Interim Charge with House Committee on Energy Resources)
4. Monitor the agencies and programs under the committee's jurisdiction.

A full list of the interim charges for the House committees is available at <http://www.lglawfirm.com/Publications.asp>.

To date, the Senate Natural Resources Committee has been charged with studying and providing recommendations on the following issues:

1. Differences in cost between immediate and delayed implementation of the State Water Plan;
2. The joint planning process for management of Texas' finite groundwater resources; and
3. Implementation of water conservation and reuse projects.

The official announcement of the SNR committee charges by Lieutenant Governor Dewhurst is available at <http://www.lglawfirm.com/Publications.asp>. The Lieutenant Governor stated that he will release the full list of interim charges for the rest of the committees and subcommittees at a later date.

*This article was prepared by Brian Sledge and Mindy Martinez of the Firm's Government Relations Practice Group, which has been recognized by Capitol Insider's Texas Lobby Power Rankings as one of the top law firm lobby practices in Texas. Both are registered lobbyists with the Texas Ethics Commission. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Brian at (512) 322-5839 or [bsledge@lglawfirm.com](mailto:bsledge@lglawfirm.com), or Mindy at (512) 322-5824 or [mmartinez@lglawfirm.com](mailto:mmartinez@lglawfirm.com).*

# They're Here! Revisions to the Texas Surface Water Quality Standards

by Lauren Kalisek

In the final stretch of a process that began in 2006, the Texas Commission on Environmental Quality ("TCEQ" or "Commission") recently released a final draft of its proposed revisions to the Texas Surface Water Quality Standards (Title 30, Texas Administrative Code, Chapter 307), the regulations that govern the review and assessment of Texas surface water quality and drive the development of discharge permits issued pursuant to state and federal law ("TSWQS"). The Commission reviewed the draft proposed rule change at its meeting on January 13, 2010, with public comment to follow until mid-March and final adoption in the summer of 2010. Accompanying the proposed rule revisions are proposed changes in the agency's related guidance document, *Procedures to Implement the Texas Surface Water Quality Standards, RG-194* ("Implementation Procedures").

Some of the substantive changes proposed to the water quality permitting program based on the final drafts of the TSWQS and the Implementation Procedures include:

- Expanded categories for recreational uses and procedures for assigning such uses;
- Revisions to toxic criteria;
- New numeric nutrient criteria and screening levels for certain reservoirs;
- Revisions to how the TSWQS apply in low flow conditions;
- New screening procedures and data to address the impacts of wastewater discharges on nutrients and aquatic vegetation;
- New procedures for determining when to include whole effluent toxicity limits based on both lethal and sublethal test results;
- New requirements for dechlorination; and
- New procedures for addressing aluminum in stormwater discharges.

As noted above, this list is not inclusive of all changes being proposed, but is intended to provide just some of the highlights.

The stakeholder meetings leading up to the final draft focused much time and attention on the new categories proposed for recreational uses, the more stringent implementation of whole effluent toxicity limits, and the new proposed nutrient criteria for reservoirs. One of these focus topics, the issue of when whole effluent toxicity limits should be placed in permits, caused some delay in the release of the draft revisions due to negotiations between TCEQ and the Environmental Protection Agency ("EPA"). The EPA had been advocating a stringent approach that, if implemented, would lead to a large percentage of wastewater permittees in the state having such limits imposed in their permits. However, the proposed revisions to the Implementation Procedures call for the use of best

professional judgment of the permit writer in assessing whether a limit is required.

Another interesting change proposed in the Implementation Procedures is the addition of new assessment and screening procedures for predicting the impacts of discharges to nutrients and aquatic vegetation in streams that do not yet have assigned numeric criteria. The procedures imposed a rating system for eutrophication potential as "low, medium, or high" based on screening factors such as the size of the discharge, the instream dilution, type of stream bottom, depth, clarity, and others. The proposed changes also set forth general guidelines as to when a total phosphorus limit should be considered for inclusion in a permit to control nutrients. These general guidelines focus on new or expanded discharges

greater than or equal to 0.25 million gallons/day to perennial clear shallow streams with rocky bottoms or other substrates that promote the growth of attached vegetation and to streams with long, shallow, and relatively clear perennial impoundments.

The specific numeric criteria for nutrients are included in a new Appendix F that includes corresponding chlorophyll *a* criteria for each listed reservoir and supplemental screening values for total phosphorus

and transparency that are proposed to be used to confirm if the criteria is being exceeded.

The proposed revisions also include changes to the general provisions, including definitions, site-specific criteria since the last round of revisions in 2000, and updates to segment boundary descriptions. Certainly, these revisions for 2010 are very significant in the number of substantive changes being proposed, only a small portion of which have been discussed here. The Commission approved the draft revisions to the TSWQS and the Implementation Procedures for publication at the meeting on January 13, 2010, and the regulated community will have the opportunity to file comments until mid-March. Upon adoption this summer, it is certain that these revisions will have an appreciable and lasting impact on discharge permitting in the state.

*Lauren Kalisek is a Principal in the Firm's Water and Districts Practice Groups. She regularly advises water districts and other political subdivisions on regulatory and compliance issues. If you have any questions or would like additional information on the Texas Surface Water Quality Standards, please contact Lauren at (512) 322-5847 or [lkalisek@lglawfirm.com](mailto:lkalisek@lglawfirm.com).*



*The Lonestar Current is pleased to premiere a new column authored by Sheila Gladstone, the head of the Firm's Employment Law Practice Group. "Ask Sheila" will address employment and labor law questions in an informal format that we hope you will find informative and useful.*



### *Ask Sheila:*

**Dear Sheila:** We have a crew of non-exempt/hourly field operators, and sometimes we need to call them on their days off to ask a quick question. We know we have to count their time as paid if they actually are called in, but what about those short calls to ask, for example, where they left a piece of equipment? Do we have to pay for these minutes, and do they count towards overtime?

*Signed, Thrifty and Legal*

**Dear Thrifty:** It depends on how long these "short" calls are, how many are made in a day, and how practical it is to record and track the time. In wage and hour law, there is a concept (get ready for the Latin) called *de minimus* time. This means that insignificant periods of time outside normal working hours may be ignored if payroll could not practically track the time. An unplanned call here or there to the employee would likely fall under the *de minimus* exception, but a regularly scheduled conference call outside of an employee's schedule would not. As a guideline (but not a hard rule) consider time spent under ten minutes as *de minimus*. But calling too often, so that it would look like the employer is taking advantage of the employee or

significantly interfering with his time off, could cause the employer to lose the exception.

**Dear Sheila:** I have heard that Texas is an "employment at will" state, and also that Texas is a "right to work" state. Are these the same thing?

*Signed, Confused Lone Star*

**Dear Confused:** No, although I too have heard the terms used interchangeably. The two terms both correctly describe Texas law, but they have very different meanings.

"Employment at will" means that there is no implied contract or duty of fairness between employers and employees – either the employee or employer can end the relationship at any time, without notice or penalty, unless there is a clear contract between them, or there is a violation of law. For example, it is an exception to employment at will to fire an employee based on gender, race, religion, etc., because the termination would violate current law.

"Right to work" means that no employee can be forced to join a union in Texas, even if the union represents most of the other employees at the facility. Another term used in this context is "open shop." Some states are "closed shop" states, meaning that you must join the union in order to work in a particular job. Texas, an "open shop" state, prohibits making employees choose between the job and union membership.

*"Ask Sheila" is written by Sheila Gladstone, the head of the Firm's Employment Law Practice Group. If you have an employment law question, please submit it to Sheila at [sgladstone@lglawfirm.com](mailto:sgladstone@lglawfirm.com), with the subject line: "Ask Sheila," and it might appear in our next quarterly newsletter. If you have questions or would like additional information regarding Sheila's column, you may contact Sheila at [sgladstone@lglawfirm.com](mailto:sgladstone@lglawfirm.com), or (512) 322-5863.*

## **Action Alert!**

### **Annual Reporting of Water Conservation Plan Implementation Due May 2010**

The Firm's Water Practice Group reminds our clients of the **upcoming deadline on May 1, 2010**, for filing annual reports with the Texas Water Development Board ("TWDB") regarding implementation of water conservation plans ("WCP"). Pursuant to TWDB rules at 31 TAC § 363.15 and Texas Commission on Environmental Quality ("TCEQ") rules at 30 TAC § 288.30(10), entities that were required to file revised WCPs on or before May 1, 2009, with TWDB and TCEQ are also required to report to the TWDB on the entity's progress in implementing its WCP. This annual report must be filed no later than May 1, 2010 (and annually thereafter), and must comply with the minimum requirements established in the TWDB's rules. If an entity fails to comply with the TWDB's rules, the TWDB is required to notify TCEQ, and the TCEQ is directed to take appropriate enforcement action upon receipt of such notice. Please let us know if we can assist you in this important reporting requirement.

## Texas Court of Appeals Clarifies Rights of Easement Holders

by Joe de la Fuente

The 1st District Court of Appeals in Houston issued a decision this past month that clarifies the rights of easement holders in the State of Texas. In its December 22, 2009, opinion in *Brookshire Katy Drainage District v. Lily Gardens LLC*, the Court of Appeals reversed a summary judgment the trial court had granted in favor of the property owner, Lily Gardens, and against the holder of a drainage easement, Brookshire Katy Drainage District (“BKDD”). BKDD holds a drainage easement that runs through Lily Gardens’ property. After Lily Gardens partially constructed a covered bridge on a culvert within that drainage easement, BKDD sent Lily Gardens a “cease and desist” letter requesting that the bridge be removed. In that letter, BKDD stated that the bridge would impede BKDD’s rights to construct, operate, maintain, and repair the easement, and thus BKDD was asserting its specific right under the easement to abate any obstruction that would interfere with those activities.

When the parties were unable to reach an agreement regarding the bridge, BKDD filed suit against Lily Gardens asserting its easement rights. The trial court found that the bridge covering did not encroach on BKDD’s easement rights, and allowed Lily Gardens to complete the bridge covering. BKDD appealed that judgment. On appeal, BKDD successfully argued that BKDD’s easement, which is similar to many other easements throughout the state, plainly granted BKDD: (1) the right to construct, operate, and maintain its easement; and (2) the right to abate any obstruction that may injure, endanger, or interfere with those activities. The Court of Appeals agreed and reversed the trial court’s judgment. The Court rejected Lily Garden’s argument that the bridge did not interfere with BKDD’s easement rights because it does not presently impede the

flow of water in the drainage ditch. Instead, the Court noted that such easements are by nature “forward looking” documents, and the Court concluded that the easement should be construed “to grant to the District the authority to remove any obstruction upon its canal right of way that may interfere with the operation of its drainage canal now or in the future.”

The *Lily Gardens* opinion is a significant victory for easement holders in Texas because it not only clarifies the rules of construction for easements but also construes common easement language in favor of the easement holder. As a result, easement holders should face fewer challenges to their right to conduct operation and maintenance activities within their easements, and should be more assured of their right to put a stop to any actions that interfere with those activities. The circumstances of the *Lily Gardens* case also demonstrate how important it is that all easement holders periodically review both their existing easement agreements and any form easement agreements that they intend to use in the future to ensure that they provide the appropriate balancing of rights and obligations for a particular use. Additionally, regular inspection of easements for structures or activities that may interfere with the use and maintenance of the easement may help avoid disputes, or at least bring them to an early resolution, without the need for litigation.

*Joe de la Fuente is a Principal in the Firm’s Litigation and Alternative Dispute Resolution Practice Group. Joe represented amicus curiae in the BKDD case. If you would like further information or have any questions, you may contact Joe at (512) 322-5849 or [jdelafuente@lglawfirm.com](mailto:jdelafuente@lglawfirm.com).*

## Advanced Meter Web Portal Go-Live

by Pat Jackson

On January 31, 2010, the web portal that will serve the advanced electric meters and smart grid will go-live. Advanced meters are an important component of the “smart grid,” which has been touted as having a wide range of benefits, from reliability improvements to lower costs and reduced consumption. The web portal is essentially a central repository for information that the utility companies and retail electric providers can use to gather and access information and to provide beneficial services to consumers, including real-time pricing.

Advanced meters are digital meters that can be read remotely by electric utility companies and that can communicate with in-home devices. The system is designed to provide a meter read every 15 minutes in order to provide real-time information for grid operators, market participants, and consumers. Proponents of advanced meters claim that consumers will be motivated by access to real-time usage information to reduce demand in response to peak period price spikes. If that type of demand response does result from the advanced meter deployment, the result will be significant peak demand load reduction that will benefit the electric market in Texas by reducing generation costs. At the very least, the advanced meters will

save utilities the cost of monthly manual meter reads and will provide the benefit of greater access to information in outage situations.

These expected benefits, however, come at a very high price to consumers. Texas energy consumers will be paying for the advanced meters in the form of a monthly surcharge on their electric bills in the range of \$2 to \$3 per month over the next decade, or longer. Also, there is no guarantee that what is currently considered to be an “advanced” meter will not become obsolete in the near future, and that the Public Utility Commission and the utilities will not soon be clamoring for yet another round of meter deployments. Consumers have already begun paying for the advanced meters, most of which are yet to be deployed. Furthermore, many of the touted benefits, such as demand response, are hypothetical benefits that may or may not materialize in the future.

*Pat Jackson is an Associate in the Firm’s Utility Practice Group and assists clients in all aspects of navigating the complicated field of utilities regulation. If you have any questions regarding the deployment of advanced meters or other electric utility issues, please contact Patrick Jackson at 512-322-5825 or [pjackson@lglawfirm.com](mailto:pjackson@lglawfirm.com).*

# Regulating Runoff: EPA Addresses Construction Site Stormwater Discharges

by Michelle M. Smith

Runoff from construction activities is considered a large contributor of point source pollution in state and federally regulated water bodies. In 1990, pursuant to the Clean Water Act (“CWA”), the Environmental Protection Agency (“EPA”) established Phase I of the National Pollutant Discharge Elimination System (“NPDES”) stormwater program to address, among other items, certain stormwater discharges from large construction activities disturbing five or more acres of land. In 1999, EPA adopted Phase II stormwater regulations, expanding the NPDES permitting program to include small construction activities disturbing between one and five acres of land. The Phase II regulations require permittees to implement Stormwater Pollution Prevention Plans so as to limit soil erosion and off-site transport of materials from construction sites, and authorize the use of general permits.

The State of Texas assumed authority to administer the NPDES program in Texas in September 1998 under the Texas Pollutant Discharge Elimination System (“TPDES”). On February 13, 2008, the Texas Commission on Environmental Quality (“TCEQ”) approved TPDES Permit Number TXR150000. This general permit authorizes the discharge of stormwater associated with construction activities disturbing one or more acres of soil and certain non-stormwater discharges from such construction sites. Currently, this general permit is set to expire March 5, 2013.

On December 1, 2009, the EPA published notice of final regulations establishing technology-based “Effluent Limitations Guidelines and Standards” for stormwater discharges from certain construction activities. These new regulations, which can be found at 40 CFR Part 450, apply nationwide to any construction operation required to obtain NPDES permit coverage, including construction operations within states that have delegated permitting programs, such as the TPDES program. EPA was required to adopt such regulations pursuant to a 2006 court order from the U.S. District Court for the Central District of California in response to a suit filed by the Natural Resources Defense Council and Waterkeeper Alliance. The U.S. Court of Appeals for the Ninth Circuit upheld that District Court ruling [*see NRDC v. EPA*, 542 F.3d 1235 (9th Cir. 2008)].

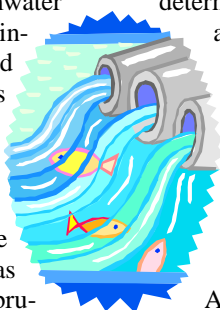
EPA’s regulations require that stormwater permits for all regulated construction activities (those disturbing one or more acres of land) include the use of certain best management practices to prevent water pollution from runoff. Additionally, the regulations impose a turbidity effluent limitation and monitoring requirement for sites disturbing more than 10 acres of land at one time. Although the regulations become effective in February 2010, they will be phased in over a four-year period. According to agency staff, TCEQ will not revise its existing general permit for stormwater discharges from construction activities (TXR150000) to address these new regulations before that general permit expires in 2013. TCEQ intends to incorporate these new regulations into its general permit as that permit is renewed.

These new regulations are the first time EPA has imposed enforceable numeric limitations on stormwater discharges from construc-

tion sites. Despite the fact that TCEQ has been delegated permitting authority over such stormwater discharges, EPA maintains enforcement oversight and authority pursuant to the “Memorandum of Agreement” between TCEQ and EPA Region 6 concerning the NPDES program (the “MOA”). Pursuant to the MOA and TCEQ’s delegated TPDES program, EPA functions to provide oversight to ensure programs are enforced and to improve performance. If EPA determines that the TCEQ has not taken timely and appropriate enforcement action against a violator and has not properly escalated enforcement action or has not assessed and collected an adequate penalty, EPA may proceed with any or all of the enforcement options available under the CWA. As EPA’s new regulations are implemented in Texas, regulated entities can expect continued oversight and enforcement regarding stormwater discharges from both TCEQ and EPA.

Additional information regarding EPA’s recent rulemaking and its implementation is available on EPA’s website at <http://www.epa.gov/waterscience/guide/construction/>.

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## IN THE COURTS

**United States v. Albert Inv. Co.**, 585 F.3d 1386 (10th Cir. November 10, 2009).

The 10th Circuit Court of Appeals has held that under CERCLA, a non-settling potentially responsible party (“PRP”) has a right to intervene in a settlement between the government and PRPs attempting to settle with the EPA. In this case, the government was attempting to recover approximately \$30 million spent remediating a waste oil disposal site in Oklahoma City. The EPA had negotiated a settlement with 44 PRPs, but had not settled with another PRP, the Union Pacific Railroad Company, and had filed a cost recovery suit against

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it. Union Pacific filed comments opposing the proposed consent decree, to which the EPA did not (and was not required to) respond. Union Pacific sought to intervene in the settlement, contending that the amount allocated to the settling PRPs was too low. The court held that since the settling PRPs would be immune from a contribution claim by Union Pacific, and Union Pacific might be held liable for the difference between the total cost and the amount allocated to the settling PRPs, its interest was sufficient to intervene. The case further widens a split among the appellate courts regarding whether such an interest is too speculative to allow for intervention.

**Connecticut v. American Electric Power Co.**, 582 F.3d 309 (2nd Cir. September 21, 2009), **Comer v. Murphy Oil Co.**, 585 F.3d 855 (5th Cir. October 16, 2009), and **Native Village of Kivalina v. ExxonMobil Corp.**, 2008 WL 2951742 (N.D.Cal. May 16, 2008).

These three cases are discussed together as they each deal with issues related to climate change. In each case, the plaintiffs brought suit against emitters of greenhouse gases (“GHG”), requiring the courts to address whether the issue should be dealt with by the legislature or by the courts.

In *American Electric Power*, the plaintiffs (environmental trusts, eight states and New York City) requested an injunction against six companies that own or operate fossil fuel-fired power plants, alleging that climate change caused in part by the defendants would increase droughts and floods, resulting in property damage, loss of land due to rising sea levels, and an increase in fatalities due to smog. Although the district court dismissed the case on “political question” grounds (meaning that the issue should be dealt with by the political branches of the government rather than the courts), the Second Circuit Court of Appeals reversed, and allowed the suit to proceed.

In *Comer*, a group of Mississippi residents sued various companies that emit GHGs for damages (rather than injunctive relief) alleging that global warming caused a warming of the Gulf coast waters, which in turn exacerbated Hurricane Katrina and caused the destruction of their property. As in *AEP*, the district court dismissed the claims based on the “political question” doctrine, and as in *AEP*, the traditionally conservative Fifth Circuit Court of Appeal, reversed the district court, allowing the case to go forward.

Finally, in *Kivalina*, an island village in Alaska north of the Arctic Circle alleged that global warming and the resulting rise in sea levels will require the residents to relocate. The district court has dismissed the case, again on “political question” grounds, and the case is expected to be appealed to the Ninth Circuit Court of Appeals. Taken as a whole, these cases show that the courts are not as likely to shy away from the complex causation issues inherent in global warming cases as many had expected, at least until the political branches (federal or state) show that they intend to preempt the issue by legislation. All three cases are expected to be appealed to the U.S. Supreme Court, but if the Ninth Circuit follows the Second and Fifth Circuits, the lack of a split among the circuits may keep the Supreme Court from hearing the case. However, the current rulings only allow the plaintiffs to continue forward with their cases, leaving them to try to prove the causes and effects of carbon emissions on the planet’s climate.

**Adobe Lumber Inc. v. Hellman**, --- F.Supp.2d ---, 2009 WL 2913415 (E.D. Cal., September 8, 2009).

A California district court held a municipality liable in a CERCLA claim for contribution where a dry cleaner illegally dumped PCE into the municipality’s sewer system, and the sewer leaked. The court rejected both the city’s claim that the sewer did not meet CERCLA’s definition of “facility,” and the city’s innocent party defense. The court held that the city had knowledge that its sewers leaked and had no proactive sewer maintenance system, and therefore the leakage was foreseeable, thus negating the innocent party defense.

**The City of Austin v. Texas Comm’n on Env’tl. Quality and KBDJ, L.P.**, ---S.W.3d ---, 2009 WL 5150047 (Tex. App—Austin, Dec. 31, 2009), No. 03-07-00699-CV.

The Court of Appeals in Austin rendered its opinion in this case on the last day of 2009, holding that the deadline to appeal a decision of the Executive Director (“ED”) of the Texas Commission on Environmental Quality (“TCEQ”) to a district court is no later than 30 days after the effective date of the TCEQ’s decision. When the ED takes final action on a matter, the decision can be challenged in two ways: (1) filing a motion to overturn the decision at the TCEQ, or (2) filing a petition (“Petition”) in Travis County district court. Specifically, Title 30 Texas Administrative Code § 50.139 provides that the applicant, public interest counsel, or other person *must* file the motion to overturn within 23 days after the date the TCEQ mails notice of the signed permit, approval, or other action of the ED, and Texas Water Code §§ 5.351 and 5.354 provide that a person affected by a ruling, order, decision, or other act of the TCEQ *may* file a petition in a Travis County district court to challenge such decision within 30 days after the effective date of the ruling, order, or decision.

In this case, the City of Austin timely filed a motion to overturn the ED’s decision, but it did not file a Petition until the motion to overturn had been addressed by the TCEQ, which occurred more than 30 days after the date of the ED’s decision. Thus, the issue before the court was whether the ED’s decision becomes effective upon execution, or only after the TCEQ addresses a motion to overturn, if filed. In other words, the court had before it the question: are the deadlines to file a motion to overturn and a Petition concurrent, or does the 30-day deadline to file a Petition begin when a motion to overturn is decided by the TCEQ?

The Court of Appeals held that the two deadlines are *concurrent*, and the ED’s order is effective on the date that it is signed by the ED. Consequently, the City’s Petition, filed more than 30 days after the effective date of the Commission’s decision, was deemed untimely and the district court did not have jurisdiction to consider that filing. This opinion is consistent with the Court of Appeals’ prior holding in *West v. Texas Comm’n on Env’tl. Quality*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied), and reinforces the procedure to appeal a decision by the ED of the TCEQ.

**City of Garland, Texas v. Public Utility Commission of Texas**, D-1-GV-09-001199.

On December 21, 2009, Travis County District Court Judge Yelenosky issued a letter ruling in the City of Garland’s favor in its ap-  
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peal of the Public Utility Commission's decision to exclude all municipally owned utilities ("MOUs") and electric cooperatives from potentially constructing transmission lines associated with the Competitive Renewable Energy Zone ("CREZ") buildouts. The judge stated that the Commission's defenses for its decision to exclude these publicly-owned entities lacked substantial evidence and as such, were "irrelevant factors" for consideration. He further elaborated that the Commission could not categorically exclude MOUs simply because consideration of them would be inconvenient and might present additional opposition to the CREZ transmission line proceedings. An order reversing and remanding the PUC's order was issued on January 15, 2010. The impact of this decision on the pending proceedings at the PUC in which multiple transmission providers have applied for certificates of convenience and necessity ("CCN") to route these transmission lines is unclear.

*In the Courts is prepared by attorneys from the Firm's different practice areas. If you have any questions or need additional information, please contact our Editor at [editor@lglawfirm.com](mailto:editor@lglawfirm.com).*



## AGENCY HIGHLIGHTS

### Environmental Protection Agency

**EPA Greenhouse Gas Reporting Rule.** On September 22, 2009, the greenhouse gas reporting rule became final. This rule requires that covered facilities begin monitoring their greenhouse gas ("GHG") emissions on January 1, 2010, and report those emissions to the EPA by March 31, 2011. Covered facilities include facilities that have the potential to emit more than 25,000 tons of GHGs per year, and also include certain categories of facilities even if they emit GHGs below that threshold. The rule also requires reporting from some entities that are not direct emitters, but that provide products that produce GHGs, such as producers and importers of petroleum products. The EPA estimates that the rule reaches 85% of the GHGs that are emitted in the United States. Once a facility is required to begin reporting its GHG emissions, it must continue reporting those emissions even if its emissions fall below the threshold until it meets one of the requirements to cease reporting (for example, when its emissions are below the threshold for five consecutive years). The rule also allows most sources to use "best available monitoring methods" to determine their emissions for the first quar-

ter of 2010, to allow the facilities time to develop more detailed methods to meet the rule. The rule also provides for waivers under certain conditions to extend the time allowed for use of "best available monitoring methods." The new rule can be found at 40 C.F.R. Part 98.

**EPA Endangerment Finding.** On December 7, 2009, EPA finalized its long-expected finding that greenhouse gases ("GHG") endanger human health and cause and contribute to air pollution. Although the findings, issued in response to the U.S. Supreme Court's decision in *Massachusetts v. EPA* (2007), do not in themselves create any regulation of GHGs, they are necessary for the EPA to begin regulating GHGs, and in fact, obligate the EPA to regulate them under the Clean Air Act. The findings set the stage for regulations of GHG emissions from vehicles and stationary sources, for lawsuits challenging the findings, for lawsuits seeking to require EPA to regulate GHG emissions, and for lawsuits collaterally attacking permits that do not address GHG emissions whether issued by EPA or state agencies. In response, U.S. Senator Lisa Murkowski has announced plans to introduce a resolution in Congress in January to disapprove the endangerment finding. If the resolution is approved by both the House and the Senate, and ultimately signed by the President, the EPA's endangerment finding would be nullified and EPA would be unable to regulate GHGs. However, in the absence of legislation addressing GHGs it is considered unlikely that the President would sign the resolution.

**Regulation of GHGs from Stationary Sources by EPA's Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Fuel Economy Standards Rule.** On September 15, 2009, EPA issued a Notice of Proposed Rulemaking to establish Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Fuel Economy Standards. EPA anticipates that the rule will go into effect in March 2010. The rule is important not only because of its effect on vehicle emissions, but because it will make GHGs a "regulated pollutant" for the first time. Once GHGs are a "regulated pollutant," and in light of the EPA's "Endangerment Finding" (see note above), EPA has taken the position that GHGs from stationary sources automatically become subject to the Clean Air Act's existing Prevention of Significant Deterioration ("PSD") and Title V programs. This position is based on language in the existing PSD program that requires a permit for any new or modified facility that emits 100 tons or 250 tons (depending on the type of source) of a "regulated pollutant." In anticipation of the regulation of GHGs under the CAA, EPA has formed a workgroup to create guidance on Best Available Control Technology ("BACT") for GHG emissions. Left unchecked (see "GHG Tailoring Rule" note below), EPA estimates that more than 6 million facilities that have never been subject to the Clean Air Act would be required to obtain Title V and/or PSD permits. EPA estimates that over 40,000 facilities would require PSD permits each year, compared to approximately 300 applications currently received each year. Likewise, EPA estimates that the number of Title V permits needed each year would increase from approximately 15,000 to over 6 million, a 400-fold increase.

**EPA's Prevention of Significant Deterioration and Title V Greenhouse Gas "Tailoring Rule."** To avoid a potential 400-fold increase in PSD and Title V permits caused by the regulation of greenhouse gases ("GHGs") under the Clean Air Act ("CAA") (see note above), EPA published the proposed "tailoring rule" in the  
*(Agency Highlights continued on page 14)*

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Federal Register on October 27, 2009, opening a 60 day comment period that closed on December 28, 2009. This rule “tailors” the CAA to GHG regulation by creating a two-phased approach to GHG regulation. Under the first phase, which would begin when the Light Duty Vehicle rule (see note above) becomes effective (expected in March 2010) and would last six years, the PSD and Title V program threshold would be set at 25,000 tons per year of “carbon dioxide equivalent” (“CO<sub>2e</sub>”) and would set a PSD significance level of between 10,000 and 25,000 tons per year of CO<sub>2e</sub>. During this phase, the EPA would conduct a study to “assess the administrability issues” of regulating GHGs, including streamlining actions such as standard permits and permits-by-rule. The tailoring rule would only address federal requirements. Many states have separate programs or are delegated the ability to issue and enforce permits under the CAA. The tailoring rule would not change state law, creating a situation where the 250/100 ton per year level would remain enforceable at the state level. (The 250/100 ton per year levels are explicitly set out in the CAA and were not set by regulation. Therefore, it is at least questionable whether the EPA has the authority to set different levels for GHGs.) In anticipation of legal challenges, the EPA has based its decision on the doctrines of “absurd results” and “administrative necessity.” According to the EPA, the “absurd results” doctrine allows the agency to depart from the literal text of the statute where application of the text “produces results that are inconsistent with other statutory provisions [or] run contrary to expressed congressional intent,” such as Congress’ intent to exclude small sources from the PSD and Title V programs. The “administrative necessity” doctrine, according to the EPA, allows it “to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer.”

**EPA seeks comments on calculating stationary source emissions.**

The EPA is seeking public comment on the use of emission factors in calculating emissions from stationary sources. The EPA is seeking to revise the way that it establishes emissions factors in an effort to obtain more accurate factors.

**EPA proposing to revise sulfur dioxide standard.** On December 8, 2009, the EPA published a proposed rule that would replace the existing annual and 24-hour primary national ambient air quality standards (“NAAQS”) for sulfur dioxide with a one-hour standard. The standard proposed would be between 50 parts per billion (“ppb”) and 100 ppb, replacing a 30 ppb annual average and 140 ppb daily average standard. The rule would also require additional monitoring for sulfur dioxide. The EPA is accepting comments on the proposed rule until February 8, 2010, and must issue final standards by June 2, 2010.

## **Texas Commission on Environmental Quality**

**Rule Revisions to Notice Requirements for Certain Water Applications.**

TCEQ adopted rule changes to notice requirements on December 9, 2009, to address the problems that may arise when notice is mailed years before a water rights or water quality permit application is heard or issued. The new rules require an applicant for a water quality permit to provide an updated landowner map and landowner list for the Notice of Application and Preliminary Decision (“NAPD”) when it is scheduled to be mailed more than two years after the Notice of Receipt and Intent to Obtain a Permit (“NORI”).

For water rights applications, the rulemaking changes the timing of notice to later in the process when the technical review is complete. The revisions are effective December 31, 2009.

**New Rules for Water Rights Sediment Control Pond Exemption.**

On December 9, 2009, TCEQ adopted new rules to implement Senate Bill 1711 from the 81st Legislative Session that amended § 11.142 of the Texas Water Code to allow a person to be exempt from obtaining a permit to construct or maintain a reservoir as part of a surface coal mining operation under Chapter 134 (Texas Surface Coal Mining and Reclamation Act), Natural Resources Code, if the water in the reservoir is used solely for sediment control or in compliance with the applicable laws, rules, or regulations relating to fire or dust suppression. The rules are effective December 31, 2009.

**Imported Water Rules Proposed.**

TCEQ proposed new rules on November 4, 2009, to implement House Bill 4231 from the 81st Legislative Session to allow the use of stream beds and banks to convey water imported from out of state and to exempt transfers of same imported water from existing interbasin transfer requirements. The public comment period is set for November 20, 2009, until January 11, 2010. The rule is scheduled to be adopted on April 14, 2010.

**Revisions to Water Quality Standards Proposed.**

On January 13, 2010, TCEQ proposed revisions to the Texas Surface Water Quality Standards (Title 30, Chapter 307 of the Texas Administrative Code) and Procedures to Implement the Texas Surface Water Quality Standards (TCEQ RG-94). The public comment period is proposed for January 19, 2010, to March 17, 2010. No date for adoption of the revisions has been set. For further information, please see the article by Lauren Kalisek in this edition of *The Lone Star Current*.

**Rules to be Proposed on CCN Notice and Submetering.**

TCEQ proposed new rules on January 13, 2010, to implement HB 1295 and SB 2126 from the 81st Legislative Session. HB 1295 requires that notice for a Certificate of Convenience and Necessity (“CCN”) application be given to each county and groundwater conservation district that is within the proposed CCN area in the CCN application. SB 2126 allows owners/managers of apartments to add up to a nine percent (9%) service charge to the water bills for tenants in sub-metered Apartment units. The public comment period is proposed for January 29, 2010, until March 1, 2010. The rule is scheduled to be adopted on June 2, 2010.

**New Rules for Fire Hydrants Proposed.**

On January 13, 2010, TCEQ proposed rules to implement changes to Texas Health and Safety Code § 341.0358(b) enacted by HB 3661 in the 81st Legislative Session. The proposed rulemaking would amend 30 TAC § 290.46 to require the regulatory authority for a public utility to adopt standards for installing fire hydrants adequate to protect public safety in residential areas in a municipality with a population of 1,000,000 or more. These standards must, at a minimum, follow current American Water Works Association standards pertaining to fire hydrants and the requirements of 30 TAC § 290.44(e)(6) pertaining to the location of fire hydrants. The public comment period is proposed for January 29, 2010, until March 1, 2010. The rule is scheduled to be adopted on May 19, 2010.

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**Rules for Penalty Payments and Enforcement Authority to be Proposed.** TCEQ intends to propose rules on January 27, 2010, to implement SB 1693 from the 81st Legislative Session to allow for monetary civil or administrative penalties to be paid in periodic installments of up to 36 months. The proposed rules will also allow TCEQ to delegate to the Executive Director the authority to issue an administrative order. The public comment period is proposed for February 12, 2010, until March 15, 2010. The rule is scheduled to be adopted on June 30, 2010.

**New Rules for Rates and Depreciation to be Proposed.** TCEQ will propose rules on January 27, 2010, to implement SB 2306 from the 81st Legislative Session that requires the “book cost less net salvage of utility plant retired” be charged to the accumulated depreciation account for ratemaking purposes. The public comment period is proposed for February 12, 2010, until March 15, 2010. The rule is scheduled to be adopted on June 16, 2010.

**Rules to be Proposed for Injection and Storage of Anthropogenic Carbon Dioxide.** On February 24, 2010, TCEQ will propose rules to implement SB 1387 from the 81st Legislative Session. This rulemaking relates to the Executive Director’s review and advisory responsibility for protection of fresh water in response to Texas Railroad Commission permit applications for injection and geologic storage of anthropogenic carbon dioxide (“CO<sub>2</sub>”). The public comment period is proposed for March 12, 2010, until April 11, 2010. The rule is scheduled to be adopted on July 28, 2010.

**Revisions to TCEQ and Railroad Commission MOU to be Proposed.** On February 24, 2010, the TCEQ will propose revisions to the December 1, 1987 Memorandum of Understanding (“MOU”) between TCEQ and the Railroad Commission. The public comment period is proposed for March 12, 2010, until April 12, 2010. The revisions are scheduled to be adopted on July 14, 2010.

**TCEQ seeks to amend air rules.** The TCEQ announced its intent to propose amendments to 30 TAC § 116 intended to ensure that TCEQ’s regulatory requirements regarding Prevention of Significant Deterioration (“PSD”) meet the requirements of the Clean Air Act and eliminate deficiencies that might prevent approval of Texas’ State Implementation Plan (“SIP”) by the EPA. The TCEQ does not anticipate that the amendments will have any effect on the permitting process, the public, or on the regulated community. The rule amendments are expected to be published in the Texas Register on January 29, 2010.

## **Public Utility Commission**

**Docket No. 37119 - Application Of Oncor Electric Delivery Company To Amend A Certificate Of Convenience And Necessity For A Proposed CREZ Transmission Line Pursuant To P.U.C. Subst. R. 25.174 Within Jack, Parker And Wise Counties.** On December 18, 2009, the Public Utility Commission approved the first Competitive Renewable Energy Zone (“CREZ”) transmission line, located within Jack, Parker, and Wise Counties. Oncor had applied to upgrade the existing transmission line. The upgrade will rebuild the existing 345-kV single-circuit line using double-circuit 345-kV lattice steel V-tower structures with two 345-kV circuits. No intervenors filed pleadings challenging the route.

**Docket No. 36851 - Application Of The Electric Reliability Council Of Texas For Approval Of A Revised Nodal Market Implementation Surcharge.** After the Electric Reliability Council of Texas (“ERCOT”) announced that it would not meet the go-live date for nodal implementation of January 1, 2010, ERCOT conducted a complete review of the schedule and budget for completing nodal market implementation. In addition, ERCOT made substantial changes in the structure and management of the Nodal Program, approving a new budget and scheduling the go-live date for implementation no later than December 31, 2010. In November 2008, ERCOT had requested an increase in the nodal surcharge on an interim basis to \$0.38 per MWh while it completed the revised schedule and budget for implementing the nodal market. On October 14, 2009, the Commission approved ERCOT’s application to establish a revised nodal market implementation surcharge of \$0.375 per MWh. The surcharge went into effect on January 1, 2010.

**Docket No. 36958 – Application of Oncor Electric Delivery Company LLC for 2010 Energy Efficiency Cost Recovery Factor.** In May 2009, Oncor filed a request to approve a rider to collect \$53.5 million associated with 2010 energy efficiency programs. Energy efficiency cost recovery proceedings are limited by Commission rule to a discrete set of issues. The Steering Committee of Cities Served by Oncor (“Cities”) intervened and challenged the Company’s proposal to allocate its energy efficiency bonus based, in part, on the number of customers rather than the amount of usage. The proceeding was referred to the State Office of Administrative Hearings. Briefs were filed in September, and in October the Administrative Law Judge filed a Proposal for Decision (“PFD”) adopting the Company’s proposed 50% demand and 50% customer class allocation method. Cities filed exceptions to the PFD, arguing that because the bonus is an award for demand reduction, the allocation of the bonus should be based entirely on demand. The Commission agreed with Cities, reversed the PFD, and adopted Cities’ proposed 100% demand allocation. Texas Industrial Energy Consumers (“TIEC”) filed a Motion for Rehearing supporting the Company’s proposed allocation method. TIEC has the option to appeal the Commission’s final order.

## **Railroad Commission of Texas**

**GUD Docket No. 9910 - Appeal of CenterPoint Energy Resources Corp. dba CenterPoint Energy Entex and CenterPoint Energy Texas Gas from the actions of the Cities of Baytown, Clute, Shoreacres, Wharton, and Angleton.** On October 13, 2009, CenterPoint Energy Gas (“CenterPoint”) filed an appeal of actions of the cities of Baytown, Clute, Shoreacres, Wharton, and Angleton (“Cities”). Centerpoint had requested a Cost of Service Adjustment (“COSA”) rate increase within the areas served by its Texas Coast Division, which includes Cities. The Cities sought to extend the 90-day review period as provided in the COSA process provided by the Commission, which expired on August 1, 2009. The Commission held that Cities do not have the authority to extend the 90-day review period and that the rates were valid and effective as of August 1, 2009.

*Agency Highlights is prepared by attorneys from the Firm’s different practice areas. If you have any questions or need additional information, please contact our Editor at [editor@lglawfirm.com](mailto:editor@lglawfirm.com).*



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